IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Single Mothers' Alliance of BC Society v. British Columbia,* 2019 BCSC 1427

Date: 20190823
Docket: S173843
Registry: Vancouver

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

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Plaintiffs:	M. Pongracic-Speier, Q.C. R. Mangat K. Feeney K. Govender
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Place and Dates of Hearing:	Vancouver, B.C. February 25-27, 2019
Place and Date of Judgment:	Vancouver, B.C. August 23, 2019

I. Introduction

[1] In this action, the plaintiffs, the Single Mothers' Alliance of BC Society ("SMA") and Nicolina Bell, advance a systemic constitutional challenge to the legislative scheme authorizing and determining British Columbia's family law legal aid regime. They seek relief for alleged infringements of ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution Act, 1982*], and for alleged violation of s. 96 of the *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3 [*Constitution Act, 1867*].

[2] In the two applications before me, the defendants apply to this Court under Rule 9-5(1)(a) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, to have the plaintiffs' pleadings struck in whole or in part as disclosing no reasonable claim.

[3] Following the release of the reasons for judgment of the Court of Appeal in *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2019 BCCA 228 [*BCCLA*], counsel for the defendant Legal Services Society ("LSS") sought leave to make written submissions concerning the application of the reasoning in that case to this litigation. I agreed to permit brief submissions by all parties, but only the LSS and the plaintiffs filed further submission. I will discuss these submissions when I address the application by the LSS at para. 160 below.

II. The Parties

[4] The plaintiff SMA is a non-profit advocacy organization, incorporated pursuant to the former *Society Act*, R.S.B.C. 1996, c. 433, created by and for single mothers in British Columbia. The SMA's mandate is to:

a) build community and promote empowerment among single mothers;

b) develop leadership skills for single mothers to participate in public policy-making that affects their lives and the lives of their children; and

c) advocate for the rights of single mothers and their children to live free of poverty and discrimination.

[5] Nicolina Bell is a university student who resides in Langley, B.C. She is the mother of an autistic child, who is currently four years old. The pleadings assert that the care needs of her child limit Ms. Bell's ability to engage in paid employment.

[6] Her Majesty the Queen in Right of the Province of British Columbia (the "Province") is named in the proceedings pursuant to the *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, as a manifestation of the government of the Province for the purposes of s. 24(1) of the *Charter*.

[7] The LSS was created in 1979 and is a corporation continued pursuant to the *Legal Services Society Act*, S.B.C. 2002, c. 30 [*LSSA*].

[8] A.B. has discontinued her claim and is therefore no longer a party in these proceedings.

III. Background

1. Legislative scheme

[9] The Province has the exclusive jurisdiction to make laws relating to the administration of justice in British Columbia, pursuant to s. 92(14) of the *Constitution Act, 1867*.

[10] It is common ground that the LSS implements and administers the Province's policy and programme of legal aid services in British Columbia ("legal aid").

[11] Section 10(2) the *LSSA* provides that the LSS "must not provide prescribed services to prescribed persons or classes of persons in prescribed circumstances unless it does so without using any of the funding provided to it by the government". Moreover, pursuant to s. 10(3), the LSS must not engage in an activity unless it does so without using any of the Province's funding, or it does so in accordance with the *LSSA*, the regulations, and the memorandum of understanding. The money

available for that activity must also be available within the budget approved by the Attorney General.

[12] Section 11 of the *LSSA* provides for the methods of providing legal aid services:

> 11(1) Subject to subsections (2) to (4), the society may provide legal aid by any method that it considers appropriate, including, without limiting this,
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> (a) by providing one or both of
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> (i) services ordinarily provided by a lawyer, and
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> (ii) other services,
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> (b) by providing duty counsel,
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> (c) by assisting individuals representing themselves, including by providing them with summary advice, information packages, self-help kits and assistance in preparing documents,
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> (d) by funding alternative dispute resolution services, and
>
> (e) by providing public legal education and information.
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> (2) The society may provide legal aid through lawyers or any other persons, whether or not those lawyers or other persons are employed by the society.
>
> (3) In determining the method, if any, by which legal aid is to be provided in any circumstance, the society must have regard to the costs involved, the needs of the person or persons involved and the society's financial resources.
>
> (4) The extent to which legal aid may be provided in relation to any legal problem is not to exceed the extent of legal and other services that a reasonable person of modest means would employ to resolve the problem.

[13] The Province provides more than 90% of the LSS's annual funding. The LSS's budget is subject to approval by the Attorney General of British Columbia.

[14] Specifically, s. 18 of the *LSSA* provides:

> 18(1) The society must provide a budget to the Attorney General when directed to do so by the Attorney General.
>
> (2) If the Attorney General does not approve the budget provided under subsection (1), the Attorney General may return the budget to the society and require the society to prepare a revised budget.

> (3) If a budget is returned to the society under subsection (2), the society must promptly revise the budget and provide the revised budget to the Attorney General.
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> (4) The Attorney General may approve a budget provided under this section and, if the Attorney General does not return to the society a budget presented under subsection (1) or (3) within 30 days after receipt, the budget is deemed to have the approval of the Attorney General.
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> (5) Subsections (2) to (4) apply to a revised budget prepared under subsection (3).

[15] Section 17(1) of the *LSSA* defines "revenue" as "the revenue of the society from all sources for that year, including, without limiting this, all grants made or to be made to the society for that year by the government or any other person or agency." The LSS is prohibited under ss. 17(2) and (3) of the *LSSA* from accruing liabilities and making expenditures in a fiscal year that exceed the revenue for that fiscal year and accumulated surpluses from previous fiscal years, except with the approval of the Attorney General and the Minister of Finance.

[16] Under s. 21 of the *LSSA*, the Attorney General and the LSS must enter into negotiations every three years to attempt to negotiate a memorandum of understanding ("MOU") between them. The matters that may be negotiated as part of the MOU include, among other matters:

a) an estimate of the funding provided by the Province in each of the three fiscal years to which the MOU is to apply (the "Provincial Transfer");

b) the types of legal matters in relation to which the LSS may provide legal aid and those which the LSS must not provide legal aid, from the Provincial Transfer;

c) the priority to be accorded to the types of legal mattes in relation to which the LSS may provide legal aid from the Provincial Transfer; and

d) how, if at all, the LSS is able to provide legal aid from the Provincial Transfer in circumstances that are not contemplated by, or do not accord with, the terms and conditions established under paras. (b) and (c).

[17] Pursuant to s. 19 of the *LSSA*, the LSS must submit to the Attorney General any financial, statistical, or other information that the Attorney General may require respecting the operations of the LSS and the services provided by it to the Attorney General.

[18] Access to legal aid in family law proceedings in British Columbia depends on the applicant meeting financial eligibility criteria, based on household size, net monthly income, and certain asset qualifications. The LSS sets the criteria by policy.

[19] In all cases where the LSS agrees to fund counsel, it pays lawyers under a tariff that caps the lawyer's billable hours. The tariff caps "general preparation" hours – including time spent on meetings and phone calls with the client, correspondence, drafting pleadings and affidavits, document disclosure, preparing for court appearances and discoveries, and legal research – at 25 hours for provincial court matters and 35 hours for superior court matters.

[20] In exceptional cases, the LSS has discretion to approve extended services of 25 or 35 general preparation hours, depending on the level of court in which a family law proceeding is filed, subject to its available funding. The plaintiffs have pleaded that generally, the LSS does not approve more than one request for extended services in a family law proceeding.

[21] Finally, the LSS may approve limited scope legal aid retainers to financially qualifying women in family law proceedings on an emergency basis.

2. The underlying claim

A. The plaintiffs' claim

[22] The plaintiffs have pleaded that women who are not in spousal relationships with the male parents of their children, or women who are separated from their ex-spouses in heterosexual relationships, are more likely than their co-parents or ex-spouses to:

a. have low or unstable income or live in poverty following relationship breakdown;

> b. have primary economic and parental responsibilities for children following relationship breakdown; and
>
> c. experience family violence or abuse and have their personal security, or the security of a child, at stake in a legal proceeding.

[23] The plaintiffs contend that such women require access to the provincial and superior courts to resolve legal issues that affect their vital interests and the vital interests of their children. They assert that:

> A woman who requires a lawyer in a family law proceeding but does not have one or whose retainer with a lawyer ends before resolution of the proceeding is at risk, or increased risk, of:
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> a. being unable to protect her own safety or the safety of her children;
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> b. suffering physical or mental health risks from family violence or abuse;
>
> c. experiencing continued or aggravated poverty;
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> d. agreeing to inappropriate or impractical guardianship, parenting or custody and access arrangements;
>
> e. intentionally or unintentionally abandoning rights without a remedy; or
>
> f. experiencing court-related harassment, manipulation or abuse from the opposing party.

[24] Ms. Bell applied for legal aid on December 20, 2012, disclosing that she had an RRSP and reporting its value. The plaintiffs plead that from May 2013 to June 2014, Ms. Bell was provided with the assistance of a lawyer funded by the LSS but that when Ms. Bell applied for legal aid around August 2015, she was denied. Her appeal from the denial was rejected. She was again approved for legal aid in February 2017. The plaintiffs plead that Ms. Bell was subject to threats of violence by her former partner, and that Ms. Bell's lack of access to legal aid between June 2014 and February 2017 caused her both psychological and physical harm.

[25] The plaintiffs plead that the impugned legal scheme and/or its administration specifically infringe the s. 7 rights of Ms. Bell and women like her, by causing them significant stress when legal aid services are withdrawn or denied before a family law proceeding is resolved.

[26] Finally, the plaintiffs contend that the impugned legal scheme impedes access to the superior courts in family law proceedings in a manner inconsistent with the requirements of s. 96 of the *Constitution Act, 1867*.

[27] In their notice of civil claim, the plaintiffs seek the following relief:

a) a declaration that ss. 10(2), 10(3), 11, 17–19 and 21 of the *LSSA*, the MOU and/or the LSS policies (the "impugned legal scheme") unjustifiably infringe ss. 7 and 15 of the *Charter* and are of no force and effect;

b) a declaration that the impugned legal scheme impedes 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 LSS exercise its discretion to determine legal aid coverage for family law proceedings in accordance with the requirements of the *Charter*.

B. The Province's position

[28] In its response to the notice civil claim, the Province agrees that it is an important policy objective to make reasonable access to courts and other means of resolving legal issues available to low and middle income British Columbians. It also agrees that single mothers have special needs in this regard, and that achieving such access is a challenge for all participants in the judicial system.

[29] The Province further agrees that it has a major policy role in promoting access to the courts, and that funding for legal aid is an important part of that role. That said, the Province argues that access to courts cannot mean unlimited funding for legal representation. It argues that funding is necessarily limited by scarce resources and other social needs, including other funding needs that promote access to justice.

[30] The Province contends that it is a fundamental principle of the Canadian Constitution, as a Constitution similar in principle to that of the United Kingdom, that an appropriation of public revenue may only be made pursuant to a money bill, introduced in the lower house of the legislature on the recommendation of the Crown, and enacted by the legislature.

[31] The Province says that this principle is reflected in relation to the federal consolidated revenue fund in ss. 53 and 54 of the *Constitution Act, 1867*, and applies in relation to provincial revenue in British Columbia under s. 90 of the *Constitution Act, 1867*, s. 10 of the *British Columbia Terms of Union*, *1871*, and s. 47 of British Columbia's *Constitution Act*, R.S.B.C. 1996, c. 66.

[32] With respect to s. 96, the Province asserts that this section of the *Constitution Act, 1867* does not require the Province to provide state-funded legal counsel. It contends that a family law proceeding is not government action that deprives a person of life, liberty or security of the person because such proceedings are not brought by the government, and are under the control of the litigants.

[33] With respect to the claims under ss. 7 and 15 of the *Charter,* the Province argues that the plaintiffs have not established any such breaches or, in the alternative, that the impugned legal scheme is a reasonable limit prescribed by law and should be upheld.

C. The LSS's position

[34] The LSS agrees that single mothers often require access to the courts to obtain family law relief for themselves and their children, and that such access can be difficult without legal representation.

[35] The LSS contends that because the policies that it employs are not "law", they cannot, accordingly, be declared to be of no force or effect under subsection 52(1) of the *Constitution Act, 1982*.

[36] Even if the LSS's administration of the impugned legal scheme is found to be "law", the LSS says that it is not inconsistent with s. 96 of the *Constitution Act, 1867.*

[37] With respect to ss. 7 and 15 of the *Charter*, the LSS contends that its policies in administering the impugned legal scheme, as an ameliorative program, are constitutionally compliant with the meaning of s. 15(2) of the *Charter*. Further, it contends that the policies do not deprive the plaintiffs of life, liberty or security of the person in a manner that is contrary to principles of fundamental justice for the purpose of s. 7, nor do they or infringe s. 15(1).

[38] Like the Province, the LSS says that even if its policies in administering the impugned legal scheme are found to infringe ss. 7 or 15 of the *Charter*, the infringement is justified under s. 1.

3. Applications to be determined

[39] There are two applications before me, one made by each defendant in the underlying action.

[40] In its application, the Province seeks an order that the plaintiffs' notice of civil claim be struck in its entirety and their action dismissed or, alternatively, that parts of the notice of civil claim be struck.

[41] In response, the LSS would consent to the striking of parts of the notice of civil claim, and takes no position with respect to the entire claim being struck or the action dismissed.

[42] The plaintiffs oppose all of the relief sought by the Province.

[43] In its application, the LSS asks this Court to strike paras. 3 and 4 of the relief sought in Part 2 of the plaintiffs' notice of civil claim, which state:

> 3. further or in the alternative, a declaration that the administration of the impugned legal scheme unjustifiably infringes ss. 7 and 15 of the Charter;

> 4. an order that L.S.S. exercise its discretion to determine legal aid coverage for Family Law Proceedings in accordance with the requirements of the Charter;

[44] The LSS also seeks an order striking the phrase "and/or its administration" from paras. 6, 8, 11, 12, 19, 20 and 30 in Part 3 of the plaintiffs' notice of civil claim. Those paragraphs state:

> (a) The s. 7 claims:
>
> 6. The impugned legal scheme and/or its administration infringe the s. 7 Charter interests in life and security of the person of women litigants of limited or moderate means engaged in Family Law Proceedings by denying them access to the legal services they require to effectively participate in those proceedings and obtain remedies to protect themselves and their children from family violence or abuse.
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> …
>
> 8. Further, or in the alternative, the impugned legal scheme and/or its administration infringes the security of the person of Bell and A.B. and women like them, including members of the S.M.A., by causing them serious stress due to the denial or withdrawal of legal aid before resolution of a Family Law Proceeding.
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> …
>
> (b) The s. 15 claims:
>
> 11. The impugned legal scheme and/or its administration violates s. 15(1) of the Charter and is not protected from constitutional scrutiny by s. 15(2), as follows.
>
> 12. Women are disproportionately impacted by the impugned legal scheme and/or its administration because:
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> a. Women, particularly women who are racialized, Indigenous, recent immigrants, disabled, or who have limited English language skills or education, are less likely than their male ex-spouses or co-parents to be able to afford to retain counsel; and
>
> b. As the primary victims of family violence and abuse, the physical and psychological integrity of women is more likely to be at stake in Family Law Proceedings than for their male ex-spouses or co-parents.
>
> …
>
> 19. Further, or in the alternative, children whose best interests are to remain with their mothers are disadvantaged under the

> impugned legal scheme in comparison with children whose best interests are to remain with their fathers. In particular, children who are dependent on their mothers to present to the court the facts and legal propositions necessary to determine the best interests of the child are disproportionately affected by their mothers' lack of access to a lawyer. The impugned legal scheme or its administration therefore discriminates against the children of women of limited or moderate means under s. 15(1) of the Charter on the basis of family status and denies those children the equal benefit and protection of the law.
>
> 20. Further or the alternative, the impugned legal scheme and/or its administration violates s. 7 and 15(1), as those provisions of the Charter interact with each other.
>
> …
>
> 30. As a result of the disproportionately constrained ability of women litigants of limited or moderate means to access legal services, the impugned legislative scheme and/or its administration creates undue hardship for women seeking resolution of Family Law Proceedings because it:
>
> a. requires these litigants to sacrifice reasonable current and future living expenses for themselves and their children in seeking access to justice;
>
> b. denies these litigants a meaningful opportunity to seek adjudication by the courts of Family Law Proceedings where fundamental rights and obligations are at stake and the assistance of counsel is reasonably necessary to justly resolve the Family Law Proceeding; and
>
> c. provides only piecemeal and inadequate resolution of Family Law Proceedings where fundamental rights and obligations are at stake, thereby creating ongoing hardship.

[45] The Province consents to the relief sought by the LSS, and the plaintiffs oppose it.

IV. Legal principles

1. Rule 9-5(1)

[46] Rule 9-5(1) provides, in part, that:

> At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

> (a) it discloses no reasonable claim or defence, as the case may be,
>
> …
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[47] Under this Rule, a claim will only be struck if it is "plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action": *R. v. Imperial Tobacco*, 2011 SCC 42 at para. 17; see also *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980. When the matter has a "reasonable prospect of success", it should be permitted to proceed to trial: *Imperial Tobacco* at para. 17. As Madam Justice Wilson wrote in *Hunt*:

> [A]ssuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, <u>if there is a chance that the plaintiff might succeed</u>, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is <u>certain to fail</u> because it contains a radical defect … should the relevant portions of a plaintiff's statement of claim be struck out …
>
> [Emphasis added.]

[48] In determining whether the proceeding discloses a reasonable cause of action, the court must assume the facts pleaded to be true, unless they are "manifestly incapable of being proven": *Imperial Tobacco* at para. 22; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441 at 455. That said, because a motion to strike is about the pleadings, the court also cannot consider what evidence adduced in the future might or might not show: *Imperial Tobacco* at para. 23.

[49] Striking claims that have no prospect of success is an important gatekeeping function of the court. There is little to be achieved in allowing claims to consume court time when it becomes evident that a trial of the matter will not result in the remedy sought by the claimant. The policy reasons for striking claims were set out in *Imperial Tobacco* at para. 20 as follows:

> This promotes two goods - efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be - on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.

[50] Striking proceedings, however, should be done with caution. In *Imperial Tobacco* at para. 21, Chief Justice McLachlin wrote:

> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson.* Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.
>
> [Emphasis added.]

[51] In *R. v. Gamble*, [1988] 2 S.C.R. 595, the Court was presented with an innovative application of *habeas corpus*, where Madam Justice Wilson observed at p. 638 that:

> … applicants for *Charter* relief should, I believe, be allowed a reasonable measure of flexibility in framing their claims for relief in light of the interests the *Charter* rights on which they rely were designed to protect.

V. Discussion

1. The Province's application to strike

[52] The Province argues that the plaintiffs' notice of civil claim should be struck on the following bases:

a) the declarations of invalidity sought by the plaintiffs under s. 52(1) have no causal or rational connection to the harms alleged;

b) there is no triable claim under s. 7 of the *Charter* because there is no state interference with an interest that amounts to a "deprivation";

c) there is no triable claim under s. 15 because there is no distinction based on an enumerated or analogous ground; and,

d) section 96 of the *Constitution Act, 1867* does not require state-funded counsel to assist with private law disputes.

A. Available Remedies

[53] As to the remedies sought, the Province says that s. 52 cannot be used to create a new social program. The plaintiffs, the Province argues, seek relief under the wrong remedial section of the Canadian constitution. The Province contends that there is no rational or causal basis for declaring the impugned legislation to be constitutionally invalid, and that if the declarations sought are granted, the members of the SMA will be in the same situation as they are in now, or worse off. The Province contends that the appropriate procedure for an individual stating he or she is constitutionally entitled to legal aid would be to apply to the LSS and, if denied, seek an order under s. 24(1) of the *Charter* overturning that denial.

[54] The Supreme Court of Canada discussed the distinction between ss. 52(1) and 24(1) in *R. v. Ferguson*, 2008 SCC 6. At para. 59, the Court commented that s. 52(1) does not create a personal remedy, and a claimant can seek a declaration that an unconstitutional law is of no force or effect to the extent of its inconsistency with the *Charter* in the claimant's own case, or for third parties. By contrast, the

Court noted that s. 24(1) is a personal remedy, that is generally used to remedy unconstitutional government acts committed under the authority of constitutional legal regimes, rather than remedy unconstitutional laws. According to the Court at para. 61, "[s]ection 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".

[55] With respect to the declaratory relief sought by the plaintiffs under s. 52 of the *Constitution Act, 1982*, the Province argues that the plaintiffs' claim is fundamentally flawed as the "laws" that are sought to be declared invalid under s. 52 of the *Constitution Act, 1982* have no rational, causal relationship to the harms alleged, citing *Operation Dismantle Inc. v. Canada* [1985] 1 S.C.R. 441, and *Solosky v. The Queen* (1979), [1980] 1 S.C.R. 821 at 832. As such, the Province contends that the plaintiffs' claim should not proceed to trial.

[56] In *Operation Dismantle*, Mr. Justice Dickson, as he then was, wrote:

> In my opinion, if the appellants are to be entitled to proceed to trial, their statement of claim must disclose facts, which, if taken as true, would show that the action of the Canadian government could cause an infringement of their rights [...] I have concluded that the causal link between the actions of the Canadian government, and the alleged violation of appellants' rights under the Charter is simply too uncertain, speculative and hypothetical to sustain a cause of action.

[57] The Province argues that, as in *Operation Dismantle*, the plaintiffs are incapable of proving a rational connection between the harms to their security of the person and equality interests, and the impugned legal scheme, which authorizes and determines the delivery of legal aid services for the following reasons:

a) With respect to subsection 10(2) of the *LSSA*, the Province argues that it has no legal effect at this time because no regulation limiting the use of funding by the government has ever been enacted.

b) If subsection 10(3) of the *LSSA* was declared to be invalid, the legal effect would be that the LSS could engage in an activity with provincial

government funds contrary to the *LSSA*, the MOU, and its budget with one of two effects: (i) the Province could no longer fund legal aid through an arms-length body; or (ii) the Province could place no financial controls on the use of public monies by the LSS. Neither consequence would benefit the women litigants as the plaintiffs plead, and either option would seriously disrupt the existing legal aid system.

c) With respect to s. 11 of the *LSSA*, the Province says that the pleadings do not disclose how this section affects the ability of women litigants of limited or moderate means to obtain state-funded counsel. The Province argues that striking down subsections 11(1)–(3) of the *LSSA* would make this even more difficult.

d) Sections 17–19 of the *LSSA*, which restrict the ability of the LSS to engage in deficit spending without approval and provide for an approval process for the budget, the Province says are likewise not connected to the factual and legal claims set out by the plaintiffs.

e) The Province contends that s. 21 of the *LSSA*, which deals with the MOU, is not rationally or causally connected to the issue of whether women litigants of moderate or limited means are constitutionally entitled to state-funded counsel.

f) The second declaration sought by the plaintiffs, that the impugned legal scheme is inconsistent with s. 96, has no causal or rational relationship to any lack of access to the superior courts, even on the assumption that lack of counsel could impede access to the superior courts.

g) The third declaration sought, that the impugned legal scheme infringes ss. 7 and 15 of the *Charter*, is too vague to provide any guidance to either it or the LSS and that the remedies sought would simply disrupt the existing legal aid system.

[58] I note that *Operation Dismantle* did not involve a claim for relief under s. 52(1) Instead, the Court there was discussing the causal connection necessary to invoke s. 7. Likewise, *Solosky* was decided before s. 52(1) of the *Constitution Act, 1982* was enacted. In that case, the Court was discussing common law declaratory relief, and emphasized that such relief is discretionary, and that courts ought to consider its utility before granting it. Nevertheless, as I understand the Province's argument, it is that s. 52 is not available because there is no inconsistency with the *Charter* in purpose or effect; that the impugned legal regime does not *cause* the alleged unconstitutional effects.

[59] The Province contends that, if successful, judicial review of a decision of the LSS not to fund, or to limit funding of, legal aid combined with an application for an order under s. 24(1) of the *Charter* would remedy the harms alleged by the plaintiffs.

[60] As the Province chose to refrain from making submissions with respect to the principles articulated by the Court of Appeal in *BCCLA,* I will discuss those principles when I address the LSS's application below.

[61] The plaintiffs contend that the Province's argument concerning the lack of a causal connection between the relief sought by the plaintiffs and the impugned legal scheme and its corollary argument that the relief sought is not rationally connected to the harms alleged are based on "a fundamental misapprehension of the plaintiffs' claims, and a contextual and disingenuous framing of the impugned legal scheme, and a deficient appreciation of the flexibility and utility inherent in declaratory relief in the context of constitutional challenges."

[62] They say that their claims are pleaded in respect of the legal scheme viewed holistically, and not as a stand-alone right to state-funded counsel as the Province repeatedly contends. They say further that the legislative history of legal aid in B.C. and the amendments to the framework are essential to understanding how the components of the legal aid system are intended to, and do in fact, operate as interlocking building blocks that constitute the "law" under challenge.

[63] The plaintiffs say that in 2002, the *LSSA* repealed and replaced the *Legal Services Society Act*, R.S.B.C. 1996, c. 256 [*1996 LSSA*], and that the intended effect was clear: the *LSSA* eliminated statutorily prescribed entitlements to legal aid and established the "scaffolding for a discretionary regime in which key questions such as the Society's coverage areas and priorities were to be determined extra-legislatively". Moreover, the plaintiffs say that the interlocking nature of the elements of the legal scheme are readily apparent. The MOU itself describes the MOU, the *LSSA*, the mandate letter (and any successor), the service plan and the approved budget as providing the "accountability framework" for legal aid service delivery. The plaintiffs' claim is, essentially, that this accountability framework authorizing and determining their access to legal aid services infringes constitutionally protected rights.

[64] Indeed, the plaintiffs say that their systemic effects-based challenge is similar to the challenge in *Conseil scolaire francophone de la Columbie-Britanique v. British Columbia*, 2016 BCSC 1764 [*Conseil*], rev'd in part on other grounds, 2018 BCCA 305, leave to appeal to SCC granted. In that case, the legislative and operational framework for delivering French language schooling in British Columbia was challenged by individual and institutional plaintiffs. There, the plaintiffs challenged the entire regime and sought relief for systemic infringements of s. 23 of the *Charter*.

[65] In *Conseil*, Madam Justice Russell found there was "no question that the funding allocation system and its many components are prescribed by law": at para. 981. The regime at issue in the *Conseil* case included the *School Act*, R.S.B.C. 1996, c. 412, and various guidelines, policies, and orders made pursuant to the legislation, such as, among others, operating grant manuals, capital plan instructions, annual facility grant policy, capital asset management project procurement procedures and guidelines.

[66] The plaintiffs argue that, nevertheless, each part of the overall legal aid scheme is also "law" based on the test set out in the *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia*

Component, 2009 SCC 31 [*GVTA*]. In *GVTA*, the Court considered whether and to what extent administrative rules, guidelines or policies may be viewed as "law" that prescribes a limit on constitutional rights. The Court held that such non-statutory instruments are legislative in nature where the "enabling legislation allows the entity to adopt binding rules, and so long as the rules establish rights and obligations of general rather than specific application and are sufficiently accessible and precise …".

[67] The plaintiffs contend that LSS policies concerning the provision of family law legal aid services, while allowing LSS staff to exercise a measure of discretion, are thus "law", as they are specific, accessible to the public and precise, binding in nature, have general application, and are enacted by LSS pursuant to delegated powers and affect individual rights and obligations. The plaintiffs contend that the MOU is likewise "law" as it is mandated by s. 21 of the *LSSA* and operates as a binding agreement of general application that is sufficiently accessible and precise.

[68] The plaintiffs contend that at trial, this Court will be called upon to determine whether and to what extent the impugned legal scheme falls short of meeting the government's constitutional obligations, not whether any component in isolation may constitute a rights infringement. Accordingly, the plaintiffs argue that relief under s. 52 is available because the impugned laws themselves are alleged to produce the unconstitutional effects claimed.

[69] The plaintiffs also dispute the Province's assertion that declaratory relief under s. 52 would not benefit the plaintiffs, as it would immediately deprive them (and everyone else) of a program for the delivery of legal aid services. They refer, for example, to the decision of the Supreme Court of Canada in *Schachter v. Canada*, [1992] 2 S.C.R. 679, where the Court affirmed that there are various remedial options available under s. 52. Those options include reading in, reading down, as well as the discretion to suspend a s. 52 declaration in order to provide the legislature time to respond to the directions provided by the Court in its reasons for judgment.

[70] The plaintiffs also referred me to the comments of Chief Justice McLachlin in *Ferguson*, who wrote at para. 49:

> Section 52(1) grants courts the jurisdiction to declare laws of no force and effect only "to the extent of the inconsistency" with the Constitution. It follows that if the constitutional defect of a law can be remedied without striking down the law as a whole, then a court must consider alternatives to striking down. Examples of alternative remedies under s. 52 include severance, reading in and reading down …

[71] The plaintiffs accept that the Province may be able to justify any rights violations found as resulting from the impugned legal scheme or its administration on a s. 1 analysis as reasonable limits on those rights, if it can show how the impugned legal scheme meets a pressing need, is rationally connected and a proportionate response. But they say that in applying to strike their claim, the Province is not entitled to ask the Court to assume that the impugned legal scheme is the only way to deliver legal aid in British Columbia.

[72] In my view, declaratory relief under both s. 24(1) and s. 52(1) can play an important role in allowing the government to exercise its institutional expertise and role in fashioning the precise means to comply with the *Charter*. In *Attorney General of British Columbia v. Attorney General of Alberta*, 2019 ABQB 121, Mr. Justice Hall referred to the decision of the Supreme Court of Canada in *Solosky*, in which the court discussed declaratory relief at common law. At paras. 20–21, Hall J. commented that the majority in *Solosky* held that declaratory relief will not normally be granted where:

a) the dispute is over and has become academic;

b) the dispute is merely hypothetical in that it has yet to arise, and may not arise, or "merely possible or remote", or where the dispute is "contingent on some future event which may never take place"; or

c) the dispute is theoretical, or not real.

[73] Declaratory relief under s. 52 combined with suspended declarations of invalidity has been granted to preserve the proper institutional roles of courts and legislatures, as I will discuss below.

[74] The plaintiffs say that their ss. 7 and 15 rights are unjustifiably infringed by the laws currently in place that authorize and determine the provision of legal aid services for family law proceedings. The fact that their systemic claims are "effects-based" does not render these claims hypothetical, uncertain or incapable of proof.

[75] While it is clear that there must be a causal connection between the harm alleged and the impugned state action to invoke s. 7 of the *Charter* (as in *Operation Dismantle*), and that declaratory relief at common law is discretionary and courts ought to consider its utility before granting a declaration (as in *Solosky*), I am unable to conclude that the plaintiffs' claim is merely hypothetical, or that the impugned legal scheme has no connection to the harm alleged, given the high standard to strike claims, and given my conclusions with respect to the applications to strike the *Charter* arguments below.

[76] Ultimately, I find the Province's submission too simplistic. If the plaintiffs can make out a case that Ms. Bell's *Charter* rights have been breached, or that the impugned legal scheme is law that is inconsistent with the *Charter*, relief in the nature granted in *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 [*G.(J.)*], could be entertained.

B. Section 7

[77] Section 7 is infringed when the state interferes with an individual's right to life, liberty and security of the person, and does so in a manner that is not in accordance with principles of fundamental justice. Chief Justice McLachlin explained in *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 127 [*Bedford*], that to make a claim of s. 7 infringement:

> … the claimant bears the burden of establishing that the law deprives her of life, liberty or security of the person, in a manner that is not connected to the law's object or in a manner that is grossly disproportionate to the law's object.

> The inquiry into the purpose of the law focuses on the nature of the object, not on its efficacy. The inquiry into the impact on life, liberty or security of the person is not quantitative - for example, how many people are negatively impacted - but qualitative. An arbitrary, overbroad, or grossly disproportionate impact on one person suffices to establish a breach of s. 7. To require s. 7 claimants to establish the efficacy of the law versus its deleterious consequences on members of society as a whole, would impose the government's s. 1 burden on claimants under s. 7. That cannot be right.

[78] With respect to the s. 7 claim, the plaintiffs argue that the impugned legal scheme or its administration deny women litigants of limited or moderate means engaged in family law proceedings access to the legal services they need to effectively participate in such proceedings, and obtain remedies they need to protect themselves or their children from family violence or abuse. These deprivations, they say, are not in accordance with the principles of fundamental justice.

[79] The Province argues that the plaintiffs' claim has no reasonable prospect of success because courts have no authority to order state-funded legal counsel, and that even if they did, failure to fund legal aid is not a "deprivation" within the meaning of s. 7.

[80] First, the Province argues that the plaintiffs' arguments under s. 7 of the *Charter* are doomed to fail because there is no general right to state-funded counsel under the Canadian constitution nor is there constitutional authority to order a government to fund counsel.

[81] Specifically, the Province points to *R. v. Prosper*, [1994] 3 S.C.R. 236, where the Court held that 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 Province says that *Prosper* supports the proposition that there is no free-standing constitutional right to state-funded legal counsel.

[82] In *Prosper*, at p. 267, 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.

[83] The plaintiffs contend that the right to counsel at trial and on appeal (in any proceedings) was not at issue in *Prosper*. I cannot agree. In that case, the Supreme Court of Canada rejected an invitation to create a right to state-funded counsel under the guise of interpretation of the *Charter* as an illegitimate amendment of the Canadian constitution. Madam Justice L'Heureux-Dubé, although in dissent on another point, 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 at p. 288 that the proper allocation of state resources in legal aid is a matter for the legislature:

> However, the scope of services available through Legal Aid is generally not, in my opinion, for the courts to decide. The proper allocation of state resources is a matter for the legislature. In its choice of measures, given limited resources, a legislature may prefer to fund victims of crime rather than accused persons or vice versa - or may wish to reduce rather than increase Legal Aid funding.

[84] In *Canada (Attorney General) v. Savard* (1996), 106 C.C.C. (3d) 130 [*Savard*], the Yukon Court of Appeal followed *Prosper* in finding that there was no constitutional authority to order a government to fund counsel. Madam Justice Rowles, for the majority, held that the foundational constitutional principle asserted by the Privy Council in *Auckland Harbour Board v. The King*, [1924] A.C. 318 (J.C.P.C.) that spending from public revenue must derive from an appropriation recommended by the Crown and approved in a money bill by the legislature had to be respected.

[85] The plaintiffs contend that the issue in *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. While it is true that no legislation or state action was subject to constitutional challenge in *Savard*, the majority of the Court found that s. 672.24 of

the *Code* did not provide a judge with the authority to order payment by government of the fees and costs of counsel

[86] Relying on the dissenting reasons of Mr. Justice Fish in *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, the plaintiffs argue that the Province's reliance on *Auckland Harbour Board* for the proposition that spending from public revenue must derive from an appropriation recommended by the Crown and approved in a money bill by the legislature is unwarranted. In his dissenting reasons, Fish J. wrote: "The principle acts only to constrain the ability of the executive branch of government to spend money in the absence of authorization by the legislature": at para. 128.

[87] The plaintiffs contend that Mr. Justice Willcock correctly expressed the governing principle in his reasons for judgment in an application to strike brought by the Province in *Conseil scolaire francophone de la Columbie-Britanique v. British Columbia (Education)*, 2011 BCSC 1219 [*Conseil scolaire*] at paras. 27, 31-32, rev'd on other grounds at 2012 BCCA 422:

> 27 … the courts may grant both declaratory relief and injunctive relief that effectively require the expenditure of public funds to remedy *Charter* breaches. Such orders are not generally regarded as subverting parliamentary control of the public purse but, are seen instead as a means of effecting the intentions expressed in the *Charter* and, as an exercise of the courts' fundamental role in ensuring that government is not immune from *Charter* challenges. The constitutional role of Canadian courts is not the same as the narrow role of the New Zealand courts articulated in *Auckland Harbour Board*.
>
> …
>
> 31 In recent Canadian cases where the principle described in *Auckland Harbour Board* has been [considered] … the courts have expressly noted that the principle governs *in the absence of statutory authority or Charter breach*. In cases arising out of demands for payment of legal fees or medical expenses, for example, where the courts have relied upon the principle described in *Auckland Harbour Board* in refusing to order the expenditure of public funds, they have expressly noted the absence of a breach or threatened breach of a *Charter* right: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2001 BCCA 647; *R. v. Gray*, 2002 BCSC 1192; *New Brunswick (Minister of Health and Community Services) v. G.(J.),* [1999] 3 S.C.R. 46.

> 32 In most cases the principle described in *Auckland Harbour Board* is a bar to ordering the payment of funds out of the general revenues. In cases where *Charter* relief is sought, however, it is a brake upon, but not a bar, to the exercise of the court's remedial jurisdiction.

[88] *Conseil scolaire* considered whether or not an association's claim should be struck in an action on the basis of standing and justiciability. It was decided based on Rule 9-5(1)(d) not 9-5(1)(a). Here, the defendants are not arguing that the plaintiffs' claim is not justiciable, but that it has no prospect of success.

[89] Nevertheless, I am satisfied that the principle in *Auckland Harbour Board* does not bar the plaintiffs' *Charter* claims that impugn legislation involving the expenditure of government funds, nor preclude judicial remedies that may require expenditures to be made under statutes: see e.g. *R. v. Gray*, 2002 BCSC 1192 at para. 67; *Conseil scolaire* at para. 31; *G.(J.)*. Therefore, I decline to strike the plaintiffs' s. 7 claim on this basis.

[90] The Province argues that even if courts have the authority to order state-funded counsel, the failure to fund lawyers in private litigation, including family law litigation, is not a state "deprivation" of the interests protected by s. 7. It says that s. 7 of the *Charter* can only be triggered if there is government action that "deprives" a person of life, liberty or security of the person. In short, the *Charter* does not guarantee positive action on the part of the government. In making this argument, the Province relies on *Cambie Surgeries Corp. v. British Columbia (Attorney General),* 2018 BCCA 385; *Savard*; *British Columbia (Attorney General) v. Christie*, 2007 SCC 21; *Prosper*; *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.).

[91] In *British Columbia (Attorney General) v. Christie*, 2007 SCC 21 at para. 23, the Supreme Court of Canada unanimously found that there was no general constitutional right to access to legal services:

> The issue, however, is whether *general* access to legal services in relation to court and tribunal proceedings dealing with rights and obligations is a fundamental aspect of the rule of law. In our view, it is not. Access to legal services is fundamentally important in any free and democratic society. In some cases, it has been found essential to due process and a fair trial. But a review of the constitutional text, the jurisprudence and the history of the

> concept does not support the respondent's contention that there is a broad general right to legal counsel as an aspect of, or precondition to, the rule of law.
>
> [Emphasis in original.]

[92] In *British Columbia (Minister of Forests) v. Jules*, 2001 BCCA 647, at para. 27, Madam Justice Newbury commented that although many people find themselves unable to pay the high cost of litigation, "[n]o case has gone so far, however, as to find that one's right to "access to justice" includes a right to state-funded legal fees or to counsel provided by the state if one cannot afford to pay for one's own lawyer."

[93] The Province argues that the Court of Appeal in *Cambie Surgeries* recently confirmed that there is no general constitutional right to counsel. While I do not disagree, the Court also commented at para. 23 that:

> *Christie* settled certain questions with respect to the right to counsel but certainly did not overrule the judgment in [*John Carten Personal Law Corp. v. British Columbia (Attorney General)*, [1998] 40 B.C.L.R. (3d) 181 (C.A.), leave to appeal refused [1998] S.C.C.A. No. 205] to the effect that the constitutionality of tax measures said to impose obstacles to access to the courts must be assessed by examining the effect of the tax on access to justice.

[94] Therefore, I cannot conclude that *Cambie Surgeries* necessarily precludes the plaintiffs' claim. Indeed, *Cambie Surgeries* confirms that if state action has the effect of denying litigants access to the courts or legal services, s. 7 may be engaged in some circumstances.

[95] Indeed, in some circumstances, the state must provide counsel to litigants. In *G.(J.)*, the Supreme Court of Canada directed the province of New Brunswick to provide state-funded counsel to the appellant to ensure the fairness of a hearing concerning the custody of her children. The appellant was indigent and had been denied legal aid under the provincial program. Under the program, custody issues were not covered as a result of budgetary restraints that had necessitated a reduction in services.

[96] In its reasons, the Court emphasized the fact that the Minister of Justice's program did not cover either guardianship or custody applications initiated by the Minister of Health and Community Services to avoid any potential conflicts of interest. As a result of this program, Legal Aid New Brunswick had agreed to fund guardianship applications, but did not have the resources to fund custody issues.

[97] Chief Justice Lamer, writing for the majority in *G.(J.)*, held at p. 56 that the government of New Brunswick was constitutionally obligated to provide the appellant with state-funded counsel because government action triggered a hearing in which the interests protected by s. 7 are engaged. The *Charter* infringement in *G.(J.)* was not caused by the legislation itself, but by the actions of a delegated decision-maker in applying it and therefore the remedy granted was under s. 24(1). The Court held that the state had an obligation to ensure that the hearing was fair, which in that case, meant providing state-funded counsel. The Court specifically noted that where the government fails to discharge its constitutional obligations, courts have the power to order the government to provide a parent with state-funded counsel under s. 24(1), through whatever means the government preferred, including the budget of the legal aid system.

[98] But at p. 87, Lamer C.J.C. qualified his comments, saying that "the right to a fair hearing will not always require an individual to be represented by counsel when a decision is made affecting that individual's right to life, liberty, or security of the person." According to the Court, in the context of custody hearings, the seriousness and complexity of the hearing and the capacities of the parent would have an impact on whether the person required state-funded counsel.

[99] In *DeFehr v. DeFehr*, 2002 BCCA 139, Justice Levine further clarified *G.(J.),* and explained at para. 9 that following *G.(J.)*, the first hurdle to establish a constitutional right to counsel is that a given case involves "state action" rather than "a private dispute between two parents as to which of them will have custody and the terms of access".

[100] When the state takes action against an individual through the legal system, it may be a deprivation of liberty or security of the person: see also *G.(J.)*; *Rowbotham*. The Province argues that there is no "state action" here because unlike in *G.(J.)* and *Rowbotham*, the state is not initiating proceedings against the claimants, and therefore the state need not provide state-funded legal counsel.

[101] The plaintiffs say, however, that in *DeFehr,* the self-represented father did not contest the Attorney General's position that there was no constitutional right to public funding for legal fees in a family law appeal, nor provide evidence that his right to a fair hearing would be infringed if he did not have the assistance of counsel. The plaintiffs argue that, read in that context, *DeFehr* did not involve a constitutional challenge to the legal aid scheme, and was only an appeal from orders for custody and access. The plaintiffs therefore say that the Court did not make any generalizable findings about the viability of the s. 7 claims at issue in this action.

[102] In the context of a medical malpractice action, the Court of Appeal explained why the absence of state action is fatal to a s. 7 claim for state-funded counsel in *Holland v. Marshall*, 2010 BCCA 164 at paras. 16–17 [*Holland*]:

> 16 The plaintiff's contention in the further alternative that the court should require counsel to be appointed for him at public expense is predicated on his being disabled and unable to afford counsel. He maintains his s. 7 *Charter* right to life, liberty, and security of person requires the appointment of counsel for the preservation of what is said to be his right to "psychological integrity". He relies on *New Brunswick (Minister of Health and Community Sen/ices) v. G.(J.),* [1999] 3 S.C.R. 46, 177 D.L.R. (4th) 124, where it was determined that state-funded legal representation may be ordered when by virtue of the action of the state an individual's s. 7 rights may be compromised. But there is no state involvement in this case. The litigation is between private parties. There is nothing about it which engages the *Charter*.
>
> 17 Thus, quite apart from the absence of any evidence of financial hardship being adduced before us, the absence of any state involvement in this action is determinative of any entitlement to state-funded representation.

[103] The Province also relies upon the comments of Chief Justice McLachlin, for the majority, in *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84 at para. 81, where McLachlin C.J.C. wrote:

> 81 Even if s. 7 could be read to encompass economic rights, a further hurdle emerges. Section 7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these. Such a deprivation does not exist in the case at bar.
>
> [Emphasis in original.]

[104] The plaintiffs contend that the Province's reliance on this case for the categorical proposition that s. 7 does not impose positive obligations on the state is overstated. They point out that in *Gosselin*, the Chief Justice said at para. 82:

> 82 One day s. 7 may be interpreted to include positive obligations. To evoke Lord Sankey's celebrated phrase in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136, the *Canadian Charter* must be viewed as "a living tree capable of growth and expansion within its natural limits": see *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 180, *per* McLachlin J. It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases. In this connection, LeBel J.'s words in *Blencoe, supra*, at para. 188 are apposite:
>
> > a) We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*.
>
> The question therefore is not whether s. 7 has ever been — or will ever be — recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.

[105] Therefore, the plaintiffs say, the question of whether s. 7 protects positive rights is an open question and should not be struck prior to a full hearing of the matter.

[106] Moreover, the plaintiffs contend that, properly understood, their claim is a negative rights claim. Indeed, the plaintiffs argue that the evolution of s. 7

jurisprudence suggests that s. 7 is properly employed where a deprivation is created by non-state forces or actions, but state action exacerbates or perpetuates the risk of that deprivation. The plaintiffs say that the deprivation pleaded in this action is analogous to the deprivations experienced by the claimants in *Victoria (City) v. Adams,* 2009 BCCA 563; *Bedford*; and *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 [*PHS*].

[107] In *Adams,* the Court of Appeal held that the state conduct need not be the primary cause of the deprivation for a claim to be brought under s. 7: at paras. 86–89. In *Bedford*, the Supreme Court of Canada held that while non-state actors were the immediate source of harm to sex workers, it did not diminish the role of the state in making them more vulnerable to that harm: at para. 89. Finally, in *PHS*, the Court concluded that although the law prohibiting the possession of drugs did not cause the deprivations of security of the person in question, the law created a risk to health by "preventing access to health care": at para. 93.

[108] The plaintiffs assert that given the importance of rule of law to our constitutional structure, it is at least arguable that the constitution prevents impediments to judicial remedies that promote the safety and security of the person, as forcefully as it prevents unjustified impediments to health care services.

[109] The plaintiffs say that the situation pleaded in this action is analogous to the situations at issue in these cases, especially *PHS*. Here, they argue, the impugned legal regime and its administration create a risk to the health and safety of women litigants of limited or moderate means and their children exiting abusive relationships by denying them access to the legal services they need to effectively participate in those proceedings. Therefore, the legal scheme impedes their access to the legal remedies that are necessary to protect their security of person and, sometimes, their lives.

[110] While plaintiffs acknowledge that Ms. Bell was provided with legal aid services, they say that the fluctuation in legal aid services that affected Ms. Bell's access to a lawyer over the course of her family law proceeding was state action

that led to an infringement of security of her person by causing state-induced harm, and that the Province has not demonstrated that that claim is inarguable.

[111] The test to strike a claim or pleadings imposes a high threshold, as I have discussed above. The applicant must show that the case advanced on the pleadings (which, for the most part, must be taken as true) has no reasonable prospect of success. The test must err on the side of permitting a novel but arguable case to proceed to trial.

[112] While I agree that s. 7 does not currently impose positive obligations on the state to ensure that each person enjoys life, liberty or security of the person, given the comment of Chief Justice McLachlin in *Gosselin* that "[o]ne day s. 7 may be interpreted to include positive obligations", and the holdings in *Adams, Bedford,* and *PHS*, I am unable to say that the plaintiffs' claim under s. 7 of the *Charter*, erring on the side of permitting a novel but arguable case to proceed to trial as the test requires, has no prospect of success.

C. Section 15

[113] Section 15 provides that:

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Section (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[114] In *Kahkewistahaw First Nation v. Taypotat,* 2015 SCC 30 at paras. 19–20, the Supreme Court of Canada identified two stages to the equality analysis under s. 15(1) of the *Charter*:

> a) does the impugned law, on its face or in its impact, create a distinction based on enumerated or analogous grounds; and

b) if so, does the law fail to respond to the actual capacities and needs of the members of the group and instead impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage.

[115] The plaintiffs also plead that the impugned legal scheme and/or its administration infringe s. 15(1) of the *Charter,* and such infringement is not protected from constitutional scrutiny under s. 15(2). They allege that the impugned legal scheme creates distinctions on the basis of the protected ground of sex, and the intersecting grounds of race, national or ethnic origin, and disability. These effects-based distinctions are pleaded as follows:

a. Women, particularly women who are racialized, Indigenous, recent immigrants, disabled, or who have limited English language skills or education, are less likely than their male ex-spouses or co-parents to be able to afford to retain counsel because they have a limited earning capacity in comparison to men;

b. Women litigants of limited or moderate means at the lowest end of the income spectrum experience disproportionately greater disadvantage from the cap on lawyers' billable hours under legal aid retainers because they are the least able to afford legal representation when their legal aid hours run out;

c. As the primary victims of family violence and abuse, the physical and psychological integrity of women is more likely to be at stake in family law proceedings than for their male ex-spouses or co-parents. Not having access to state funded counsel therefore disproportionately impacts women litigants of limited or moderate means;

d. Women litigants of limited or moderate means and their children are disproportionately affected by the inclusion of child support payments

in the determination of net monthly household income for the purposes of assessing eligibility for legal aid;

e. Children whose best interests are to remain with their mothers are disadvantaged under the impugned legal scheme in comparison with children whose best interests are to remain with their fathers;

f. Women litigants are more likely than their male co-parents or ex-spouses to have primary economic and parental responsibilities for children following relationship breakdown; and

g. Women who are racialized, Indigenous, recent immigrants, disabled, or who have limited English language skills or education, have characteristics that make it more difficult for them to access justice through self-representation.

[116] The Province contends that for three reasons, the plaintiffs' equality claims have no reasonable likelihood of success:

(1) the plaintiffs' claims do not disclose a "distinction" because there is no differential treatment based on an analogous or enumerated ground;

(2) the differential treatment alleged is based on a pre-existing disadvantage and therefore is not "imposed by law"; and

(3) the only distinction pleaded is one mandated by the constitution.

[117] The first and second reasons advanced are interrelated. The Province argues that, because the plaintiffs' claims are based on pre-existing social disadvantage, unless the impugned law or program differentiates on an enumerated or analogous ground and singles out disadvantaged groups for inferior treatment, it is not contrary to s. 15. Section 15, it argues, does not require the government to take positive actions to ameliorate pre-existing social disadvantage, but simply requires that when it takes action, that action is not discriminatory.

[118] The Province says that the plaintiffs' pleadings disclose no enumerated or analogous ground, and the impugned legal scheme and its administration do not give rise to differential treatment on the basis of an enumerated or analogous ground, or on intersecting grounds as the plaintiffs claim.

[119] Further, even if there is differential treatment, the Province argues that that differential treatment is not discriminatory. The government is permitted to determine which social programs it wishes to target. The Province argues that this case is more like *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, than *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, and that *Auton* has overtaken *Eldridge.*

[120] In *Eldridge*, the Supreme Court found that the Province was obligated to provide translators to the deaf so that they could have equal access to core benefits accorded to everyone under B.C.'s medicare scheme. The Court held that by failing to provide translators, the Province effectively denied one group the benefit it had granted by law.

[121] The Province says that limitations on funding for programs that ameliorate social disadvantage may have a disproportionate effect on disadvantaged groups, but that is an insufficient basis upon which to find a s. 15 breach, relying on *Auton*. Any "differential treatment" in this case, argues the Province, is simply the pre-existing disadvantage that a more well-funded social program might be able to mitigate. Everyone is subject to the same financial eligibility requirements to obtain legal aid and, therefore, there is no differential treatment.

[122] The Province contends that because the alleged burden or benefit is a result of a pre-existing social inequality, it is also not "imposed by law". In *Auton*, the Supreme Court of Canada considered whether the provincial government's failure to fund certain treatment for autistic children violated s. 15 of the *Charter*. The Court held that the benefit alleged (government funding for all "medically required" treatment) was not imposed by law because the relevant legislation did not state that any Canadian would receive funding for such a benefit. The Court further held that

the legislative scheme was not discriminatory, even though certain therapy for autistic children was not included in the scheme.

[123] In this case, the Province argues that the plaintiffs' claim lies outside the ambit of s. 15 because there is no general right to access to justice and therefore there is no "benefit".

[124] The Province also analogizes this case to *Pavlis v. HSBC Bank of Canada*, 2009 BCCA 450, where the plaintiff challenged the constitutionality of a rule in the *Court of Appeal Rules* that required a prospective appellant to procure a transcript of the oral testimony given in the trial court. She argued that the rule offended s. 15 on the basis that it infringed her right to equality before the law. As a disabled and indigent person, she said she did not have the same opportunity to exercise her right of appeal as did an able-bodied person of means. Madam Justice Newbury held that the production of transcripts was not a "benefit" provided by law, and therefore s. 15 was not engaged. Newbury J.A. wrote:

> As for the necessity of paying for transcripts, persons who are in the business of providing transcribing services require payment for their services as a matter of contract rather than any statutory provision. There is no authority in Canada supporting a general right to access to justice (see *British Columbia (Attorney General) v. Christie* 2007 SCC 21, [2007] 1 S.C.R. 873) that might extend to transcripts, and in my view, there is no basis for Ms. Pavlis' argument that R. 20(1) engages her right to the equal protection and equal benefit of the law.

[125] In response to these arguments, the plaintiffs contend that the impugned legal scheme creates effects-based distinctions on the basis of the enumerated ground of sex alone, and as it intersects with the other protected grounds. The Province's argument about pre-existing social inequality, the plaintiffs' contend, is based on an anachronistic formal equality analysis which has been rejected by the Supreme Court of Canada in cases such as *Andrews v. Law Society British Columbia*, [1989] 1 S.C.R. 143. In this case, the plaintiffs argue, the government has provided a benefit that discriminates against women litigants of limited or moderate means engaged in family law proceedings by denying them the benefit of legal aid in a way that reinforces, perpetuates and exacerbates the disadvantage they experience.

[126] The plaintiffs assert that substantive equality requires the state to account for how its laws and actions affect different people differently, including based on pre-existing disadvantage. Once the state provides a benefit, it must do so in a non-discriminatory manner, by accounting for the lived experiences of those accessing the benefit. Formal equality has been squarely rejected by the Supreme Court of Canada in favour of a substantive equality analysis: *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 18 [*Alliance*]; *Quebec v. A*, 2013 SCC 5; *Withler v. Canada (Attorney General)*, 2011 SCC 12; *Taypotat*; *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18. In *Andrews*, Mr. Justice McIntyre anticipated the dangers of formal equality, in which likes are treated alike:

> In simple terms, then, it may be said that a law which treats all identically and which provides equality of treatment between "A" and "B" might well cause inequality for "C", depending on differences in personal characteristics and situations. To approach the ideal of full equality before and under the law -- and in human affairs an approach is all that can be expected -- the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.

[127] In *Alliance*, Madam Justice Abella, for the majority, wrote that "when the government passes legislation in a way that perpetuates historic disadvantage for protected groups, regardless of who caused their disadvantage, the legislation is subject to review for s. 15 compliance": at para. 41. Further, according to Abella J., s. 15 "does require the state to ensure that whatever actions it does take do not have a discriminatory impact": at para. 42.

[128] There is no question that pre-existing disadvantage plays an important role in the substantive equality analysis. It has even been used to determine whether a distinction created by the law amounts to a disadvantage. This was explained by the Supreme Court of Canada in *M. v. H.*, [1999] 2 S.C.R. 3 at 26, as follows:

> The crux of the issue is that this differential treatment discriminates in a substantive sense by violating the human dignity of individuals in same-sex relationships. As *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, established, the inquiry into substantive discrimination is to be undertaken in a purposive and contextual manner. In the present appeal, several factors are important to consider. First, individuals in same-sex relationships face significant pre-existing disadvantage and vulnerability, which is exacerbated by the impugned legislation. Second, the legislation at issue fails to take into account the claimant's actual situation. Third, there is no compelling argument that the ameliorative purpose of the legislation does anything to lessen the charge of discrimination in this case. Fourth, the nature of the interest affected is fundamental, namely the ability to meet basic financial needs following the breakdown of a relationship characterized by intimacy and economic dependence.

[129] Indeed, the plaintiffs' argue that, contrary to the Province's submission, s. 15 of the *Charter* is violated where the government fails to take into account a pre-existing disadvantage on an enumerated or analogous ground, and that failure exacerbates the disadvantage. While the equality analysis is inherently comparative, *disadvantage* rather than distinction lies at its heart. As articulated by Abella J., in her dissenting reasons (but with whom the majority of the Court agreed with respect to her s. 15 analysis) in *Quebec v. A*, 2013 SCC 5:

> The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory.

[130] The plaintiffs contend that here the impugned legislative scheme does just that. They say that the scheme widens the gap between the claimants and the rest of society because their pre-existing disadvantage is perpetuated by lack of access to lawyers in family law proceedings. The plaintiffs plead that the alleged deficiencies in legal aid funding fail to address their disadvantage due to their low income status, and experiences with family violence or abuse.

[131] Whether the legal scheme widens the gap between the claimant group and the rest of society, they argue, is an arguable question. Therefore, they say, their claim should not be struck on this basis.

[132] While I have reservations about the viability of the plaintiffs' s. 15 claims, the requirement that I must err on the side of permitting a novel but arguable case to proceed to trial, I am unable to say that the plaintiffs' claim under s. 15 of the *Charter* has no prospect of success on the first two bases alleged by the Province.

[133] The final argument advanced by the Province to strike the plaintiffs' s. 15 claim is that s. 15 does not apply to distinctions created by the constitution itself, and is therefore bound to fail. The plaintiffs plead that there is more legal aid funding for criminal matters (that is disproportionately received by men) than legal aid funding for family law matters (that is disproportionately received by women). This, the plaintiffs argue, is a distinction in impact based on the enumerated ground of sex. The Province argues, however, that even assuming this factual basis is true, it is mandated by the constitution and therefore cannot be a basis of a s. 15 challenge.

[134] In support of this argument, the Province points to *Adler v. Ontario*, [1996] 3 S.C.R. 609, where the Supreme Court of Canada considered a challenge to the funding scheme of the Ontario school system, where secular public schools and separate Roman Catholic schools received full funding, but other separate schools for religious minorities did not. The funding for Roman Catholic schools was required by s. 93 of the *Constitution Act, 1867*. The claimants argued that s. 15 of the *Charter* required all schools to be funded. The claimants were unsuccessful. The Court held that the distinction in question was based in the constitution itself and immune from *Charter* scrutiny: at 639.

[135] The plaintiffs argue that *Adler* is distinguishable and that the constitution does not require the distinction in question here. They point to the fact that while in *Adler* the potential conflict between funding of different denominational schools was contemplated in the drafting of the constitution, and steps were taken to ensure that the funding of Roman Catholic schools could not be used as comparator under s. 15(1), no such similar steps were taken with respect to the availability of LSS funding for the plaintiffs.

[136] I note that while the plaintiffs assert that most of the individuals who require legal aid in family law proceedings are women**,** I find that this self-serving assertion is at best questionable. It is premised upon the argument that in 2015/16, approximately 18% of the LSS budget went to family law proceedings, while 52% went to criminal law proceedings, and that since more men than women require legal aid in criminal law proceedings, only 30.6% of legal aid recipients in that year were women.

[137] In their oral submissions, counsel for the plaintiffs agreed that both men and women share the same eligibility challenges for legal aid in criminal matters, but they maintain that even though the formal requirements are the same, the effect is that women are disadvantaged, because more women need legal aid in family proceedings.

[138] Ultimately, based on the test to strike proceedings in *Imperial Tobacco*, I am not satisfied that the Province has demonstrated that the plaintiffs' claim under s. 15 has no reasonable prospect of success.

D. Section 96

[139] Section 96 of the *Constitution Act, 1867* gives the federal government the power to appoint the judges of the superior, district, and county courts. This section guarantees the core jurisdiction of the provincial superior courts, as it existed at the time of Confederation, against either provincial or federal abolition or removal: *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 at para. 51.

[140] The Province asserts that s. 96 of the *Constitution Act, 1867* does not create positive obligations on the government to provide state-funded legal counsel, and has no application to family law proceedings in the provincial court. Ms. Bell has brought proceedings in provincial court, s. 96 has no relevance to her claim and as a result, the Province argues that the plaintiffs' claim under this section is bound to fail.

[141] Further, the Province argues that while s. 96 confers a right of access to the superior courts, access does not require the government to provide state-funded

legal counsel. In support of its argument, the Province points to *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)* 2014 SCC 59, [*Trial Lawyers*]. In *Trial Lawyers*, the Supreme Court of Canada held that s. 96 of the *Constitution Act, 1867* prohibits government from putting in place hearing fees if they have the effect of "barring access" to the superior courts. While the Province agrees that *Trial Lawyers* tied s. 96 to the value of access to justice, access to justice does not include a right to counsel to assist with private law disputes.

[142] Indeed, as Madam Justice Newbury wrote in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2001 BCCA 647 at paras. 27–28:

> 27 … No case has gone so far, however, as to find that one's right to "access to justice" includes a right to state-funded legal fees or to counsel provided by the state if one cannot afford to pay for one's own lawyer.
>
> 28 Of course there are legal aid programs in every province of Canada which soften the effect of this reality to some extent. In some circumstances as well - e.g., where a person is charged with a serious criminal offence and his liberty is at risk - there is statutory recourse such as that provided by s. 684 of the Criminal Code. But I am not aware of any authority for the proposition that the principle of access to justice means more than a duty on the government to make courts of law and judges available to all persons or that it includes an obligation to fund a private litigant who is unable to pay for legal representation in a civil suit - even one that may be sui generis. If the meaning of access to justice is to be extended that far, it is in my view for government to do.

[143] The Province contends that s. 96 does not confer jurisdiction on the courts to order the government to pay for counsel for a litigant nor does the absence of state-funded counsel impede litigants access to the courts.

[144] Further, the Province contends that in the overwhelming majority of cases, legal issues arising as a result of relationship breakdown are resolved by agreement without court involvement. In the majority of the cases that do go to court, litigants are either not represented by lawyers at all or have a limited retainer with lawyers.

[145] The plaintiffs say that the jurisprudence has come to recognize that s. 96 protects access to justice interests well beyond the provision's wording, including resolving disputes between individuals, and deciding questions of law. As a result,

the Province's jurisdiction under s. 92(14) of the *Constitution Act, 1867* over the administration of justice in the province must be exercised consistent with s. 96 of the *Constitution Act, 1867* and in a manner that does not interfere with the core jurisdiction of superior courts.

[146] They note that SMA represents a diverse group of women of limited or modest means, including those with proceedings before judges of the B.C. Supreme Court. The plaintiffs assert that the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.), and the *Family Law Act,* S.B.C. 2011, c. 25, are statutory schemes that reach deep into the "private sphere" to regulate the economic and other consequences of family breakdown (through child support, spousal support, and property division). Where ex-partners are not able to reach an agreement on how to reorganize their affairs after separation, the plaintiffs argue that there is no self-help option, and dispute resolution through the courts becomes necessary. Further, the plaintiffs assert that a party seeking protection from family violence will require a protection order under Part 9 of the *Family Law Act*, and that a court application is required to obtain such an order.

[147] The plaintiffs contend that it is not plain and obvious that the SMA's claim under s. 96 will fail. The impugned legal scheme, they say, creates unlawful barriers for women litigants of limited or moderate means to access the superior courts in family law proceedings. Access to justice is essential to the rule of law, and because the impugned legal scheme limits access to the superior courts, the plaintiffs contend that it prevents the courts from complying with their basic judicial function of resolving disputes between individuals, and infringes s. 96 of the *Constitution Act*, *1867*. The scope of that protection has yet to be determined in the context of ensuring meaningful access to a court process that is mandated by legislation.

[148] In my view, the Province's argument ignores the issue that the plaintiffs wish to have determined: whether it is a lack of real access to lawyers who might otherwise represent them in reaching a fairer agreement, or appearing on their

behalves when fair agreement cannot be reached without recourse to the courts, due to their inability to afford representation by a lawyer.

[149] In light of the guidance provided by the Supreme Court in *Imperial Tobacco*, that on applications to strike, courts ought to be generous and err on the side of permitting a novel but arguable claim to proceed to trial, I cannot conclude that the plaintiffs' claims under s. 96 have no reasonable prospect of success.

2. The LSS's application to strike

[150] In its application for an order pursuant to Rule 9-5(1)(a) to strike certain parts of the plaintiffs' notice of civil claim, the LSS argues that s. 24(1) of the *Charter* does not empower courts to grant remedies that are anticipatory and hypothetical.

[151] While the LSS concedes that a particular decision made by it in conformity with its administration of the impugned legal scheme might give rise to personal remedy under subsection 24(1) of the *Charter*, such a remedy could only be granted on a petition for judicial review of the particular decision and would be limited to the particular person affected.

[152] Under s. 24(1) of the *Charter*, anyone whose rights or freedoms, as guaranteed by the *Charter*, have been infringed or denied, may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. This section is a personal remedy against unconstitutional government action, and can therefore only be invoked by a party alleging a violation of their own rights: see e.g. *Ferguson* at para. 61; *R. v. Edwards*, [1996] 1 S.C.R. 128 at 145; *Vancouver (City) v. Zhang,* 2010 BCCA 450 at para. 80; *Adams* at para. 141.

[153] According to the LSS, the plaintiffs' claim is made in anticipation of how the LSS may make discretionary decisions in the future, such as how to decide future applications for legal aid by persons with certain characteristics. In seeking a remedy under s. 24(1), the LSS argues that the plaintiffs invite the Court to conduct an anticipatory and hypothetical judicial review of discretionary decisions and to pre-

emptively order the LSS to approve all such applications. The LSS says that that type of relief is unavailable even if the claimed constitutional right exists.

[154] This submission is somewhat at odds with the approach adopted by the Supreme Court of Canada in *G.(J.).* In that case, the appellant was denied legal aid in violation of what were determined to be his rights under s. 7. The Court directed that in the future, in some circumstances where a parent in a custody application wants a lawyer but is unable to afford one, courts should order the government to provide the parent with state-funded counsel under s. 24(1) of the *Charter*.

[155] Furthermore, contrary to the submissions of the LSS, the plaintiffs assert that they do not seek a remedy in relation to "anticipatory and hypothetical" issues, in the absence of sufficient facts, or a "pre-emptive" order. They contend that what they seek is an appropriate and just remedy for their *Charter* claims relating to the overall administration of the impugned legal scheme, as it is occurring. The SMA represents the interests of women who are *currently* financially ineligible for legal aid, or ineligible because they have exhausted the hours in their legal aid contract. They contend that the overall administration of the impugned legal scheme gives rise to ongoing rights infringements of its members.

[156] The plaintiffs contend that they are making an effects-based challenge to the laws that they impugn. As such, they say that s. 24(1) provides them a remedy for unconstitutional state action committed under the authority of legislative regimes accepted as fully constitutional. They say that unconstitutional state action should not be regarded as the "effect" of the law or as being caused by the law. Instead, they assert that unconstitutional state action should be viewed as an unconstitutional application of a discretion conferred by constitutionally compliant law as in such situations, while the law itself is not constitutionally infirm, it is being administered in a way that infringes constitutional rights.

[157] The plaintiffs argue that while s. 24(1) is commonly used to challenge a particular decision made by a government agent by way of a judicial review of that decision, the scope of s. 24(1) is not necessarily limited to a particular government

decision. Nor does the fact that LSS decisions are open to judicial review mean that their claim under s. 24(1) is barred. As the claims have collective and systemic dimensions, their claims inure not only to the named plaintiff and members of the representative plaintiff but to other similarly situated individuals, typical of a systemic challenge, and do not make the action untenable.

[158] In *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2010 BCCA 439, the majority found that the availability of other means to bring a claim is not determinative of the reasonableness or effectiveness of a systemic claim. The ability of an individual to bring a systemic challenge and the likelihood of doing so are thus relevant considerations, even apart from a formal challenge to a plaintiff's standing.

[159] If the plaintiffs' *Charter* claim is made out on the merits, they contend that this Court will be obliged to craft a remedy that that is effective and responsive. In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at para. 59, the Supreme Court of Canada stated that it is important to preserve remedial flexibility, "responsive to the needs of a given case." Thus, the plaintiffs argue that declarations coupled with directions to remedy *Charter* infringements are appropriate remedies, and this Court may find such remedies effective and responsive in this case.

[160] The LSS contends that *BCCLA* unequivocally determined that a plaintiff cannot seek declaratory relief under s. 24(1) of the *Charter* for an infringement of the *Charter* rights of another person, and that that result implies that the plaintiffs in these proceedings cannot remedy that defect by reliance on the common law declaratory power as opposed to s. 24(1).

[161] In *BCCLA*, the Attorney General argued on appeal that while an inmate who had been denied the right to have counsel represent him or her at a review hearing could seek relief under s. 24(1) of the *Charter*, that relief was not available to the respondents because it is a personal remedy. In support of that submission, the

Attorney General relied on *Ferguson* at paras. 59–61, cited at para. 54 above, in which the Supreme Court discussed the difference between ss. 24(1) and 52(1).

[162] The Court of Appeal held that the *Corrections and Conditional Release Act,* S.C. 1992, c. 20, and its regulations did not confer a right to legal representation at segregation review hearings, and that Correctional Services of Canada ("CSC") had no statutory obligation to permit the attendance of counsel at such hearings: at para. 204. The court concluded that CSC had not failed in its implementation or interpretation of the legislative scheme by refusing to permit counsel to attend review hearings: at para. 204. Therefore, the court held at para. 208 that "a declaration to the effect that segregated inmates are entitled to be represented by counsel at a segregation review hearing was likely more appropriate than a remedy under s. 52(1) striking the impugned provisions."

[163] The court emphasized that superior courts have inherent jurisdiction to grant declaratory relief because such relief is a discretionary remedy that is available without a cause of action and whether or not any consequential relief (such as damages) is sought: at para. 259.

[164] In *Ewert v. Canada,* 2018 SCC 30, at para. 81, Mr. Justice Wagner, as he then was, writing for the Court, held that:

> A court may, in its discretion, grant a declaration where it has jurisdiction to hear the issue, where the dispute before the court is real and not theoretical, where the party raising the issue has a genuine interest in its resolution, and where the respondent has an interest in opposing the declaration sought …

[165] The LSS contends that as a result of the holding in *BCCLA*, the plaintiffs before me cannot seek declaratory relief pursuant to s. 24(1) of the *Charter* for infringements of others, including women litigants of limited or moderate means.

[166] In fairness, the LSS accepts that the Court of Appeal in *BCCLA* noted at paras. 265–266 that although a party with public interest standing cannot seek declaratory relief under s. 24(1) of the *Charter,* it can seek declaratory relief at common law.

[167] The plaintiffs have not sought declaratory relief at common law; although they have advised me that, as a result of *BCCLA*, they intend to amend their pleadings to do so. The LSS asserts that even if the plaintiffs did amend their pleadings, they cannot obtain such relief because their claims are anticipatory and forward-looking, in anticipation that the LSS will decide future applications for legal aid by persons with certain characteristics the same way as they have previously done.

[168] I have concluded that I should not decide the applications before me on the pleadings as they presently exist. To do so would require the plaintiffs to recommence their petition in an amended form, and bring about the same applications that are presently before me. I do not see that that is in anyone's interest, and would amount to wasting scarce judicial time. The plaintiffs say that until the decision in *BCCLA*, they did not need to plead a common law basis for the declaratory relief that they seek. Only a minor and straightforward amendment is needed to permit them to do so, and I am prepared to determine the applications before me on the basis that such an amendment will be sought within the next two weeks.

[169] The LSS relies upon paras. 269–270 in *BCCLA* where Mr. Justice Fitch, writing for the court, held:

> 269 In the result, I would make a declaration that CSC has, in its administration of the impugned provisions, breached its obligation under ss. 31-33 and 87(a) of the *Act* to give meaningful consideration to the health care needs of mentally ill and/or disabled inmates before placing or confirming the placement of such inmates in administrative segregation.
>
> 270 I would also make a declaration that CSC has breached its obligation under s. 97(2) of the [Corrections and Conditional Release Regulations, SOR/92-620] to ensure that inmates placed in administrative segregation are given a reasonable opportunity to retain and instruct counsel without delay and to do so in private.

[170] The LSS argues that the Court of Appeal made declarations about what CSC had done or failed to do in the past. According to the LSS, however, unlike in *BCCLA,* the plaintiffs in this case seek declarations about what the LSS may do in the future in the exercise of its discretion concerning legal aid provision.

[171] While I accept that the declarations in *BCCLA* involved past acts or omissions, Fitch J.A. noted at para. 254 that a "superior court judge has inherent jurisdiction to grant a declaration that legislation is being applied in a way that violates the *Charter* without relying on s. 24(1)" (emphasis added). Fitch J.A.'s use of the present tense makes clear that superior court judges have jurisdiction to grant common law declaratory relief when legislation is currently being applied in a manner that violates the constitution. That is what the plaintiffs allege in this case.

[172] Similarly, at para. 271, Fitch J.A. addressed prospective breaches by the appellant before him, writing:

> [271] If this case involved an inmate in administrative segregation who was being denied the right to counsel at a review hearing, that inmate would clearly be entitled to a remedy under s. 24(1) of the Charter. For the reasons given, the respondents are entitled to a declaration that inmates confined in administrative segregation have a constitutional right to be represented by counsel at segregation review hearings and that CSC has infringed the rights of segregated inmates who have been denied such representation.

[173] The plaintiffs contend that it is trite law that declarations may issue not only for present, but also for the prospective guidance of parties. I need not accept that such law is trite, but do accept that it is, at a minimum, an arguable proposition, that finds support not only in Lazar Sarna's *The Law of Declaratory Judgments*, 4th ed. (Toronto: Thompson Reuters Canada Ltd., 2016), and in *Hupacasath First Nation v. British Columbia (Minister of Forests) et al,* 2005 BCSC 1712 at paras. 292–294, but in *BCCLA* itself at para. 267.

[174] Returning to the test that is to be applied to strike pleadings that I have set out above, the holding that applicants for *Charter* relief should be allowed flexibility in framing their claims in *Gamble*, and erring on the side of permitting a novel but arguable case to proceed to trial as the test requires, I am unable to say that the plaintiffs' claims against the LSS have no prospect of success. Indeed, the plaintiffs argue that Ms. Bell's rights *were* infringed, as she was denied representation despite her need, and experienced delays as a result. The plaintiffs are seeking to address that, and comparable future conduct.

[175] The factual basis on which the plaintiffs' claims against the LSS are founded are set out in Part 1 of the notice of civil claim, paras. 3 and 4 of Part 2 set out the relief sought, and the LSS has not established that the plaintiffs' have no reasonable prospect of success. As such, I decline to strike out "and its administration" from paras. 6, 8, 11, 12, 19, 20, and 30 in Part 3 of the plaintiffs' notice of civil claim.

VI. Conclusion

[176] The Province's application to strike the plaintiffs' notice of civil claim is dismissed.

[177] The LSS's application to strike parts of the plaintiffs' pleadings is also dismissed.

"The Honourable Chief Justice Hinkson"