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), 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: Her Majesty the Queen in right of the Province of British Columbia (the "Province")

To: The plaintiffs, Single Mothers' Alliance of BC Society and Nicolina Bell (also known as Nicole Bell) (the "Plaintiffs")

And to: The Legal Services Society

And to: Their solicitors

TAKE NOTICE that an application will be made by the applicant to Chief Justice Hinkson at the Courthouse at 800 Smithe Street in the city of Vancouver, province of British Columbia, at 10:00 a.m. on February 25, 2019 for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An order under Rule 9-5(1) that:

    a. the Notice of Civil Claim be struck;

    b. the action be dismissed;

c. alternatively, parts of the Notice of Civil Claim be struck;

2. Costs.

Part 2: FACTUAL BASIS

A. Overview

1. The Plaintiffs seek the following orders:

a. a declaration that ss. 10(2), 10(3), 11, 17-19 and 21 of the *Legal Services Society Act*, S.B.C. 2002, c. 30 (the "*Act*") the Memorandum of Understanding ("MOU") between the Province and the Legal Services Society and/or certain policies of the Legal Services Society (the "policies") unjustifiably infringe ss. 7 and 15 of the *Charter* and are of no force and effect;

b. a declaration that those provisions of the *Act,* the MOU and the policies impede access to the superior courts in Family Law Proceedings in a manner inconsistent with the requirements of s. 96 of the *Constitution Act, 1867*;

c. a declaration that the administration of the impugned legal scheme unjustifiably infringes ss. 7 and 15 of the *Charter*; and

d. an order that the Legal Services Society exercise its discretion to determine legal aid coverage for Family Law Proceedings in accordance with the requirements of the *Charter*.

2. The Province says it is plain and obvious that none of this relief is available for the following reasons:

a. None of the relief sought is rationally connected to the claims.

b. It is well established that there is no right to state-funded counsel under the *Charter,* except where there is state action that could deprive an individual of "life, liberty or security of the person."

c. Section 15(1) of the *Charter* cannot be breached by distinctions mandated by the Constitution itself. The only distinction alleged by the Plaintiffs – between the availability of legal aid for criminal accused (a disproportionately male group) and family law litigants of limited or moderate means (a disproportionately female group) – is mandated by the Constitution itself.

d. Section 96 of the *Constitution Act, 1867* has been held not to create a positive obligation to fund access to lawyers and has no application to family law proceedings in provincial courts.

B. Social/Legislative Facts as Pleaded

3. In an application under Rule 9-5(1), the facts are taken as pleaded in the Notice of Civil Claim, unless they are manifestly incapable of being proven.[1] The pleaded social or legislative facts relevant to the Plaintiffs' constitutional claim are as follows:

a. Women who are not in spousal relationships with the male parents of their children and women who are separated from their ex-spouses in heterosexual relationships are, in comparison with those male parents or ex-spouses, more likely to have low or unstable income, to have childcare responsibilities and to experience family violence or abuse (Part 1, para. 1).

b. Family Law Proceedings, as the Plaintiffs have defined them, are more likely to involve court-related abuse, violence or harassment than other legal proceedings (Part 1, para. 4).

c. Women without lawyers in Family Law Proceedings are at greater risk of a number of negative outcomes, including inability to protect their safety or those of their children, physical or mental health risks from domestic violence, increased poverty, agreeing to inappropriate resolution of the proceeding and experiencing court-related harassment (Part 1, para. 8).

[1] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 SCR 45 [*Imperial Tobacco*], at para. 17

d. Most of the individuals who require legal aid in Family Law Proceedings are women (Part 1, para. 78).

e. The Province is the primary funder of the Legal Services Society (Part 1, para. 88).

f. The Legal Services Society may approve limited scope legal aid retainers for Family Law Proceedings. These are subject to financial eligibility requirements and cap billable hours under the tariff (Part 1, paras. 79-87).

g. In 2015/16, approximately 18 per cent of the Legal Services Society budget went to Family Law Proceedings, while 52 per cent went to criminal law proceedings. Since more men than women require legal aid in criminal law proceedings, 30.6% of legal aid recipients in that year were women (Part 1, paras. 92-3).

4. The adjudicative facts relevant to this application to strike are that Ms. Bell has brought proceedings in the B.C. Provincial Court (Part 1, para. 26).

Part 3: LEGAL BASIS

A. Framework for Striking Out a Claim Under Rule 9-5

5. The power to strike out claims is a valuable housekeeping measure when the legal merits of a claim can be determined based on the most favourable factual assumptions for the plaintiff. It promotes efficiency, and therefore systemic access to justice, and correct results. At the same time, it should be exercised with care, so as not to prevent meritorious-but-novel claims from going to trial.[2] A claim will be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action.[3] An alternative way of stating the test is that a claim should be struck if, but only if, there is no reasonable prospect of success at trial.[4]

6. Although a claimant is entitled to the presumption that facts capable of proof will be proven at trial, the claimant cannot argue that the evidence may develop such that

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[2] *Imperial Tobacco* at para. 19-20
[3] *Imperial Tobacco* at para. 17; *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 15; *Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 959 at p. 980
[4] *Imperial Tobacco* at para. 17

other facts will be established as well.[5] Nor is it enough for the claimant to show that there is some mathematical chance of success based on change in the law. A motion to strike operates on the assumption that the claim will proceed through the court system in the usual way — in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in the context of the law and the litigation process, the claim has a reasonable chance of succeeding.[6]

B. Remedies Are Not Rationally Connected to Complaint

7. It is plain and obvious that no court would grant the remedies sought by the Plaintiffs under s. 52 of the *Constitution Act, 1982* based on the facts and legal basis pleaded. The impugned statutory provisions do not determine the denial of or scope of legal aid retainers. Indeed, they are necessary for the functioning of an independent provincially-funded body for allocating legal aid resources. If they were declared invalid, it would not only fail to remedy any conceivable violation of rights, but it would mean British Columbia's system of legal aid could not function at all.

8. No s. 52 remedy is available against a Memorandum of Understanding.

9. The Plaintiffs' real complaint against the Province is lack of funding.

10. There is an alternative process in which the merits of any constitutional claim could be heard. An individual challenging denial of or the scope of a legal aid retainer could, in the context of a judicial review petition, seek a remedy under s. 24 of the *Charter.* Without commenting on the legal merits of such a proceeding, it would have a clear factual matrix and lead to a defined remedy that could provide determinate guidance.

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[5] *Imperial Tobacco* at para. 23
[6] *Imperial Tobacco* at para. 25

C. No *Charter* Right to State-Funded Counsel in General

11. The Supreme Court of Canada has repeatedly said there is no general right to state-funded lawyers under the Canadian Constitution, and that this was a deliberate decision of the framers of the *Constitution Act, 1982*.[7] The two exceptions to this principle arise when the state initiates litigation that could result in the deprivation of an individual's s. 7 *Charter* rights.[8]

12. In *Prosper*, Chief Justice Lamer stated that in light of the decision of the Special Joint Committee of the Senate and House of Commons on the Constitution in 1981 to reject a positive right to state-funded counsel, it would be "a very big step for this Court to interpret the *Charter* in a manner which imposes a positive constitutional obligation on governments" to fund counsel, particularly in light of the interference with governments' ability to allocate limited resources.[9] Justice L'Heureux-Dubé, in dissent on another point, agreed. She stated that it would be dangerous to use the "living tree" doctrine to judicially amend the Constitution to "add a provision that was specifically rejected at the outset." She said the proper allocation of state resources in legal aid is a matter for the legislature.[10]

13. In *Savard,* the Yukon Court of Appeal followed *Prosper* in finding that there is no constitutional authority to order a government to fund counsel.[11] In *Savard,* Rowles JA referred to the foundational constitutional principle asserted by the Privy Council in *Auckland Harbour Board* that spending from the public revenue must derive from an appropriation recommended by the Crown and approved in a money bill by the Legislature.[12]

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[7] *R. v. Prosper*, [1994] 3 S.C.R. 236; *British Columbia (Attorney General) v. Christie*, 2007 SCC 21
[8] *R. v. Rowbotham,*(1988) 41 C.C.C. (3d) 1 (ONCA) [*Rowbotham*]; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR 46 [*G. (J.)*]
[9] *Prosper* at pp. 265-268
[10] *Prosper* at pp. 287-288
[11] *R. v. Savard* (1996), 106 C.C.C. (3d) 130 (YCA), l.r. (1997) 207 N.R. 320 (S.C.C.)
[12] *Auckland Harbour Board v. The King*, [1924] A.C. 318 (P.C.)

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

14. In *Prosper,* Justice L'Heureux-Dubé noted parenthetically, without deciding, that there may be "certain minimum levels of Legal Aid imposed by s. 7 in the context of an accused who is being tried for an offence whose penalty might result in the deprivation of the accused's right to life, liberty or security of the person."[13] In 1988 the Ontario Court of Appeal decided *Rowbotham*. The Supreme Court of Canada adopted the principles in *Rowbotham* and extended it to the area of child protection hearings in the 1999 *G.(J.)* decision. It is plain and obvious that these decisions cannot be extended to litigation between private parties.

15. Section 7 gives everyone the right to "life, liberty and the security of the person and the right *not to be deprived thereof* except in accordance with the principles of fundamental justice." If a deprivation of life, liberty or security of the person occurs as a result of the acts of a person other than government, it is not contrary to s. 7.[14]

16. In the context of *Rowbotham* and *G. (J.),* the government made a decision to take action that would, if successful, deprive an individual of liberty or security of the person. In that context, the principles of fundamental justice are necessarily engaged, and may require state funding of counsel, notwithstanding the decision of the framers of the *Charter* not to entrench a positive right to legal aid. It would be an entirely different thing if the courts held that there is a constitutional right to legal aid funding in litigation between two private parties. This would be, in effect, an appropriation of the public revenue without executive recommendation or legislative approval. Unlike a *Rowbotham* order, it would be an appropriation of the public revenue ordered by a court. *Prosper* excludes the possibility of such a decision.

E. Section 15 (Equality Rights)

17. Section 15(1) of the *Charter* says, "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without

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[13] *Prosper* at p. 288
[14] *Gosselin v. Québec (Attorney General),* [2002] 4 S.C.R. 429, 2002 SCC 84 [*Gosselin*] at para. 81

discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

18. A claimant under s. 15(1) must first show that the law – on its face or in its impact – creates a distinction based on an enumerated or analogous ground (in this case sex). Second, the claimant must show that the law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage.[15]

19. The requirement that there be a distinction based on an enumerated or analogous ground implies, in the fiscal context, that the government has a choice: it can fund a program for persons on both sides of the distinction or on neither. As a result of this choice, s. 15(1) does not interfere with the principle that budgetary decisions are ultimately for the executive to propose and the legislature to approve.[16]

20. Allegations of disadvantage without identification of a *distinction* are not the basis for a s. 15(1) claim. All limitations on funding for programs that ameliorate social disadvantage have a disproportionate effect on disadvantaged groups, but that is not sufficient for a constitutional challenge.

21. The only distinction identified by the Plaintiffs is between (predominately female) legal aid recipients in family law cases and (predominately male) legal aid recipients in criminal law cases. But s. 15 does not apply to distinctions created by the Constitution itself. Thus, a challenge to the failure of the Ontario government to fund religious schools, other than those affiliated with Roman Catholicism, was dismissed not because the funding structure was non-discriminatory, but because it was mandated by s. 93(1) of the *Constitution Act, 1867*.[17]

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[15] *Kahkewistahaw First Nation v. Taypotat*, [2015] 2 SCR 548, 2015 SCC 30 at para. 19-20
[16] *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Savard* at para. 105
[17] *Adler v. Ontario,* [1996] 3 S.C.R. 609. See also *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 (parliamentary privilege, as a constitutional principle, cannot violate s. 2(b) of the *Charter*)

22. Even if the Plaintiffs could persuade a court that the distinction between funding for criminal law retainers and funding for family law retainers amounts to a distinction based on sex, the distinction is constitutionally mandated. Legal aid for criminally accused persons is required by *Rowbotham* and successor cases. It is therefore plain and obvious that the s. 15 claim cannot succeed.

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

23. Section 96 of the *Constitution Act, 1867* gives the federal government the power to appoint the judges of the superior, district and county courts. Its constitutional purpose is to create a unified national judiciary, as part of the 1867 compromise.[18] The import of s. 96 is to guarantee the core jurisdiction of provincial superior courts, as it existed at the time of Confederation, against either provincial or federal abolition or removal.[19] It gives no individual rights, let alone a right to state-funded legal counsel.

24. Section 96 prevents provinces from interfering with the core jurisdiction of superior courts – whether through legislation that purports to transfer an aspect of the core jurisdiction of the superior court to another decision-making body, a privative clause that would bar judicial review or court fees that effectively prevent access to superior courts.[20] Section 96 has never been held to require government action.

25. While the Constitution is a "living tree", s. 96 has always been concerned with preserving the historic core jurisdiction of the superior courts.[21] In determining the core jurisdiction preserved by s. 96, courts look to the practices in the four original provinces and, if they differ, to the practices in England in 1867. Legal aid did not exist in any form until the late 1960s.

26. In any event, the remaining plaintiff, Ms. Bell, has brought proceedings in the B.C. Provincial Court, and s. 96 has no relevance to the provincial courts. The case is bound to fail for this reason alone.

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[18] *MacMillan Bloedel Ltd. v. Simpson,* [1995] 4 S.C.R. 725, at para. 51
[19] *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General),* 2014 SCC 59 at para. 29 [*Trial Lawyers Assn.*]
[20] *Trial Lawyers Assn.* at para. 33
[21] *Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (N.S.)*, [1989] 1 S.C.R. 238

Part 4: MATERIAL TO BE RELIED ON

The Notice of Civil Claim.

The applicant estimates that the application will take 3 days.

[ ] This matter is within the jurisdiction of a master.
[x] 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, with 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 family law case, 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;

(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: October 19, 2018

for Gareth Morley, Zachary Froese, Kaitlyn Chewka

Counsel for Her Majesty the Queen in right of the Province of British Columbia

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: .....[*dd/mmm/yyyy*]..... _____

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

[x] amend pleadings

[ ] add/change parties

[ ] summary judgment

[ ] summary trial

[ ] service

[ ] interim order

[ ] change order

[ ] adjournments

[ ] Proceedings at trial

[ ] appointment of additional expert(s): financial matters

[ ] other matters concerning experts