VANCOUVER
FEB 17 2022
REGISTRY

No. S173843
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

SINGLE MOTHERS' ALLIANCE OF BC SOCIETY, and 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

And

THE CANADIAN BAR ASSOCIATION

Intervenor

APPLICATION RESPONSE

Application response of: the Plaintiffs, Single Mothers' Alliance of BC Society and Nicolina Bell (also known as Nicole Bell), (the "application respondents")

THIS IS A RESPONSE TO the notice of application of the Defendant, Her Majesty the Queen in right of the Province of British Columbia, filed 02/Feb/2022.

Part 1: ORDERS CONSENTED TO

The application respondents consent to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application on the following terms: **none**.

Part 2: ORDERS OPPOSED

The application respondents oppose the granting of the orders set out in **paragraphs 1 to 3** of Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondents take no position on the granting of the orders set out in **no** paragraph of Part 1 of the notice of application.

Part 4: FACTUAL BASIS

1. On 26 April, 2017, the Single Mothers' Alliance of BC Society (the "**SMA**"), Nicolina Bell and A.B. filed this action. A.B. discontinued in July 2018. Ms. Bell seeks to discontinue and the parties have consented, on terms.[1] The SMA intends to proceed to trial.

2. The action advances a systemic constitutional claim to parts of British Columbia's family law legal aid regime. The Further Amended Notice of Civil Claim (the "**Claim**") pleads that a legal scheme of interlocking elements, comprised of ss. 10(2) and (3), 11(3) and (4), 17 to 19 and 21 of the *Legal Services Society Act*, SBC 2002, c. 30, the memoranda of understanding between the Attorney General of British Columbia and the Legal Services Society ("**LSS**"), and policies propounded by the LSS (collectively, the "**Impugned Scheme**"), unjustifiably infringes ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the "***Charter***")[2] and fails to comply with the requirements of s. 96 of the *Constitution Act, 1867*, in the way that it affects a particular group: "women litigants of limited or moderate means" engaged in Family Law Proceedings, as defined at paragraphs 3 and 10 of Part 1 of the Claim. The Plaintiffs seek relief pursuant to s. 52(1) of the *Constitution Act, 1982*, the Court's inherent jurisdiction and, alternatively, s. 24(1) of the *Charter*.[3]

The SMA:

3. The SMA is a province-wide, grass roots, non-profit society founded in June 2014 by and for single mothers. As of November 2021, the SMA numbered approximately 178 members. The membership includes Indigenous mothers, racialized mothers, immigrant mothers (including new immigrants and/or some mothers with limited English language skills), mothers with disabilities, mothers who live in small or rural communities, mothers with limited education, queer mothers, and trans and non-binary parents. Most of the SMA's members live or have lived in poverty or experienced economic insecurity.[4]

4. Since its founding, the SMA's objects have included empowering single mothers and advocating for legal and policy changes to enable single mothers and their children to live free from poverty and discrimination. In 2014 and 2015, single mothers who were members of, or in communication with, the SMA identified access to legal aid as an issue affecting their lives. In 2016, the SMA made access to legal aid an area of focus in its work and decided to take legal action with respect to the family law legal aid system.[5]

---

[1] Affidavit #1 of M. Vukosavic, made 1 February, 2022 at Exhibit. "I", p. 094.
[2] The Plaintiffs will argue at trial that s. 28 of the *Charter* informs the understanding of the s. 7 interests at issue.
[3] The Plaintiffs reject as inaccurate and incomplete the description of the claims set out in the notice of application.
[4] Affidavit #1 of V. Ellis, made 17 February, 2022 ("**Ellis Affidavit**") at paras. 3–5, 8, 14–18.
[5] Ellis Affidavit at paras. 5–7, 19–22, 34–35.

Proceedings to Date:

5. Many steps have been taken in the action. An application to strike the Plaintiffs' claims was argued between 25 and 27 February, 2019, and dismissed on 23 August, 2019.[6] Neither defendant argued against the SMA's standing to advance the action.

6. Between 10 September and 17 December, 2020 the parties made and responded to demands for particulars.[7]

7. Document discovery has been extensive. Between September 2018 and January 2022, the parties collectively served 23 lists of documents, producing between them approximately 2,500 documents listed on Part 1 or Part 2 of the lists.[8]

8. On 26 March, 2021, by consent, the Plaintiffs issued interrogatories to the LSS. The interrogatories were answered by the LSS on 23 and 29 April, 2021.[9]

9. On 5 May, 2021, the Plaintiffs conducted an examination for discovery of Heidi Mason, a representative of the LSS. Requests left on the record at Ms. Mason's examination were answered by the LSS on 3 and 17 November, 2021. The Plaintiffs stated follow-up questions on 6 December, 2021. Answers to the follow-up questions remain outstanding.[10]

10. On 18 June, 2021, the Plaintiffs conducted an examination for discovery of Wendy Jackson, a representative of Her Majesty the Queen in right of the Province of British Columbia (the "**Province**"). Requests left on the record were answered by the Province on 22 November, 2021. The Plaintiffs stated follow-up questions on 10 January, 2022. Answers to the follow-up questions were delivered on 10 February, 2022.[11]

11. On 30 November, 2021, the Plaintiffs served four expert opinion reports on the defendants. The reports are authored by Lindsay Tedds, PhD, an economist; Linda Neilson, PhD, a legal sociologist; Trevor Farrow, PhD, a professor of law; and Ashley N. Stewart, a forensic nurse. Neither defendant served any expert reports under Rule 11-6(3).[12]

12. On 7 and 14 February, 2022, the Province served three responsive expert opinion reports, pursuant to Rule 11-6(4). Patrick Francois, PhD, an economist, responded to Dr. Trevor Farrow's report; Richard Shillington, PhD, a statistician, responded to Dr. Lindsay

---

[6] *Single Mothers' Alliance of BC Society v British Columbia*, 2019 BCSC 1427 ("***SMA 2019***").
[7] Affidavit #3 of M. Ditata, made 17 February, 2022 ("**Ditata Affidavit**") at para. 4.
[8] Ditata Affidavit at paras. 5-6.
[9] Ditata Affidavit at para. 10.
[10] Ditata Affidavit at paras. 11-12.
[11] Ditata Affidavit at paras. 13-14.
[12] Ditata Affidavit at para. 15.

Tedds' report; and J.P. Boyd, a lawyer, responded to Dr. Linda Neilson's and Dr. Trevor Farrow's reports.[13]

13. On 2 February, 2022, nearly five years after the litigation was commenced, the Province brought the within application, challenging the SMA's standing to advance the action.

Part 5: LEGAL BASIS

14. The SMA does not contend for private interest standing. The question for the Court is, therefore, whether to acknowledge public interest standing for the SMA to advance the action. Ultimately, this is a question of "whether this litigation is a reasonable and effective means to bring a challenge to court".[14] The SMA bears the onus of persuasion.[15]

15. The factors for the Court to consider – cumulatively – in assessing the SMA's public interest standing are whether: (a) this case raises a serious justiciable issue; (b) the SMA has a real stake or a genuine interest in its outcome; and (c) in all the circumstances, the case is a reasonable and effective means of bringing the claims advanced to court. These factors are to be considered in light of the circumstances of the case and the rationales that underpin the law of standing, *i.e.*, "ensur[ing] that legislation and state action are lawful, that courts are accessible and that judicial resources are deployed economically and appropriately."[16]

16. The challenge to SMA's standing having been brought on a summary trial application, the Court is to focus on whether the SMA is an appropriate party to advance a justiciable claim, not on the detail of the intended trial evidence or the likelihood that the claim will ultimately succeed.[17]

17. It is uncontroversial that the action raises serious, justiciable issues but the Province denies that the SMA has a genuine interest in the action and contends that the action is not a reasonable and effective means of litigating the matters at issue. On the facts and the law, the Province's position is unpersuasive.

---

[13] Ditata Affidavit at paras. 17-18.
[14] *Manitoba Metis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623 at para. 43.
[15] *Council of Canadians with Disabilities v British Columbia (Attorney General)*, 2020 BCCA 241 ("***CCD***") at paras. 63 and 120.
[16] *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 ("***SWUAV***") at paras. 2, 3, 20, 21, 23, 26 – 30, 36, 37 and 52; *CCD* at paras. 4 (for the quotation) and 86.
[17] *CCD* at para. 87.

Genuine Interest:

18. The purpose of assessing a plaintiff's interest is to ensure "concrete adverseness" in the argument of a claim, by screening out the claims of "mere busybodies".[18] The question is whether the SMA has a real stake in the action or is engaged with the issues it raises.[19]

19. A litigant's "genuine interest" is assessed qualitatively. In *Borowski v Canada (Attorney General)*, for example, the Supreme Court affirmed the standing of an anti-abortion activist to seek a declaration that exculpatory provisions in the *Criminal Code* did not comply with the requirements of the *Canadian Bill of Rights* because he was "a concerned citizen and a taxpayer" who was as well placed as anyone else to seek declaratory relief.[20] In *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, the Court found that the proposed plaintiff had a genuine interest in the constitutional validity of Canada's immigration legislation because the organization had demonstrated a "real and continuing interest in the problems of the refugees and immigrants".[21] In *SWUAV*, the plaintiff organization was found to a have genuine interest because it had considerable experience with sex workers in the Downtown Eastside and was familiar with their interests.[22] And, in *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, this Court found that the plaintiff's interest in furthering the rule of law and the administration of civil justice for the public good and in upholding and preserving the right to trial by jury were sufficient to support a genuine interest in a challenge to civil jury fees.[23]

20. The SMA has a genuine interest in the claims advanced in this litigation. It is an organization run by and for single mothers – especially single mothers of limited or moderate means – and advocates for their interests. The SMA's constituents experience adverse social impacts from family violence, economic insecurity, and lack of access to legal aid. The SMA has conducted three "listening projects" in which participants identified these intersecting issues as salient to their lives. The SMA has acted upon the information it heard in these listening projects, by pursuing this and previous litigation, as part of a multi-pronged approach to securing legal and policy changes to benefit single mothers.[24]

21. The Province challenges the genuineness of the SMA's interest in the litigation by complaining that the SMA has not produced documents to show a quantitative study of

---

[18] *SWUAV* at para. 43; *CCD* at paras. 70 and 98; *B.C./Yukon Association of Drug War Survivors v Abbotsford (City)*, 2014 BCSC 1817 ("***Drug War Survivors***") at para. 44, affirmed 2015 BCCA 142.
[19] *SWUAV* at para. 43.
[20] [1981] 2 SCR 575 at 597.
[21] [1992] 1 SCR 236 at 254.
[22] *SWUAV* at para. 58.
[23] 2016 BCSC 1391 ("***Trial Lawyers 2016***") at para. 18; affirmed on other grounds, 2017 BCCA 324, leave denied 2018 CanLII 68340.
[24] Ellis Affidavit at paras. 3, 5, 8–11, 14–55.

data about the legal aid experiences of its members. The Province also complains that Ms. Ellis did not, on examination for discovery in late 2021, recall specific details of her discussions with women who contacted the SMA in 2016 and 2017, in connection with the SMA's legal aid listening project.[25] Neither of these complaints weighs against the sufficiency of SMA's interest in this action. The law of public interest standing has never made standing dependent on whether an advocacy organization – particularly one run wholly or predominantly on a volunteer basis – engages in quantitative data analysis or catalogues its members' personal experiences. The fact that, in 2021, Ms. Ellis could not recall the specific circumstances of women whom she volunteered to speak with five years earlier is not an indicator that the SMA lacks a genuine interest in the claim.[26] It is an indicator that human memory is finite.

Reasonable and Effective Means of Bringing the Claim before the Court:

22. The question to be addressed under the third part of the *SWUAV* framework is whether, in *all of the circumstances*, the Claim is *a* reasonable way to litigate the issues it advances.[27] Relevant considerations include: the SMA's capacity to bring the Claim, including its resources, expertise and whether the case will be presented in a sufficiently concrete and well-developed factual setting; whether the case is of the public interest in the sense that it transcends the interests of those most directly affected by the law or action; whether there are realistic, alternative ways to present the claim in a way that would more efficiently and effectively use judicial resources; and the potential impact of the proceeding on those who are equally or more directly affected, especially if private and public interests may come into conflict.[28] These matters will be addressed in turn.

23. ***The SMA has the capacity to bring the claim***: The Province says that the SMA lacks capacity to bring the claim because it is incapable of providing "concrete information" about the core factual issues in the claim. The argument is without merit. The action advances a comprehensive systemic constitutional challenge, the material facts of which are pleaded at paragraphs 1 – 15 and 56 – 77 of Part 1 of the Claim and the legal bases for which are pleaded in Part 3 of the Claim. The measures of SMA's capacity to advance the Claim are whether the organization is positioned to marshal the evidence relevant to these allegations and to present cogent legal argument, not an assessment of the "concreteness" of "information".

24. Systemic constitutional challenges are in certain ways a "unique" form of civil litigation, with unique evidentiary requirements.[29] Social facts are extremely important, even dispositive, in this kind of litigation.[30] Such facts may be proved by expert evidence, academic or government reports, statistics or, in the right circumstances, by judicial

---

[25] See Ellis Affidavit at paras. 34–40.
[26] See Ellis Affidavit at para. 39.
[27] *SWUAV* at para. 44; emphasis added.
[28] *SWUAV* at para. 51.
[29] *CCD* at para. 97.
[30] *R. v Spence*, 2005 SCC 71, [2005] 3 SCR 458 at para. 64.

notice.[31] The SMA has served four expert reports, will cross-examine the Province's experts and will rely on government reports and statistical evidence to prove its case.[32]

25. Material facts in systemic constitutional litigation may also be proven by: admissions, documentary evidence, evidence taken on examination for discovery, interrogatories and direct and cross-examination of lay witnesses. The SMA has already laid the groundwork to prove facts at trial by these means. There is no merit to the suggestion that the SMA cannot bring evidence to prove the Claim.

26. The Province also argues that with the SMA as sole plaintiff, the Claim is vague and the claimant group amorphous. These arguments are spurious. The Claim and the claimant group are defined by the pleadings. The claimant group – women of limited or moderate means engaged in Family Law Proceedings – may be large and the specificities of its members' circumstances varied but that does not mean the group is undefined or that the Claim is unfocused.[33] Instead, as in *CCD*, the Claim challenges a specific legal scheme that "directly affects all members of a defined and identifiable group in a serious, specific, and broadly-based manner *regardless of the individual attributes or experiences of any particular member of the group*".[34]

27. The Province further attacks the SMA's standing to bring the Claim on ground that, if Ms. Bell is not a plaintiff, the Claim lacks the necessary factual matrix for the Claim to be justly and fairly tried. This argument is without merit. It is not necessary for the SMA to have an individual co-plaintiff, or to plead an individual's facts, to prove that the Impugned Scheme infringes the Constitution. Indeed, the Court of Appeal in *CCD* expressly rejected a requirement for an individual co-plaintiff in broadly framed systemic constitutional litigation.[35] The Court held that it was open to the plaintiff to establish its claim by adducing evidence from directly affected non-plaintiff witnesses and expert witnesses.[36] At trial, the SMA will adduce evidence from both.

28. Nonetheless, the Province complains that lay witness evidence will be ineffective or will lead to trial by ambush. These positions are untenable. They do not weigh against

---

[31] *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 at para. 53; *R. v Malmo-Levine; R. v Caine*, 2003 SCC 74, [2003] 3 SCR 571 at paras. 26 – 28; *Fraser v Canada (Attorney General)*, 2020 SCC 8 at paras. 57 to 67. See also *CCD* at para. 113.

[32] Ditata Affidavit at paras. 5-9, 15, 19.

[33] *CCD* at paras. 110 – 111.

[34] *CCD* at para. 112 (*emphasis added*).

[35] *CCD* at paras. 110 – 114. At the Supreme Court of Canada, the Province conceded that CCD did not need to proceed with an individual co-plaintiff; see Ditata Affidavit at para. 22, Exhibit "S", Transcript of Hearing before Supreme Court of Canada in *Attorney General of British Columbia v Council of Canadians with Disabilities* (SCC), Case No. 39430, Day 1, p. 10:2-17, 21:20-22:3, 27:18-24, 37:7-38:5. It has been implicitly rejected in other *Charter* litigation, too; see, *e.g.*, *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228.

[36] *CCD* at para. 113.

SMA's standing to advance the Claim. With the SMA as sole plaintiff, the Province will continue to have all the usual means of trial preparation at its disposal. It has the Plaintiffs' expert reports. It has the Plaintiffs' Trial Brief and, in due course, will have an Amended Trial Brief. A witness list will be filed, in accordance with Rule 7-4. The Plaintiffs have also offered to provide will-say statements. The Province has already begun contacting witnesses listed in the Plaintiffs' Trial Brief.[37]

29. Finally, in contending that the SMA is incapable of advancing the action, the Province overlooks the fact that the SMA has a team of experienced litigation counsel. Counsel will organize and effectively present the evidence at trial.

30. ***The issues transcend individual interests and the SMA's immediate interests***: The interests at stake in this litigation are manifestly of public interest. This is demonstrated by government reporting on the prevalence and seriousness of family violence in British Columbia, and by admissions given by Ms. Jackson on examination for discovery. Ms. Jackson admitted: family violence is a serious public concern; access to civil legal aid is part of an effective response to family violence; legal aid is expected to be provided in Family Law Proceedings where someone's safety and security is at risk because of the extreme seriousness of the interests at issue; and victims of family violence are among the people with the greatest need for access to legal aid resources.[38]

31. Moreover, each year, thousands of women in British Columbia apply for family law legal aid but are denied, including for reasons of financial ineligibility. Additionally, each year, women whose initial applications for legal aid are approved because they are affected by family violence subsequently may be denied extended services when sought, due to the requirements of the Impugned Scheme.[39]

32. ***The prospect of effective alternative proceedings is illusory***: Pointing to *P.D. v British Columbia,* 2010 BCSC 290, the Province argues that there is "no reason" why individual women litigants could not launch constitutional challenges to the Impugned Scheme and that such challenges are, in fact, necessary to litigate the matters put at issue in this litigation. The flaws in this argument are readily apparent.

33. First, the central question at the third part of the *SWUAV* framework is whether there are better ways for *the claim at bar* to be brought to court.[40] In addressing this question, it is necessary to examine not only the precise legal issues engaged but the perspective from which they are raised.[41] As noted above, this action brings a systemic constitutional challenge to the Impugned Scheme and its effects on a particular group: women litigants of limited or moderate means engaged in Family Law Proceedings. A systemic challenge

---

[37] Ditata Affidavit at paras. 20-21.
[38] Ditata Affidavit at paras. 9 and 13, Exhibits "I" and "L" (Jackson Examination for Discovery, Qs 124, 125, 142, 232, 236, 241 – 244, 247 and 358 – 359).
[39] Ditata Affidavit at paras. 7-10, Exhibits "A"–"J".
[40] *SWUAV* at paras. 44 and 51.
[41] *SWUAV* at para. 64.

is different in nature from a claim to legal aid in a "test case", such as *P.D.* *P.D.* involved an application for a mandatory injunction for legal aid to support the judicial determination of *P.D.*'s family law issues.[42] "Test cases" are one way to test the constitutionality of laws or state action but they are not the only – let alone a preferable – way to do so, especially where the claim is systemic in nature.[43] Indeed, *P.D.* illustrates some of the pitfalls of constitutional test cases: critical social facts may be underdeveloped and legal argument truncated, resulting in an inefficient and suboptimal use of judicial resources.

34. Second, the Province's contention that a case must be brought on individual facts because there is no "general constitutional right to counsel in civil proceedings" has the Province tilting at windmills (and recycling arguments from its unsuccessful application to strike the Claim). The Plaintiffs do not contend for a "general constitutional right" to legal aid. The Claim challenges the constitutional compliance of the Impugned Scheme.

35. Third, it is obvious that women of limited or moderate means who are denied legal aid for Family Law Proceedings and are simultaneously contending with the effects of family violence and family breakdown are ill-positioned to mount constitutional challenges – especially when there is no legal aid funding available to do so.[44] To borrow from this Court's language in *Trial Lawyers 2016*, these women do not have "the financial wherewithal or the luxury of the time required to litigate the constitutionality of the [Impugned Scheme], or to wait for their day in court until the issue of the constitutionality of [Impugned Scheme] is litigated."[45] Indeed, if it were "realistic" for private litigants to undertake the challenge this Claim brings, one would have expected the Province to point to at least one such case since *P.D.* was decided 12 years ago.

36. Finally, there is a manifest difference between *bringing* and *sustaining* a systemic constitutional challenge to the Impugned Scheme. The Province's argument conveniently overlooks the demands and rigour involved in prosecuting systemic constitutional litigation, litigation which may outlive an individual's need for legal aid representation. One need look no further than the action at bar to understand that systemic constitutional litigation can be exceedingly demanding. Almost five years to the day that the Notice of Civil Claim was filed – after applications to strike the claim, multi-year document discovery, interrogatories, examinations for discovery and the production of expert reports – the Court will be asked to decide whether the SMA should have brought the case at all.

---

[42] *P.D.* at para. 161. *P.D.* did not challenge the constitutionality of the *Legal Services Society Act*; see *P.D.* at para. 68.

[43] See: *SWUAV* at para. 70.; see also *Drug War Survivors* at paras. 52 and 60.

[44] See: *Michel v Graydon*, 2020 SCC 24 at paras. 95 and 96, per Martin J, for herself and Wagner CJC, concurring.

[45] *Trial Lawyers 2016* at para. 28. It is not by accident that the challenge to the constitutionality of hearing fees that began in the context of *Vilardell v Dunham*, 2012 BCSC 748 metamorphosed into and completed the litigation process as *Trial Lawyers Association v British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 SCR 31.

37. ***The potential impact of the proceeding on the rights of others***: There is no evidence, and no reason to suspect, that the rights of others will be adversely affected by the Claim.

Conclusion:

38. Weighing the factors of the *SIVUAV* framework purposively and cumulatively, as the law requires,[46] it is respectfully submitted that this Court should confirm the SMA's standing to bring the Claim to trial.

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of V. Ellis, made 17 February, 2022;
2. Affidavit #3 of M. Ditata, made 17 February, 2022; and
3. The pleadings filed in the action.

The application respondents estimate that the application will take **2.5 days**.

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

Date: 17/Feb/2022

Signature of Lawyer for filing party
Monique Pongracic-Speier, QC
Rajwant Mangat, Kate Feeney, Humera Jabir,
Anita Ghatak and Gita Keshava

[46] *SIVUAV* at para. 20.