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, the Legal Services Society (the "Society"), filed 11 October, 2018.

Part 1: ORDERS CONSENTED TO

None.

Part 2: ORDERS OPPOSED

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

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

None.

Part 4: FACTUAL BASIS

2. 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."

3. The Plaintiffs do not accept – and the Court should not accept – the gloss on the facts offered by the Society in Part 2 of its notice of application.

4. The Society erroneously asserts that the Plaintiffs plead that women of limited or modest means assert a constitutional right to legal aid "for the duration" of their Family Law Proceedings. This is not the Plaintiffs' claim. The Plaintiffs' claim relates to access to legal aid for women of limited or modest means until the *resolution* of Family Law Proceedings. The issues in Family Law Proceedings may be resolved in substance before the proceedings are formally brought to an end.

5. The Plaintiffs' action is brought in the context of the significant changes made to the *Legal Services Society Act* in 2002. It is therefore appropriate for the Court to have regard to the following legislative history.

6. The *Legal Services Society Act*, R.S.B.C. 1979, c. 227 established the Society to provide and administer government-funded legal aid in British Columbia. Since 1979, successive versions of the *Legal Services Society Act* have continued the Society and the Province's legal aid program.

7. In 2002, the *Legal Services Society Act*, S.B.C. 2002, c. 30 ("the 2002 Act") came into force. The 2002 Act repealed and replaced the *Legal Services Society Act*, R.S.B.C. 1996, c. 256 (the "1996 Act"). Among other things, the 2002 Act removed from the *Legal Services Society Act* the statement of the objects and purposes of the Society that the legislation had until then contained.

8. Section 3(1) of the 1996 Act stated that it was an object of the Society to *ensure* that "services ordinarily provided by a lawyer are afforded to individuals who would not otherwise receive them because of financial or other reasons."

9. For the purposes of s.3(1), s.3(2) of the 1996 Act obligated the Society to provide legal services in certain circumstances, including to a qualifying person who:

> ...
>
> (c) is or may be a party to a proceeding respecting a domestic dispute that affects the individual's physical or mental safety or health or that of the individual's children;
>
> (d) has a legal problem that threatens
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> (i) the individual's family's physical or mental safety or health,
>
> (ii) the individual's ability to feed, clothe and provide shelter for himself or herself and the individual's dependents, or
>
> (iii) the individual's livelihood.

10. Section 3(2) of the 1996 Act, like the earlier versions of the legislation, created a legally enforceable, statutory entitlement to legal aid.[1]

11. The 2002 Act does not give the Society a clear and certain mandate. Further, it does not obligate the Society to provide legal services in particular circumstances. Rather, s. 9 of the 2002 Act broadly states the Society's objects and guiding principles. The statement is enabling rather than prescriptive.

12. Section 21 of the 2002 Act requires that the Society and the Attorney General negotiate a Memorandum of Understanding (MOU) regarding matters which may include the Society's budget, the "types of legal matters in relation to which the Society may provide legal aid with government funding," and "the priority accorded to the types of legal matters in relation to which the Society may provide legal aid with government funding."

13. Further, s. 10 (3) of the 2002 Act prohibits the Society from engaging in an activity unless it does so without using government funding or "in accordance with the Act, the regulations and the memorandum of understanding referred to in section 21 and money for the activity is available within the budget approved by the Attorney General under section 18."

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[1] *Mountain v. Legal Services Society*, 1983 CanLII 277 (BCCA).

14. In effect, the 2002 Act represents a discretionary regime largely governed by the MOU. It has eliminated any statutory guarantee of a minimum level of legal aid coverage. The Society may, therefore, change its service levels to align with provincial funding and direction as set out in the MOU, subject only to constitutional rights to state-funded legal counsel. That is why it is important for this Court to consider the merits of arguable constitutional claims concerning legal aid, and to ensure that such claims are not prematurely dismissed on the applications to strike.

Part 5: LEGAL BASIS

A. The burden is on the Defendant to show that the Plaintiffs' claims are not arguable

15. The Society applies to strike and dismiss certain relief sought in the Plaintiffs' claim under R. 9-5(1)(a).

16. The Plaintiffs' relief may be struck under R. 9-5(1)(a) only if the Society 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.[2] 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.[3]

B. Section 52 and Section 24 relief is appropriately sought in the action

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

17. The Society at paragraph 12 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.

18. *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. The majority found that

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[2] *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.
[3] *Imperial Tobacco* at para. 21.

the sheer availability of other means to bring a claim is not determinative of the reasonableness or effectiveness of a systemic claim.[4]

19. 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.[5]

20. 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.

21. 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 action.[6] The Society's position on how a systemic challenge to the impugned legal scheme should be brought would effectively immunize it from review.

ii. A s. 24(1) *Charter* remedy is available to the plaintiffs

22. Contrary to the position advanced by the Society at paragraphs 2 and following of its Notice of Application, the law does not firmly establish that s. 24(1) remedies may only be claimed and enforced by parties with private interest standing, or that remedies granted under s. 24(1) are limited strictly to personal remedies, or that s. 24(1) remedies are available only to organizational plaintiffs seeking relief for alleged infringements of their members' rights.

23. Instead, the jurisprudence shows that the Plaintiffs have a reasonable case for the remedies they claim.

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[4] *SWUAV*, 2010 BCCA 439 at paras. 51, 55, 59.
[5] *SWUAV*, 2012 SCC 45 at paras. 50-52, 71-73.
[6] *Ibid.* at paras. 31-34.

24. For example, *Fédération des parents francophones de Colombie-Britannique v. British Columbia (Attorney General)* held that an organizational plaintiff had public interest standing to pursue a s. 24(1) remedy for the alleged breach of s. 23 of the *Charter*.[7]

25. Relying on *Fédération*, this Court declined to strike the s. 24(1) relief sought by the plaintiff in *British Columbia/Yukon Association of Drug War Survivors v. Abbotsford (City)*. The Court held that it was not plain and obvious that the Association's *Charter* claims concerning the actions of the City of Abbotsford toward homeless people could not succeed.[8]

26. *Drug War Survivors* was affirmed on appeal.[9] Writing for the Court, Harris J.A. observed that apart from *Fédération*, the *PHS*[10] and *Inglis*[11] decisions may also be read as "opening the door to granting a s. 24(1) remedy to an entity or a person *in effect on behalf of others affected* by the unconstitutional state conduct."[12]

27. While s. 24(1) relief was not ultimately granted in *Drug War Survivors*, Chief Justice Hinkson stated that:

> Section 24(1) is a provision that exists to provide remedies. There is no principled basis upon which a litigant with public interest standing must necessarily be foreclosed from relief for state action under s. 24(1).[13]

28. Moreover, it is not firmly established in the case law, as asserted by the Society, that s. 24(1) relief is available *only* where an organizational plaintiff seeks vindication of its own members' rights. *PHS* is illustrative. At trial, the PHS Community Services Society and two individual plaintiffs received a constitutional exemption (pending a suspended declaration of invalidity) that benefited all users of the site, as well as the site's employees.[14] At the Supreme Court of Canada, the Minister's refusal to grant an exemption to Insite under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, s. 56 was held to have violated the

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[7] 2012 BCCA 422 at paras. 34-36.
[8] 2014 BCSC 1817 at paras. 95-106 ("*Drug War Survivors*").
[9] 2015 BCCA 142 ("*Drug War Survivors*, BCCA") at paras. 16-20.
[10] *PHS Community Services Society v. Canada (Attorney General)*, 2010 BCCA 15.
[11] *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309.
[12] *Drug War Survivors*, BCCA at para. 18 (emphasis added).
[13] *Abbotsford (City) v. Shantz*, 2015 BCSC 1909 at para. 265.
[14] *PHS Community Services Society v. Canada (Attorney General)*, 2008 BCSC 661 at paras. 158-159.

rights of the claimants "and others like them."[15] The Supreme Court ordered the Minister to grant the exemption, a remedy that would again benefit employees and injection drug users at large.

29. More recently still, the remedy ordered in the *Carter* extension decision[16] may also be regarded as an instance in which a s. 24(1) remedy was granted to a public interest litigant on behalf of a class of non-member beneficiaries. In *Carter*, the Court extended the suspended declaration of invalidity that the Court had ordered in the appeal.[17] In the extension decision, the majority of the Court exempted Quebec from the four-month extension, and granted an exemption to any individuals who wished to exercise their right to obtain a physician's assistance in dying in accordance with the criteria set out in the earlier decision. While the Court did not expressly state that these orders were made under s. 24(1) of the *Charter*, the provision was arguably the legal basis for the orders.

30. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 and *Ferguson* are not dispositive of whether s. 24(1) relief may ever be available to an organizational plaintiff. In both cases, the Supreme Court was called upon to determine whether recourse to s. 24(1) or s. 52 is appropriate, but in neither case did a public interest litigant seek relief under s. 24(1) for impugned government action.

31. In exercising its remedial discretion under the *Constitution Act, 1982*, the Court is limited only by constitutional principles, including the need to fashion a meaningful remedy that is responsive to the circumstances of the violation and those of the claimant.[18] This may require the Court, in appropriate circumstances, to combine s. 52 declaratory relief with a prospective remedy under s. 24(1). While courts have been reluctant to grant such combined remedies, the law does not, in principle, foreclose such remedies. The possibility of combined relief was considered in *R. v. Demers*, 2004 SCC 46; the Court recognized that the law does not preclude prospective remedies under s. 24(1) in combination with s. 52 relief.[19]

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[15] *PHS Community Services Society v. Canada (Attorney General)*, 2011 SCC 44 at paras. 144-150.
[16] *Carter v. Canada (Attorney General)*, 2016 SCC 4.
[17] *Carter v. Canada (Attorney General)*, 2015 SCC 5.
[18] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62.
[19] *R. v. Demers* at para. 63. The majority declined to award a stay of proceedings under s. 24(1) at the same time as the suspended declaration of invalidity under s. 52(1), leaving open the possibility for a stay in the future if Parliament did not amend the invalid legislation within the year. LeBel J., dissenting on this point, would have

In *Ferguson*, the Court (citing *Demers*) then stated that the jurisprudence allows a combined s. 52 and s. 24(1) remedy "in unusual cases where additional s. 24(1) relief is necessary to provide the claimant with an effective remedy."[20]

32. In *Schachter*, the Supreme Court stated that s. 52 and s. 24 remedies will rarely be available together.[21] Since then, however, the law of *Charter* remedies has developed significantly in cases such as *Doucet-Boudreau*, *Ferguson*, and *Vancouver (City) v. Ward*, 2010 SCC 27.

33. For example, combined relief was recently considered in litigation involving the British Columbia Teachers' Federation (BCTF). At trial, the Court declared certain legislation invalid under s. 52(1) but also granted the BCTF a s. 24(1) damages award.[22] Ultimately, a majority of the Supreme Court of Canada, endorsing the dissenting judgment of Donald J.A. at the Court of Appeal, quashed the damages award. The Supreme Court nonetheless ordered a different s. 24(1) remedy, directing the Minister of Education to immediately reinstate certain working conditions into the collective agreement.[23]

34. The relief the Plaintiffs seek in this action is appropriately sought and is rationally connected to their claims that the impugned legal scheme effects systemic infringements of *Charter* rights and unlawfully impedes access to justice. In 2002, the Province chose to enact a very complex regulatory framework for the provision of legal aid in British Columbia. The complexity of the impugned legal scheme must not become a barrier to proper scrutiny of its effects. If the Plaintiffs' claims are successful, they are entitled to meaningful and effective remedies to vindicate those infringements.

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awarded a stay of proceedings for the accused and all others similarly situated along with the suspended declaration of invalidity.

[20] *Ferguson*, at para. 63.

[21] *Schachter* at 720.

[22] *British Columbia Teachers' Federation v. British Columbia*, 2014 BCSC 121 at paras. 608-637.

[23] *British Columbia Teachers' Federation v. British Columbia*, 2015 BCCA 184 at paras. 391-401; 2016 SCC 49.

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

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