December 16, 2019

Via email JSB.FPLT@gov.bc.ca

Dear Minister David Eby:

Re: *Provincial Court Family Rules* Consultation

Please accept these submissions[1] by West Coast Legal Education and Action Fund ("West Coast LEAF") and Rise Women's Legal Centre in response to your request for input regarding the proposed new *Provincial Court Family Rules* ("*Rules*").

About us

West Coast LEAF is a BC-based legal advocacy organization. Our mandate is to use the law to create an equal and just society for all women and people who experience gender-based discrimination. In collaboration with community, we use litigation, law reform, and public legal education to make change. In particular, we aim to transform society by achieving: access to healthcare; access to justice; economic security; freedom from gender-based violence; justice for those who are criminalized; and the right to parent. We have particular expertise in gender equality and we have done in-depth research on the impacts of BC's laws and policies on gender-based violence and inequality.

Rise Women's Legal Centre is a community law clinic based in Vancouver, BC that provides legal services in family law and related legal concerns to low income individuals who self-identify as women. We have extensive experience representing women at all stages of Provincial Family Court and have engaged in comprehensive consultations with women in rural and remote communities across the province about the barriers they face to accessing court services.

Introduction

We welcome the Ministry of the Attorney General's efforts to engage in a public consultation on the *Rules* and support the Working Group's decision to focus on the user experience in review of the *Rules.* We provide the following submissions with the aim to ensure the new *Rules* operate to improve user experience and reduce barriers from a gender equity perspective. Specifically, our aim is to ensure that the *Rules* do not create further barriers for users and are responsive to the realities of family violence.

[1] Submissions prepared by Amelia Roth with support from West Coast LEAF and Rise Women's Legal Centre staff.

A preliminary note about resources and the inherent limitations with any regulatory framework that is insufficiently funded

While we are hopeful this review will improve the experience of British Columbians engaging with the family justice system, the review is limited in its ability to address underfunding of Provincial Court services and legal aid. We feel that the effectiveness of the *Rules* will be dependent on whether adequate resources are available province-wide to ensure the objectives of the *Rules* can be met. Accordingly, to truly improve the user experience, the *Rules* should be reformed in tandem with increased resources.

Many of the operational problems with the existing Provincial Court rules arise from the lack of resources to carry out the rules as written, rather than from obvious issues with the way the rules are drafted. Accordingly, while the proposed *Rules* are a significant improvement from the current regulatory framework, their impact will be limited if the amendments are not coupled with an increase in resources.

For example, the current practice of courthouse "list days" does not appear anywhere in the existing rules; a close reading of the current rules suggests that first appearances, subsequent appearances and Notices of Motion could be heard on any court date. Of course the reality is very different from what appears to be contemplated in the existing rules; the practice of having one day per week or less for the "family list" means that judges frequently do not have the time to make substantive decisions on Notices of Motion, leading to adjournments and delays. Lack of sufficient resources at the start of the family court process means that interim matters are rarely resolved in a timely fashion, but this failing is not due to the existing rules; rather the delays stem from the lack of days on which interim family matters can be heard and the lengthy waiting periods for scheduling each additional step (for example dates for mandatory Family Case Conferences, (FCC's) often cannot be scheduled for many months after the first appearance due to lack of court availability).

As we discuss below, in addition to the necessary increases for court services and legal aid, there is also an urgent need for the province to invest in technology to allow for electronic filing and for parties to appear in court remotely. This is an investment that could have a significant positive impact on access to justice.

Key recommendations for improving the *Rules*

1. Consensual Dispute Resolution should not be mandatory

While dispute resolution can be a useful tool for family law disputes, it is essential that there not be a presumption of participation in CDR.[2] While we recognize that the *Rules* set out a pathway for an assessment of the appropriateness of participation in CDR, in some situations the Needs Assessment may not identify family violence because survivors do not feel safe to disclose

[2] *Provincial Court Family Rules Reform Discussion Paper,* The Provincial Court of British Columbia and the Ministry of Attorney General (2019), App III "Proposed Provincial Court Family Rules Explained" at s. 20.

violence. Our experience is that questionnaires don't adequately screen for the presence of family violence and will in fact frequently miss a history of family violence. In many cases, survivors need to build a relationship of trust before disclosing, and so family violence screening is not a single step taken once at the start of a relationship with a new client, but an ongoing activity throughout the life of the file.

The Needs Assessor will need to have significant training to be able to safely screen for family violence. If the process is mandatory, those who do not disclose violence to the Assessor will be forced to engage in CDR with perpetrators of violence. In all cases, survivors of violence should have agency in deciding the process that is right for them and they should not be forced to engage in CDR with their abuser, nor excluded from CDR if they feel safe to access it and wish to do so.

A mandatory CDR process may create further power imbalances due to the limited availability of legal aid and choice of counsel. It is critical to understand that a CDR professional fulfills a very different role than legal counsel. Mediators and other CDR professionals are tasked with helping people put the past behind them and reach agreement; lawyers are tasked with advising clients of their rights and protecting their legal entitlements, which requires an in-depth understanding of the evidence, and therefore the history of the case.

Our experience is that there is frequently significant pressure on women attending CDR processes to give up their legal rights because the decision makers are unable or unwilling to engage with the history of the parties' relationship, including taking into account complex and disputed issues like family violence. Our experience has been that women often receive poor results when they attend mediations with Family Justice Counsellors or FCCs as self-represented litigants as they agree to give up entitlements in order to keep the peace. This is the case even when clients have prepared legal briefs to provide to judges in FCCs. Especially in the case of family violence, which is present for a large percentage of our clients, the option of having legal counsel present is a necessary prerequisite to negotiating a reasonable and fair agreement in CDR processes.

CDR should therefore be viewed only as an alternative to court, *never* as an alternative to counsel. Legal counsel should be available to individuals who are going through the CDR process. It is important for individuals to receive legal advice regarding their legal entitlements prior to signing any form of agreement or resolution. This role will not be fulfilled by the CDR professional as they are not able to provide legal advice to either party.

If a person does not qualify for legal aid or the scope of their family law representation contract does not include legal representation at dispute resolution, they will not have the safeguards of counsel in CDR, and therefore CDR should not and cannot be mandatory. Under the proposed *Rules,* a party who can afford legal representation will be at a significant advantage in mandatory CDR. People must have agency under the *Rules* to decide whether they want to participate in CDR.

As such, our recommendation is that individuals have the choice to opt out of CDR. Opting out of CDR must be an easy process for users and there must be no negative inferences drawn from someone choosing not to participate in CDR. We would suggest that opting out could be achieved during the initial meeting with the Needs Assessor, and/or by ticking a checkbox on a court form.

In addition, legal counsel should be available for the entire CDR process to ensure that litigants are aware of and have an understanding of their legal entitlements and the agreements that they are entering.

2. Financial disclosure should be required in all pre-court processes under the Rules

The proposed *Rules* implement a number of pre-court processes with the objective of improving efficiency.[3] For these processes to be efficient in achieving equitable agreements, financial disclosure must be required at the earliest stages of the case, and through a standardized form.

The proposed *Rules* give consensual dispute resolution professionals discretion on the requirement and form of financial disclosure.[4] This provision inadequately addresses the need for financial disclosure. Without financial disclosure parties cannot make informed agreements. Moreover, s. 93(3) of the *Family Law Act* ("*FLA"*) explicitly identifies "fail[ure] to "disclose significant property or debts" and one spouse taking "improper advantage of the other spouse's vulnerability, including… ignorance, need or distress" as grounds for setting aside a separation agreement.[5] Any agreements that are made without enforcing financial disclosure are inherently vulnerable to challenge. Moreover, without a clear direction in the *Rules*, it is not obvious that CDR professionals will ensure that such disclosure is made; it is not uncommon for us to be approached by women who have been told by mediators and other professionals to get independent legal advice on agreements where financial disclosure has not been made.

Lack of adequate financial disclosure disproportionately affects women and often results in women agreeing to arrangements that are less than their statutory entitlements.

As held by the Honorable Mr. Justice Fraser in the case of *Cunha v. Cunha*, [1994] BCJ No 2573 (QL) (BCSC):

> "Non disclosure of assets is the cancer of matrimonial property litigation. It discourages settlement or promotes settlements which are inadequate. It increases the time and expense of litigation. The prolonged stress of unnecessary battle may lead weary and drained women simply to give up and walk away with only a share of the assets they know about, taking with them the bitter aftertaste of a reasonably based suspicion that justice was not done. Non disclosure also has a tendency to deprive children of proper support."

[3] Proposed Provincial Court Family Rules at Parts 2 and 4.
[4] Proposed Provincial Court Family Rules at s. 22.
[5] *Family Law Act,* SBC 2001, c 25 at s. 93(3).

To ensure financial disclosure is enforced in these early processes, there should be a strict requirement for standardized financial disclosure under the *Rules* and a negative inference made against any party who fails to provide complete disclosure. Furthermore, all disclosure should be in the same standard form (eg. Form 4), to avoid confusion or obfuscation.

3. *Needs Assessors must have ongoing training in trauma-informed practice and up-to-date knowledge of the appropriate resources available in the community*

The proposed *Rules* provide for a Needs Assessment when parties commence proceedings. This could be a useful first step for parties, but only if Assessors are adequately trained. The lack of qualifications and mandatory training for Assessors in the *Rules* is concerning since these professionals will be tasked with screening for family violence;[6] this reflects a broader systemic concern with the *FLA* generally, as the *FLA* requires that family law professionals and judges consider family violence even though none of these professionals are required to obtain the necessary training to do so effectively.

Family justice counsellors acting as Assessors must have ongoing trauma-informed practice training, otherwise they risk harming survivors of violence. Requiring parties to speak about their trauma in order to disclose family violence to an Assessor, who is not properly trained, can retraumatize survivors. Moreover, it is rare for survivors to disclose incidents of family violence until a relationship of trust has been developed between the survivor and the service provider. In circumstances where women believe that disclosure will result in either mandatory participation in a particular dispute resolution process or conversely mandatory exclusion from processes, early disclosure of violence is even less likely.

Information and referrals during a Needs Assessment may be useful for some people accessing the family justice system, but only if the information fits the party's actual needs. A frequent frustration experienced parties in the family justice system is perpetually being referred back and forth between organisations or resources that are unable to meet their needs. Accordingly, Assessors should have sufficient knowledge of the resources available in their community in order to provide information that is useful and relevant to the parties.

4. *The list of FLA provisions, terminology, and definition of "extraordinary parenting measures" should be amended to be accessible to individuals most in need of urgent orders.*

The definition of an "extraordinary parenting matter" includes a list of *FLA* provisions under which parties may seek relief on an urgent basis.[7] This list is exhaustive and parents cannot seek an order outside of the circumstances enumerated in the definition. The definition is particularly

[6] Proposed Provincial Court Family Rules at s. 2, s. 18.
[7] Proposed Provincial Court Family Rules at s.2.

limiting for situations where the violence is against the other parent, not the child. Only the "physical, psychological or emotional safety, security or well-being" of the child is included in the definition.[8] If the new *Rules* provide a definition for extraordinary parenting measure, that definition should be non-exhaustive to include truly unusual situations, and include violence against all family members.

For example, we note that only a portion of Part 4, Division 5 of the *FLA*, "Compliance Respecting Parenting Time or Contact with a Child" is included in this division, and that the *FLA* provisions included on the list are only those where a child was removed or wrongfully removed. The provisions for when denial is not wrongful or for a failure to exercise parenting time or contact, are not included in the definition.

All situations involving family violence, where relief is available under the *FLA*, should be classified under this division. Parents who are faced with an abusive ex-partner who don't meet the test for a protection order under Part 9 of the *FLA* will often meet the test for denying that ex-partner's parenting time with their children in situations of family violence, or in the other situations listed under section 62. It is surprising that section 61 and 62 were not considered "extraordinary parenting matters." We see this as an oversight and we strongly recommend that these provisions be included under this rule as these provisions set out a subset of urgent parenting time matters which were contemplated as such by the drafters of the legislation.

In the same vein, we recommend including s. 66(2) of the *FLA* as an "extraordinary parenting matter" as the relief set out in that section is the ability for a parent to relocate, without notice, in case of family violence, or in cases where there is no ongoing relationship between the child and the other guardian.

The choice of the term "extraordinary parenting measures" in the *Rules* is concerning since "extraordinary" implies an event that is rare or uncommon. For example, we frequently encounter the attitude that family violence cases are an exception to the norm, even though family violence makes up 30% of all police-reported violent crimes in Canada;[9] the myth that family violence is extraordinary or unusual harms survivors, contributes to the lack of disclosure of violence, and to gender inequality. The use of "extraordinary" implies an unrealistic threshold which parties must meet before they can have important and urgent matters heard and may discourage meritorious claims from being brought forward.

Lastly, due to the expedited nature of extraordinary parenting measure orders, the *Rules* should clearly set out that parties may seek an adjournment to retain counsel. For example, under the proposed *Rules* a parent could withhold parenting time for a justified reason, such as violence, and the violent parent could bring an extraordinary parenting measure order.[10] In this situation, the non-violent parent would have the onus to prove they rightfully withheld parenting time on

[8] *Ibid.*
[9] Marta Burczycka et al., "Family violence in Canada: A statistical profile, 2017" (Ottawa: The Canadian Centre for Justice Statistics, 2018) at 22.
[10] Proposed Provincial Court Family Rules at s. 1; *Family Law Act*, SBC 2011, c 25 at s. 231(4)-(5).

short notice, and potentially without counsel. If this parent cannot access counsel, the safety of the child is at risk. The *Rules* must account for the nuance of parenting agreements and violence by ensuring parties have access to counsel wherever urgent applications are brought.

5. Geographic filing restrictions are not user-friendly and must be delayed until electronic filing and remote appearance is made available across the province.

Taking into account the existing court infrastructure in the province, the requirement to file at the registry closest to where the child or initial applicant lives under the proposed *Rules* would create a barrier for many people who need to access the family justice system.[11]

Since many women in small communities do not have access to a court registry in their hometown, this rule would require them to travel to the required registry under the *Rules*, which could be a significant distance depending on where the child resides. In order to file, claimants may be required to take time off work, find access to a vehicle, pay for transportation, arrange child care, and arrange for counsel in the location of that registry. Furthermore, certain registries across the province are only open limited hours, creating an additional challenge for women who need to comply with this rule. These barriers would continue to apply for every appearance required at that registry. The registry requirement will particularly impact people who depend on legal aid who may be unable to find a lawyer accepting family legal aid certificates in the area of the required registry.

For the *Rules* to be user-friendly, there must be flexibility in filing requirements, which is especially important where parties are self-represented or low income. This rule would work and would even increase access to justice for those in remote communities if the Provincial Court system was appropriately resourced with the ability to file electronically, and to appear remotely via technology. We recommend that the Ministry of the Attorney General invest in such technology in order to have the greatest impact on access to justice. We recommend that the implementation of the *Rules* that impose geographical filing restrictions be delayed until electronic filing and the ability to appear at short hearings and case conferences remotely is available province-wide.

6. Protection Orders

We welcome the consolidation of rules regarding protection orders into one section under the proposed *Rules*. While the rules will be easier to locate, further changes are required to make the protection orders accessible.

For example, under both the existing and new *Rules*, Provincial Courts are explicitly empowered to grant protection orders without notice.[12] *Ex parte* protection orders are, however, currently underutilized by the court and judges often adhere to a narrow approach to *ex parte* orders that

[11] Proposed Provincial Court Family Rules at s. 8.
[12] Proposed Provincial Court Family Rules at s. 87.

was developed in a different legal context, and prior to the *FLA* coming into effect. The ability to obtain an *ex parte* order is particularly important for protection orders where family violence and safety are at issue. The proposed *Rules* should clarify when a judge may grant an order without notice so protection orders are more accessible.

The Ministry of the Attorney General should also consider alternative options to traditional testimony in a protection order hearing, similar to vulnerable witnesses under the *Criminal Code.* [13] For example, survivors of violence seeking a protection order should be able to provide video testimony or use a screen when testifying to avoid contact with the perpetrator of violence.

Summary of recommendations

With the foregoing in mind, we make the following recommendations:

- There should not be a presumption of participation in a CDR process. Instead, individuals should be able to easily opt in and out of the process during their Needs Assessment and throughout the entire CDR process. Additionally, legal counsel should be available for the entire CDR process to ensure that litigants are aware of and have an understanding of their legal entitlements and the agreements that they are entering.

- There should be a strict requirement under the *Rules* for financial disclosure before any agreements are signed, and a negative inference drawn where parties refuse to disclose. Furthermore, all disclosure should be in the same standard form (eg. Form 4), to avoid confusion or obfuscation.

- Needs Assessors must have ongoing training in trauma-informed practice and up-to-date knowledge of the appropriate community resources.

- The "extraordinary parenting measures" rule should be non-exhaustive and include Part 4, Division 5 and section 66(2) of the *FLA,* as well as situations of violence against all family members. We also recommend that the Working Group consider a different title for the rule to reduce user confusion. Lastly, the rule should clearly set out that parties may seek an adjournment to retain counsel.

- The rule requiring filing in the registry closest to where the child or complainant resides should not be implemented until electronic filing and the ability to appear at short. hearings and case conferences remotely is made available to everyone in the province.

- The proposed *Rules* should ensure that *ex parte* protection orders are more accessible.

- The Ministry of the Attorney General should consider the availability of alternative options to traditional testimony in protection order hearings to support witnesses that may require accommodation.

[13] *Criminal Code,* RSC 1985, c C-46 at s. 486.2.

Sincerely,

Elba Bendo
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West Coast LEAF

Kim Hawkins
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