



No. S173843
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

**SINGLE MOTHERS' ALLIANCE OF BC SOCIETY,
NICOLINA BELL (also known as Nicole Bell), and A.B.**

PLAINTIFFS

AND:

**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE
OF BRITISH COLUMBIA and LEGAL SERVICES SOCIETY**

DEFENDANTS

NOTICE OF APPLICATION

Name of applicant: The defendant Legal Services Society

TO: The plaintiffs

AND TO: The defendant Her Majesty The Queen in Right of the Province
of British Columbia

TAKE NOTICE that an application will be made by the applicant to Chief Justice Hinkson at the Courthouse at 800 Smithe Street, Vancouver, at 10:00 a.m. on 25/Feb/2018, for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An order pursuant to Rule 9-5(1)(a) striking:
 - (a) paragraphs 3 and 4 of Part 2 of the Notice of Civil Claim; and,
 - (b) the phrase "and/or its administration" from paragraphs 6, 8, 11, 12, 19, 20 and 30 of Part 3 of the Notice of Civil Claim.
2. Costs.

Part 2: FACTUAL BASIS

1. The plaintiffs plead that women who:
 - (a) are involved in a family law proceeding:
 - (i) in which they are seeking an order:
 - (A) to protect themselves or their children, or both, from family violence or abuse; or
 - (B) concerning guardianship, custody, parenting or support arrangements; or,
 - (ii) where there is history of family violence or abuse; and,
 - (b) cannot afford to retain a lawyer for the duration of the proceeding without sacrificing reasonable living expenses for themselves or their children (the “Class”)

have a constitutional right (under s 7 or 15 of the *Charter* or s 96 of the *Constitution Act, 1867*) to legal aid in the amount necessary to pay for a lawyer to represent them for the duration of the proceeding.
2. The plaintiffs plead that the plaintiff Nicolina Bell and members of the plaintiff Single Mothers’ Alliance are members of the Class (Part 1, para 11).
3. The plaintiffs plead that in February 2013 Ms Bell applied to the Legal Services Society (the “Society”) for legal aid and was approved, but her legal aid “ended” around June 2014 (Part 1, paras 29, 36).
4. The plaintiffs plead that in August 2015 Ms Bell applied again to the Society for legal aid but was denied (Part 1, para 41).
5. The plaintiffs plead that in February 2017 Ms Bell applied again to the Society for legal aid and was approved (Part 1, para 49).
6. The plaintiffs plead that Ms Bell’s lack of access to legal aid between June 2014 and February 2017 caused her harm (Part 1, para 50).
7. The plaintiffs plead that as of April 2017 the matter for which Ms Bell received legal aid was expected to be heard in 2017 (Part 1, para 47).

Part 3: LEGAL BASIS

1. The plaintiffs seek two types of relief in this action:
 - (a) a declaration under s 52 of the *Constitution Act, 1982* that certain provisions of the *Legal Services Society Act*, the Memorandum of Understanding between the

Province and the Society and certain of the Society's policies (the "impugned legal scheme") are unconstitutional and of no force or effect (Part 2, para 1); and,

- (b) a declaration that the Society's administration of the impugned legal scheme is unconstitutional and an order in the nature of *mandamus* under s 24 of the *Charter* requiring the Society to administer the impugned legal scheme differently, presumably to provide legal aid to all members of the Class if and when they apply to the Society for legal aid (Part 2, paras 3-4).
2. The relief sought under s 24 of the *Charter* at Part 2, paras 3-4, is unavailable regardless of whether the claimed constitutional right exists. Section 24 of the *Charter* provides a personal remedy against unconstitutional government action and so, unlike s 52 of the *Constitution Act*, can be invoked only by a party alleging a violation of that party's own constitutional rights. The plaintiffs do not allege any ongoing violation of their own rights. Rather, they ask the Court to conduct an anticipatory and hypothetical judicial review of how the Society is likely to decide future applications for legal aid by members of the Class, and to pre-emptively order the Society to approve all such applications. That type of relief is simply unavailable, even if members of the Class have the claimed right.
3. The Notice of Civil Claim often refers to "the impugned legal scheme and/or its administration". This shorthand obscures the fundamental distinction between *legislation* (the legislative function) and *government action* (the executive function). Each may be unconstitutional but has its own proper remedy. These distinctions were the subject of comment by the Supreme Court in *R v Ferguson*, 2008 SCC 6 at paras 59-61 (citations omitted, underlining added):

When a law produces an unconstitutional effect, the usual remedy lies under s 52(1) [of the *Constitution Act, 1982*], which provides that the law is of no force or effect to the extent that it is inconsistent with the *Charter*. A law may be inconsistent with the *Charter* either because of its purpose or its effect. Section 52 does not create a personal remedy. A claimant who otherwise has standing can generally seek a declaration of invalidity under s 52 on the grounds that a law has unconstitutional effects either in his own case or on third parties. The jurisprudence affirming s 52(1) as the appropriate remedy for laws that produce unconstitutional effects is based on the language chosen by the framers of the *Charter*.

Section 24(1), by contrast, is generally used as a remedy, not for unconstitutional laws, but for unconstitutional government acts committed under the authority of legal regimes which are accepted as fully constitutional. The acts of government agents acting under such regimes are not the necessary result or "effect" of the law, but of the government agent's applying a discretion conferred by the law in an unconstitutional manner. Section 52(1) is thus not applicable. The appropriate remedy lies under s 24(1).

It thus becomes apparent that ss 52(1) and 24(1) serve different remedial purposes. Section 52(1) provides a remedy for laws that violate Charter rights either in purpose or in effect. Section 24(1), by contrast, provides a remedy for government acts that violate Charter rights. It provides a personal remedy against unconstitutional government action and so, unlike s 52(1), can be invoked only by a party alleging a violation of that party's own constitutional rights. Thus this Court has repeatedly affirmed that the validity of laws is determined by s 52 of the *Constitution Act, 1982*, while the validity of government action falls to be determined under s 24 of the *Charter*.

4. The principle that s 24 of the *Charter* provides a personal remedy, such that a party may seek an order under s 24 of the *Charter* only on the basis of alleged infringements of their own rights, is well settled (see e.g. *Hislop v Canada (Attorney General)*, 2007 SCC 10 at para 81; *R v Edwards*, [1996] 1 SCR 128 at para 51; *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at para 37; *Vancouver (City) v Zhang*, 2010 BCCA 450 at para 80; *Victoria (City) v Adams*, 2009 BCCA 563 at para 141; *Johnston v Victoria (City)*, 2010 BCSC 1707 at para 21, aff'd 2011 BCCA 400; *Monaco v Coquitlam (City)*, 2015 BCSC 2421 at para 111; *British Columbia (Director of Civil Forfeiture) v Hells Angels Motorcycle Corp.*, 2013 BCSC 2575 at para 13).
5. When a party is an association or society, it may seek an order under s 24 of the *Charter* on the basis of alleged infringements of its members' rights (*British Columbia/Yukon Assn. of Drug War Survivors v Abbotsford (City)*, 2014 BCSC 1817 at paras 95-106, aff'd 2015 BCCA 142).
6. The upshot is that, if Ms Bell has private interest standing or the Single Mothers' Alliance has public interest standing, she or it may seek a declaration under s 52(1) of the *Constitution Act, 1982* that the impugned legal scheme is unconstitutional because it infringes the rights of members of the Class who are not parties to this litigation—but the plaintiffs may seek orders under s 24(1) of the *Charter* only on the basis of alleged infringements of *their own* rights (including the rights of the Alliance's members).
7. The plaintiffs do not allege the Society's administration of the impugned legal scheme is currently infringing Ms Bell's rights. They allege that the Society infringed Ms Bell's rights between June 2014 and February 2017, but they do not seek *Charter* damages or any other retrospective relief. The relief sought is strictly prospective. And yet the plaintiffs acknowledge that the Society provided Ms Bell with legal aid beginning in February 2017. They also plead that as of April 2017 the matter for which Ms Bell received legal aid was expected to be heard in 2017. Presumably it now has been heard.
8. The plaintiffs also do not allege the Society's administration of the impugned legal scheme is currently infringing any of the Alliance's members' rights. The only facts pleaded related to Ms Bell (and A.B., who has since discontinued her claim).
9. Instead, the plaintiffs allege that members of the Class will apply to the Society for legal aid in the future and the Society will likely deny their applications. On this basis the

plaintiffs say the Society should be pre-emptively ordered to “exercise its discretion to determine legal aid coverage for Family Law Proceedings in accordance with the requirements of the Charter” (Part 2, para 4).

10. It is not clear exactly what order is being sought. Read literally, Part 2, para 4, seeks a boilerplate order that the Society comply with the *Charter*. An order of that nature is unnecessary and frivolous within the meaning of Rule 9-5(1)(b). The Society complies with the *Charter* as the courts have interpreted it to date. If the Court recognizes a novel constitutional right, the Society will change its provision of legal aid accordingly.
11. It is more likely that the order the plaintiffs are seeking in Part 2, para 4, is an order that the Society provide legal aid to all members of the Class if and when they apply to the Society for legal aid. That kind of anticipatory relief for hypothetical non-parties is not available under s 24 of the *Charter*.
12. The proper venue in which to determine whether the Society is required by the constitution to provide legal aid to members of the Class is a judicial review of an actual decision by the Society to deny legal aid to a specific member of the Class. There must be a factual foundation. If the Court found, in such a judicial review, that the Society was required by the constitution to provide legal aid to the specific person before the Court, it would follow that similarly situated persons are entitled to the same. (This is not dissimilar to how the constitutional right to representation for certain criminal matters was established in *Rowbotham*.) In the circumstances of such a judicial review, the Society would change its practices accordingly.
13. The defects in the relief sought under s 24 of the *Charter* are not merely procedural, nor are they ones of standing. They cannot be fixed with amendments and artful pleading. They arise from substantive constitutional law, specifically the remedial limits of s 24 of the *Charter* itself. It is plain and obvious that the relief sought under s 24 of the *Charter* at Part 2, paras 3-4, cannot be granted even if the claimed constitutional right exists.
14. It follows that an order should be granted pursuant to Rule 9-5(1)(a) striking:
 - (a) paragraphs 3 and 4 of Part 2 of the Notice of Civil Claim; and,
 - (b) the phrase “and/or its administration” from paragraphs 6, 8, 11, 12, 19, 20 and 30 of Part 3 of the Notice of Civil Claim.
15. Such an order would preserve the plaintiffs’ primary claim for a declaration under s 52 of the *Constitution Act, 1982* that the impugned legal scheme is unconstitutional and of no force or effect. As set out in *Ferguson*, s 52 provides an *in rem* remedy and the plaintiffs may seek relief under s 52 on the basis that the impugned legal scheme allegedly infringes the rights of members of the Class who are not parties to this litigation.

Part 4: MATERIAL TO BE RELIED ON

1. Notice of Civil Claim filed on 26/Apr/2017.


The applicant estimates that the application will take one day.

- This matter is within the jurisdiction of a master
- This matter is not within the jurisdiction of a master

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that:
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (ii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated: 11/Oct/2018


Brent Olthuis / Trevor Bant
Lawyers for the Legal Services Society
Hunter Litigation Chambers Law Corporation

To be completed by the court only:

Order made

in the terms requested in paragraphs _____ of Part 1 of this notice of application

with the following variations and additional terms:

Date: _____

Signature of Judge Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts