



No. S-173843
Vancouver Registry

In the Supreme Court of British Columbia

Between

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

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA
(the "PROVINCE") and LEGAL SERVICES SOCIETY

Defendants

RESPONSE TO CIVIL CLAIM OF THE PROVINCE

Filed by: Her Majesty the Queen in right of The Province of British Columbia (the "Province")

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 – Defendant's Response to Facts

1. The facts alleged in paragraphs 1, 4, 73-77, 78-85, 88, 90-92 of Part 1 of the notice of civil claim are admitted.
2. The facts alleged in paragraphs 2, 3, 5, 6, 7, 9, 10, 86, 87, 89 and 93 of Part 1 of the notice of civil claim are denied.
3. The facts alleged in paragraphs 8, 11-72 of Part 1 of the notice of civil claim are outside the knowledge of the Province.

Division 2 – Defendant’s Version of Facts

4. In response to the whole of the Notice of 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, that single mothers have special needs in this regard, and that doing so is a challenge for all participants in the judicial system. The Province agrees that it has a major policy role in promoting access and that funding for legal aid is an important part.
5. Access to courts cannot practicably mean unlimited funding for legal representation. 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. Funding is necessarily limited by scarce resources and other social needs, including other funding needs to promote access to justice services.
6. With exceptions that are not relevant to this case, the Constitution of Canada does not impose substantive obligations on government to fund lawyers.
7. In response to paragraph 2, the Province agrees that women with the characteristics enumerated in paragraph 1 require access to justice services, but denies that this necessarily means representation by counsel. Whether the named plaintiffs have the characteristics enumerated is outside the knowledge of the Province.
8. The use of the word “often” in paragraphs 5 through 7 of part 1 of the Notice of Civil Claim makes the statements too vague to constitute material facts. The Province denies that the claims made are true of most family law proceedings.
9. In response to paragraph 6 of part 1 of the Notice of Civil Claim, litigants in any contested matter have limited control over the pace and length of court proceedings.
10. In response to paragraph 7 of part 1 of the Notice of Civil Claim, the question of whether a resolution of a dispute in accordance with the law is “just”, without reference to an applicable legal standard, is not a material fact and is not justiciable.
11. In response to paragraph 8 of part 1 of the Notice of Civil Claim, the Province does not have empirical evidence that establishes the relationship between lack of legal representation and the enumerated risks.
12. In response to paragraph 9 of part 1 of the Notice of Civil Claim, the Province denies that mothers are, as a general matter, uniquely positioned to articulate and advance the interests of children in family law proceedings. Most parents seek to articulate and advance the best interests of children, as they see them, and the role of the court is to impartially and critically adjudicate what is in the best interests of children based in part on the views of parents and, if appropriate, the views of the children.

Division 3 – Additional Facts

Social Facts

13. The vast majority of litigants in family law proceedings, male or female, are not represented by counsel at trial. The vast majority of persons with legal issues as a result of relationship breakdown resolve these disputes without trial.
14. There is no inherent limit to the amount that can reasonably be spent in a contested legal proceeding. Since legal resources are scarce, difficult decisions about what will be funded must be made somehow.
15. Before the 1960s, there was no publicly-funded legal aid in Canada. The Legal Services Society was set up by provincial statute in 1979. Since that time, the vast majority of its funding has come from the Province. Legal aid was originally understood as state-funded legal representation, but in recent years has been increasingly understood as including a wider range of legal services.
16. A constitutional right to government-funded legal representation was considered, but rejected, in the development of the *Charter of Rights and Freedoms*.
17. Given a limited budget for legal aid, provision of services for those most in need requires some criteria for eligibility, including financial eligibility criteria, limitations on lawyer preparation hours, and use of limited scope retainers. Legal aid systems across the world use some combination of these techniques, and others, to control costs.
18. The Province has two choices in administering a public service:
 - a. the Province may provide the service itself and make individualized decisions about funding; or
 - b. the Province may fund an independent entity to make those decisions within a limited budget.
19. As a matter of policy, the Province has decided that option “b” is a better approach for legal aid.
20. Since unlimited funding to litigants of modest means to pursue disputes to trial is not feasible, the Province, sometimes in partnership with the Legal Services Society, has explored and is exploring measures to promote access to justice for people experiencing relationship breakdown, including the following:
 - a. Expanded Family Duty Counsel, and
 - b. Family LawLINE (a service providing legal advice and information over the telephone to better serve British Columbians in remote communities who may be unable to access existing in-person services).

21. Men are charged criminally at much higher rates than women. This is true for serious charges and for charges that are likely to lead to complex or time-consuming trials. This fact is not a result of stereotyping or historic disadvantage based on sex.

Impugned Provisions

22. There is no causal relationship between the enactments the plaintiffs seek to have declared of no force and effect (the “Impugned Provisions”) and their complaints of lack of funding for their family law matters. Alternatively, the Impugned Provisions provide reasonable and necessary limitations on funding for the purposes of financial transparency and accountability.
23. Section 10(2) of the *Legal Services Society Act*, SBC 2002, c. 30 (the “*LSS Act*”) empowers the Lieutenant Governor in Council to enact a regulation limiting the services the Legal Services Society can provide using provincial funding, but no such regulation has ever been enacted.
24. Section 10(3) of the *LSS Act* provides that the Legal Services Society may not spend funding provided to it by the Province unless it does so in accordance with the Act, the regulations and the Memorandum of Understanding required by section 21, and provides that money for those activities it funds must be in its budget.
25. The purpose of section 10(3) is to reconcile the following policy objectives:
- a. ensuring that provincially funded legal aid is administered by an entity independent from the Province, i.e. the Legal Services Society;
 - b. ensuring freedom for the Legal Services Society in spending funds it obtains from sources other than the Province;
 - c. ensuring financial accountability for provincially funded legal aid.
 - d. resolving issues arising from the reconciliation of these objectives through negotiation between the Legal Services Society and the Province.
26. Sections 11(1) and (2) of the *LSS Act* empower the Legal Services Society to use different models to provide legal aid services.
27. Section 11(3) of the *LSS Act* requires the Legal Services Society, when determining the method by which legal aid will be provided, to “have regard” to the costs involved, the needs of the person or persons involved and its overall financial resources.
28. Section 11(4) says the society is not to “exceed the extent of legal and other services that a reasonable person of modest means would employ to resolve the problem.” The purpose of the standard of “a reasonable person of modest means” is to provide a rational heuristic for allocating scarce resources and to provide horizontal equity between persons who receive legal aid and those who are required to use their own resources.

29. Section 17 of the *LSS Act* prevents the Legal Services Society from running a deficit without the approval of the Attorney General and the Minister of Finance. The purpose of section 17 is to ensure the financial sustainability of the society by limiting the circumstances in which it can engage in deficit financing. Imprudent deficit financing could result in disruption of legal aid services.
30. Section 17 of the *LSS Act* is consistent with the general fiscal laws of the Province. Under section 1 of the Government Reporting Entity Regulation, BC Reg. 134/2001, the Legal Services Society is part of the government reporting entity. Section 5(2) of the *Budget Transparency and Accountability Act*, S.B.C. 2000, c. 23 requires that the main estimates presented to the Legislative Assembly include a statement of the forecast revenues and expenditures, and resulting surplus or deficit, for the government reporting entity and s. 2 of the *Balanced Budget and Ministerial Accountability Act*, S.B.C. 2001, c. 28 prohibits a forecast of a deficit in the main estimates for a fiscal year.
31. Section 18 of the *LSS Act* empowers the Attorney General to direct the society to provide a budget, and provides rules for revision and approval, including deemed approval if the Attorney General does not return the budget to the society within 30 days.
32. Section 19 of the *LSS Act* empowers the Attorney General to request financial, statistical and other information.
33. Section 21 of the *LSS Act* provides for a process for negotiating a Memorandum of Understanding between the Legal Services Society and the Province every three years. Subsection (2) sets out the matters that may be negotiated, including an estimate of funding, the types of legal matters the Legal Services Society can use that funding for, the priorities for funding, participation in justice reform initiatives and the process for review of the annual budget. Subsection (3) provides for regulations, but has not been used.
34. The purpose of the Memorandum of Understanding process, as set out in sections 21(1) and (2) of the *LSS Act*, is to reconcile the independence of the society and its detailed knowledge of the demands on the legal aid system with the need to account for public expenditures by the Province. As the entity ultimately responsible for the administration of justice in the province and as the executive government responsible to the Legislative Assembly for public expenditures, the Province clearly has an interest in all the matters set out in section 21(2).
35. The Memorandum of Understanding sets out, in Article 9, a list of “provincially-funded services.” The Memorandum of Understanding commits the Legal Services Society to provide those services to the maximum set out in the approved budget and within its capacity to deliver those services. In the event there is a surplus of provincial funding, the surplus is allocated in accordance with priorities set out in the Memorandum of Understanding. The Memorandum of Understanding states that the Provincial Transfer (as defined in Article 1(v)) will not be spent on defamation or private prosecutions, but

with this exception, the financial discipline on the Legal Services Society is that it spend funds on the agreed-upon provincially funded services and stay within its budget.

36. Without these controls, it would not be possible, within the framework of independent administration of legal aid, for the Province to limit its expenditures on legal aid while ensuring that priority services are delivered.
37. Section 21(4) of the *LSS Act* states that acts of the Legal Services Society are not rendered invalid if they are contrary to the Memorandum of Understanding and section 21(5) states that no cause of action arises as a result of a breach of the Memorandum of Understanding.
38. The purpose of subsections 21(4) and (5) is to make clear that the Memorandum of Understanding is not a legally enforceable document, but is an instrument for financial accountability between the Legal Services Society and its primary funder, the Province.
39. Assuming, without conceding, that any or all of the deleterious effects of limits on legal aid funding alleged by the plaintiffs are true, none of them are caused by any of the Impugned Provisions, but by one or a combination of the following:
 - a. the way in which the Legal Services Society prioritizes and limits the services it delivers in accordance with the budget approved by Government; and
 - b. the total amount of the Provincial Transfer.

Part 2: RESPONSE TO RELIEF SOUGHT

40. The Province consents to the granting of the relief sought in **none of the** paragraphs of Part 2 of the notice of civil claim.
41. The Province opposes the granting of the relief sought in paragraphs **1 through 6** of Part 2 of the notice of civil claim.
42. The Province takes no position on the granting of the relief sought in **none of the** paragraphs of Part 2 of the notice of civil claim.

Part 3: LEGAL BASIS

Fundamental Constitutional Principle: The Province and the Legislature Are Responsible for Provincial Expenditures

43. The relief sought by the plaintiffs implies that any limitations on the budget for legal aid and any transparency requirements for an independent entity funded to provide legal aid are unconstitutional. This cannot be correct.

44. If the plaintiffs' claim against the Province is that the amount of the Provincial Transfer should be increased, it is not a justiciable claim.
45. A fundamental principle of the Constitution of Canada, as a constitution similar in principle to that of the United Kingdom, is 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.
46. This principle is reflected in relation to the federal consolidated revenue fund in sections 53 and 54 of the *Constitution Act, 1867*, and applies in relation to provincial revenue in British Columbia under section 90 of the *Constitution Act, 1867*, section 10 of the *British Columbia Terms of Union, 1871* and section 47 of the *Constitution Act, RSBC 1996, c. 66*.
47. As a result of this principle, a court has no power to order the Province to recommend, or the Legislative Assembly to approve, a budgetary appropriation.
48. Questions of the adequacy of funding of social programs, including legal aid, are therefore political questions, not legal questions.

Section 96 of the *Constitution Act, 1867*

49. Section 96 of the *Constitution Act, 1867* empowers the Governor General to appoint the judges of the superior, district and county courts of each province.
50. Section 96 has been held to protect a core jurisdiction of these courts, based on the practices of the confederating provinces in 1867.
51. State funding of legal counsel did not exist in the confederating provinces in 1867 or for a century afterwards.
52. The majority of family law matters are litigated in provincial courts, and therefore section 96 does not apply.
53. In any event, section 96 does not require the province to provide state-funded legal counsel.

The *Charter* Provides No General Right to State-Funded Legal Counsel

54. The framers of the *Charter of Rights and Freedoms* (the "*Charter*") considered, and rejected, entrenching a positive right to state-funded legal counsel.
55. In *R. v. Prosper*, [1994] 3 S.C.R. 236, the Supreme Court of Canada rejected an invitation to create such a right under the guise of interpretation of the *Charter* as an illegitimate amendment of the Constitution of Canada, contrary to section 52(3) of the *Constitution*

Act, 1982. There is therefore no free-standing constitutional right to state-funded legal counsel.

Section 7

56. Section 7 can only be triggered if there is government action that “deprives” a person of life, liberty or security of the person. It does not guarantee positive action on the part of the government.
57. A family law proceeding is not government action that deprives a person of life, liberty or security of the person. Family law proceedings are not brought by the government, and are under the control of the litigants.

Section 15

58. A law breaches section 15(1) of the *Charter* if it creates a distinction that has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group.
59. The reason more legal aid funding goes to men than women is not *because* of membership in the respective enumerated groups, but because significantly more men than women are charged with criminal offences and, in particular, with criminal offences that require long or complex trials.
60. To the extent there is a distinction, it is a distinction mandated by the *Charter* itself, and constitutionally mandated distinctions cannot be contrary to section 15(1).
61. Wealth and income are not enumerated or analogous groups, and limitations on funding for public services are not contrary to section 15, so long as the available funding is not distributed in a discriminatory way.

Section 1

62. In the alternative, the impugned scheme is a reasonable limit, prescribed by law, on the *Charter* rights of the plaintiffs, and therefore should be upheld under section 1 of the *Charter*.
63. A *prima facie* breach of the *Charter* will be upheld if it is prescribed by law, and if it is a proportionate means to the promotion of a pressing and substantial objective. A law is proportionate if
- a. it is rationally connected to the objective;
 - b. minimally impairs the objective; and

- c. is proportionate in the strict sense, in that the deleterious effects of the infringement do not outweigh the benefits.
64. This claim raises a matter in which the government must allocate scarce resources among competing uses, and therefore calls for the greatest degree of curial deference in the application of section 1.
65. Controlling legal aid expenditures is a pressing and substantial objective, limiting funding is rationally connected to this objective, and there is no less impairing way of meeting this objective: *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR 46 at paras. 99, 100 and 108.
66. In determining whether a limitation on legal aid funding is proportionate in the strict sense, the court must consider whether the budgetary savings implied by the limitation are “minimal” in comparison with the overall budget.
67. The budgetary cost of funding legal aid so that it is no longer necessary to have financial eligibility criteria, caps on preparation hours, or limited retainers is unknowable and certainly cannot be said to be minimal. The Province’s approach to access to justice is a proportionate and reasonable approach.

Remedy and Costs

68. Further, and in any event, the remedies sought by the plaintiffs are not appropriate.
69. Further, and in any event, there is no basis for costs in any event of the cause, let alone special costs. Costs should follow the event.

Defendants’ address for service:

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Date: August 4, 2017



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

Rule 7-1 (1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.