No. S-173843
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

SINGLE MOTHERS' ALLIANCE OF BC SOCIETY, NICOLINA BELL
(also known as Nicole Bell)

Plaintiffs

And

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

Defendants

APPLICATION RESPONSE

Application response of: the Plaintiffs, Single Mothers' Alliance of BC Society and Nicolina Bell.

THIS IS A RESPONSE TO the notice of application of the Defendant, Her Majesty the Queen in right of the Province of British Columbia (the "Province"), filed October 19, 2018.

Part 1: ORDERS CONSENTED TO:

None.

Part 2: ORDERS OPPOSED

The Plaintiffs oppose the granting of the orders set out in paragraphs 1 and 2 of Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

None.

Part 4: FACTUAL BASIS

1. In this response, the Plaintiffs adopt the definitions stipulated in the Notice of Civil Claim for the phrases "Family Law Proceedings," "women of limited or modest means" and the "impugned legal scheme."

2. The Plaintiffs do not accept – and the Court should not accept – the gloss on the facts offered by the Province in Part 2 of its notice of application. Part 2 of the Province's notice of application misstates some of the facts pleaded by the Plaintiffs. It glosses certain facts while omitting others. Moreover, the Province rhetorically shades some facts. The Province's approach to stating the facts is incorrect in law. In an application to strike under R. 9-5(1)(a), the applicant must take the facts as pleaded.

3. The Plaintiffs rely on and assert the legislative history set out in their response to the application of the Legal Services Society, in replying to the Province's application to strike.

Part 5: LEGAL BASIS

A. The burden lies on the Province to show that the Plaintiffs' claims are not arguable

4. The Province's notice of application does not specify that it relies on R. 9-5(1)(a). The reliance on *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 ("*Imperial Tobacco*"), however, leads the Plaintiffs to conclude that the application is advanced under R. 9-5(1)(a).

5. The Plaintiffs' claims may be struck under R. 9-5(1)(a) only if the Province shows that it is plain and obvious that the Notice of Civil Claim does not disclose reasonable causes of action, assuming all of the facts pleaded to be true.[1] The Court's approach to assessing the Plaintiffs' claims must be generous, and err on the side of allowing novel but arguable claims to proceed to trial.[2]

B. Access to state-funded counsel and government spending decisions

6. The Province asserts, at paragraphs 11-13 of its notice of application, that there is no "general right" to state-funded counsel. The point is misplaced. The Plaintiffs claim does not assert a "general right to state funded lawyers." The Plaintiffs' claim is concerned with access to state-funded counsel in the specific circumstances of Family Law Proceedings involving women litigants of limited or modest means.

7. In any event, the Province's arguments from *R. v. Prosper*, [1994] 3 S.C.R. 236 and *R. v. Savard* (1996), 106 C.C.C. (3d) 130 (Y.C.A.) do not show that the Plaintiffs' claims will fail.

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[1] *Imperial Tobacco* at paras. 17 and 23. The Plaintiffs do not assert any facts that are manifestly incapable of proof. Neither Defendant argues that they do.
[2] *Imperial Tobacco* at para. 21.

R. v. Prosper held that s. 10(b) of the *Charter* does not impose a substantive constitutional obligation on governments to ensure that duty counsel is available to provide detainees with a guaranteed right to free and immediate preliminary legal advice upon request. The right to counsel at trial and on appeal (in any proceedings) was not at issue in the case.[3]

8. Lamer C.J.'s comments in *R. v. Prosper* regarding positive constitutional obligations are specifically directed to the Chief Justice's analysis of the text and legislative history of *s. 10* of the *Charter*. This was the analysis with which L'Heureux-Dubé J. agreed.[4] The Plaintiffs do not rely on s. 10 of the *Charter*. *R. v. Prosper* does not show that the Plaintiffs' claims under ss. 7 and 15 of the *Charter* or s. 96 of the *Constitution Act, 1867* will fail.

9. *R. v. Savard* similarly does not show that the Notice of Civil Claim fails to state an arguable claim. The issue in *R. v. Savard* was whether s. 672.24 of the *Criminal Code*, which permits a judge to appoint counsel to represent an unfit accused, also permits a judge to order that the fees and costs of counsel be paid by government.[5] The majority, per Rowles J.A., found that it did not. No legislation and no state action were subject to constitutional challenge in *R. v. Savard*. The discussion of *Auckland Harbour Board v. The King*, [1924] A.C 318 (P.C.) ("*Auckland Harbour Board*") in the case does not go to show that the Plaintiffs' constitutional claims in this case are inarguable.

10. *Auckland Harbour Board* is not a suit of armour that the Province may don to fend off judicial review of the impugned legal scheme on constitutional grounds. Government decision-making about monetary expenditures, whether manifested through legislation or by discretionary decision-making, is clearly open to scrutiny for compliance with the rights conferred by the Constitution.[6]

C. Section 7 of the Charter (Deprivation of Life, Liberty and Security of the Person)

11. The Province argues that the right to state-funded counsel is only triggered by state action against an individual. It says that no right to state-funded counsel arises where a s. 7 interest is threatened by the act of a third party. The plaintiffs say that, to the contrary, state actions

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[3] *R. v. Prosper* at 266, 273 – 274 and 278.
[4] *R. v. Prosper* at 267 and 286.
[5] *R. v. Savard* at para. 72.
[6] *New Brunswick (Minister of Health and Community Services) v. G (J.)*, [1999] 3 S.C.R. 46; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 ("*Eldridge*"); *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 ("*Inglis*").

and laws that interfere with a person's ability to access protections from non-state threats to her life and security of the person are open to constitutional scrutiny.

12. In *Victoria (City) v. Adams*, the City of Victoria and the Province argued that "the prohibition on the erection of shelter is not the cause of the respondents' state of homelessness or insecurity," and that "s. 7 is not engaged where, as a result of the state action, the claimants merely remain in a state of insecurity." The Court of Appeal rejected the argument and found that s. 7 of the *Charter* does not require that the impugned state action be the sole cause of a deprivation of security of the person.[7]

13. In *Canada (Attorney General) v. PHS Community Services Society*, Canada argued that injection drug users' own choices about drug use, and not the law or state action, gave rise to the threats to life and security of the person of which the plaintiffs complained. This argument was expressly rejected. The Supreme Court of Canada held, "…Where a law creates a risk to health by preventing access to health care, a deprivation of the right to security of the person is made out… ."[8] Here, the Plaintiffs say that the impugned legal scheme and its administration infringe the life and security of the person of women litigants of limited or moderate means obliged to contend with the legal consequences of the breakdown of abusive spousal relationships. In light of *PHS*, that is an arguable claim.

14. In *Bedford v. Canada*, the Attorneys General argued that third parties, and not the state, caused the deprivations of s. 7 interests that were at issue. The Ontario Court of Appeal disagreed. It found that the impact of the law, "in the world in which it actually operates," deprived sex workers of their ability to avail themselves of necessary protections.[9] The Supreme Court found that while third parties may be an immediate source of harm, this "does not diminish the role of the state in making a prostitute more vulnerable to that violence."[10]

15. In this case, the Notice of Civil Claim discloses an arguable claim, in the vein of those advanced in *Adams*, *PHS* and *Bedford*, that the nature and functioning of the impugned legal scheme unjustifiably interferes with the ability of women litigants of limited or moderate means to access the benefits and protections afforded by the *Family Law Act* and/or the

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[7] 2009 BCCA 563 ("*Adams*") at paras. 86–89.
[8] 2011 SCC 44 ("*PHS*") at para. 93.
[9] *Bedford v. Canada*, 2012 ONCA 186 at paras. 108, 370.
[10] 2013 SCC 72 ("*Bedford*") at para. 89.

Divorce Act. The Plaintiffs acknowledge that the potential relevance of the principle in *Auckland Harbour Board* is a factor which distinguishes the s. 7 claims advanced in *Adams*, *PHS* and *Bedford* from the s. 7 claim in the instant case. The influence of that principle on the outcome of the Plaintiffs' s. 7 claim is, however, a matter for trial.

D. Section 15 of the Charter (Equality Rights)

16. As the Plaintiffs understand it, the Province's argument is that the Notice of Civil Claim does not disclose a reasonable claim under s. 15 of the *Charter* because the disadvantage of which the Plaintiffs complain arises from the very nature of the distributive benefits scheme in issue, not from a distinction on the basis of an enumerated or analogous ground. So, the Province says, the Plaintiffs' claim will not survive the first step of the s. 15 test.

17. The Province also asserts at paragraph 21 of the notice of application that the "only distinction" identified by the Plaintiffs is between mainly female legal aid recipients in family law cases and mainly male legal aid recipients in criminal law cases. The argument ignores the pleadings. The Plaintiffs plead several distinctions created by the impugned legislative scheme on the ground of sex, on its own and as it intersects with other grounds.[11]

18. On the facts pleaded, the Plaintiffs have an arguable claim that the impact of the impugned legal scheme creates a distinction on protected grounds. Moreover, the pleadings disclose an arguable claim that the impugned legal scheme denies benefits to women litigants of limited or moderate means engaged in Family Law Proceedings in a way that reinforces, perpetuates and exacerbates the disadvantage they experience.[12] The s. 15 claim should go to trial.

19. Nonetheless, the Province argues, at paragraph 19 of its notice of application, that it is open to government to fund a program of both sides of a distinction, or on neither. This argument does not show that the Plaintiffs' s. 15 claim is inarguable. Once the state has provided a benefit – as with the impugned legal scheme – "it is obliged to do so in a non-discriminatory manner."[13] The Province's obligations under the impugned legal scheme is a matter for trial.

20. Finally, the Plaintiffs note that the Province's argument regarding the s.15 claim is circular. The Province says that if legal aid funding is found to create a distinction on the basis of sex,

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[11] Notice of Civil Claim at paras. 1, 9 and 15 of the Factual Basis and 12, 15, 18, and 19 of the Legal Basis
[12] *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para. 25.
[13] *Eldridge* at para. 73.

that distinction is constitutionally mandated because state-funded counsel in certain criminal cases is constitutionally required. This tautology ignores the pleadings: that legal aid to women of limited or moderate means engaged in Family Law Proceedings is also constitutionally mandated under s. 7 of the *Charter* and s. 96 of the *Constitution Act, 1867*. The Province's argument does not show that the Plaintiffs' s. 15 claim is bound to fail.

E. Section 96 of the *Constitution Act, 1867*

21. The Province argues that the Plaintiffs' s. 96 claim must be dismissed because that provision of the Constitution does not oblige the state to fund access to counsel, (*i.e.* create a positive right to counsel). The Province also says that s. 96 has no application to family law proceedings in provincial courts.

22. Beginning with the latter point, the Plaintiffs agree that s. 96 applies only in respect of proceedings in superior courts. Single Mothers' Alliance represents a diverse range of women, including women with Family Law Proceedings in the Supreme Court.[14]

23. Turning to the substance of the Province's argument, the Plaintiffs say that it is not plain and obvious that the s. 96 claim will fail. The jurisprudence has come to recognize that s. 96 protects access to justice interests well beyond the provision's wording. The scope of that protection has yet to be determined in the context of state-funded counsel.

24. *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 ("*Trial Lawyers*") found that certain court hearing fees were unconstitutional to the extent that they effectively prevented litigants from accessing the superior courts:

> The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act,* 1867.[15]

25. *Trial Lawyers* addressed the interplay of ss. 92(12) and 96 in respect of *hearing fees*; it is not determinative of a claim for *state-funded counsel*. However, the judgment provides an

[14] Notice of Civil Claim, Part 1, paras. 14 – 15.
[15] *Trial Lawyers*, at para. 32

important starting point for assessing the claim in this case, as the case affirmed the constitutional significance of access to justice in upholding the rule of law and the development of the common law.[16]

26. The Province does not demonstrate that it is plain and obvious that the line of reasoning in *Trial Lawyers* will not extend to the barriers imposed by the impugned legal scheme and/or its administration on access to justice for women litigants of limited or moderate means and their children.

F. Remedies

i. Relief is available under s. 52(1) of the *Constitution Act, 1982*

27. The Province asserts at paragraph 7 of its notice of application that the relief sought under s. 52(1) is not available the Plaintiffs, on the pleadings. The Province also contends at paragraph 8 that no s. 52 relief is available in respect of the Memorandum of Understanding (MOU). The Plaintiffs disagree on both points.

28. The Plaintiffs challenge the impugned legal scheme. This scheme includes sections of the 2002 Act, the MOU mandated by s. 21 of the 2002 Act, and policies guiding the Society's delivery of legal services in family law matters.

29. Each component is an essential part of the impugned legal scheme and interlocks with the others. The 2002 Act is the legislative authority for the MOU, and the MOU in turn sets the legal framework for LSS policy. The integrated nature of the scheme is recognized by the MOU itself. The current preamble describes the combination of the MOU, the 2002 Act, the mandate letter (and any successor to it), the service plan and the approved budget as the "accountability framework" for legal aid service delivery in British Columbia.[17]

30. As the elements of the impugned legal scheme interlock, it is unnecessary to consider whether a discrete component, such as the MOU, is itself "law". The components together constitute a legal scheme, in relation to which s. 52 remedies are, in principle, available.

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[16] *Trial Lawyers* at para.38-40.

[17] Memorandum of Understanding entered into between the Province of British Columbia and the Legal Services Society, dated April 1, 2017, signed September 11, 2017, Preamble, para. F.

31. This was recently affirmed in *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2016 BCSC 1764 ("*Conseil scolaire*").[18] The plaintiffs successfully challenged various components of the scheme governing the funding of francophone education in British Columbia, under s. 23 of the *Charter*. The challenged elements included legislation, guidelines, policies and orders, capital plan instructions, standards, a facility grant policy, capital asset management procedures and guidelines.[19] The trial judge considered the funding allocation system and its many components as a whole. The court did not find it necessary to consider whether each challenged component was itself "law."

32. In *Conseil scolaire*, the plaintiffs sought remedies under s. 24 of the *Charter*. The Plaintiffs in this case seek relief under s. 52(1). This is because the claim is that the necessary *effect* of the impugned legal scheme is to infringe the Plaintiffs *Charter* rights and to impede access to justice for women litigants of limited and modest engaged in Family Law Proceedings. It is trite that a law may be inconsistent with the *Charter* because of its purpose or its effect.[20] When a law produces an unconstitutional effect, the usual remedy is found in s. 52(1).[21]

33. Section 24(1), by contrast, is generally invoked to remedy unconstitutional government acts committed under laws or legal schemes accepted as fully constitutional. The acts of government agents under such regimes are not the necessary result or "effect" of the law, but of the unconstitutional application of discretion.[22] In some cases, the distinction between the law's effects and its application is clear, but in other cases it is less so.

34. The Plaintiffs' claims are systemic claims. They flow not from the application of a discretion, but from "the necessary result or 'effect' of the law",[23] comprising the 2002 Act, the MOU, and Society's policies. Specific decisions are, of course, made pursuant to the scheme but the impugned legal scheme *itself* produces unconstitutional systemic effects.

35. The Province also asserts at paragraph 7 of its notice of application that the plaintiffs' declaratory relief is irrational because, if it were granted, the legal aid system could not

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[18] rev'd in part, but not on the point pertinent to this argument: 2018 BCCA 305.
[19] *Conseil scolaire* at para. 1002.
[20] *R. v. Ferguson*, 2008 SCC 6 ("*Ferguson*") at para. 59.
[21] See, for example, *British Columbia Civil Liberties Association and the John Howard Society of Canada v. Canada (Attorney General)*, 2018 BCSC 62, appeal heard November 13-14, 2018, File No. CA045092.
[22] *Ferguson* at para. 60.
[23] *Ibid.*

function at all. With respect, the argument does not account for the proper exercise of the Court's remedial discretion. The Court is not limited, as the Province seems to assume, to ordering an immediate declaration of invalidity. A variety of remedial techniques exist to fulfill the mandate of s. 52.[24] At this stage of the action, the type of declaratory relief this court may consider appropriate cannot, and should not, be predetermined.

ii. The action is an appropriate form of proceeding with the Plaintiffs' claims

36. The Province, at paragraph 10 of its notice of application, contends that the Plaintiffs' challenges could or should be brought in judicial review proceedings responding to particular decisions denying or limiting legal aid. These arguments are easily answered.

37. *Downtown Eastside Sex Workers United Against Violence Society* ("*SWUAV*") recognized the unique nature of systemic constitutional challenges. The majority at the Court of Appeal affirmed that a systemic challenge will often be distinct in its scope from an individual's proceeding. The majority found that the sheer availability of other means to bring a claim is not determinative of the reasonableness or effectiveness of a systemic claim.[25]

38. In affirming the grant of public interest standing to the plaintiff Society, the Supreme Court of Canada emphasized the need to realistically consider whether an individual with standing could bring a systemic challenge, and the likelihood of her doing so.[26]

39. It is unrealistic to expect a woman denied legal aid for Family Law Proceedings to mount a full constitutional challenge to the impugned legal scheme through judicial review of the denial decision – without the assistance of counsel – whilst seeking to resolve the issues that brought her into contact with the justice system in the first place.

40. Moreover, the fact that individuals have a right to seek judicial review of specific legal aid decisions does not preclude this Court from granting relief under s. 52(1) in this case, if the Plaintiffs establish that the impugned legal scheme is unconstitutional. Courts must consider whether a particular means of getting to court would uphold and reinforce the principle of legality. This principle refers both to the constitutionality and legality of law and state action, and the need for practical and effective ways to challenge legislation and the legality of state

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[24] *Schachter v. Canada*, [1992] 2 S.C.R. 679.
[25] *SWUAV*, 2010 BCCA 439 at paras. 51, 55, 59.
[26] *SWUAV*, 2012 SCC 45 at paras. 50-52, 71-73.

action.[27] The Province's position on how a systemic challenge to the impugned legal scheme should be brought would effectively immunize it from review.

Part 6: MATERIAL TO BE RELIED ON

The pleadings in the proceedings herein.

The application respondents estimate that the application will take 3 days.

[X] The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

[ ] The application respondent has not filed in this proceeding a document that contains an address for service. The application respondent's ADDRESS FOR SERVICE is: n/a.

Date: 29 November, 2018

Signature of [ ] application respondent
[x] lawyers for application respondents

Monique Pongracic-Speier, Q.C., Sarah Khan,
Kasari Govender, Rajwant Mangat & Kate Feeney

[27] *Ibid.* at paras. 31-34.