No. S-173843
Vancouver Registry

In the Supreme Court of British Columbia

Between

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

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA and LEGAL SERVICES SOCIETY

Defendants

NOTICE OF APPLICATION

Name of applicant: Her Majesty the Queen in right of the Province of British Columbia

To: the plaintiffs Single Mothers' Alliance of BC Society (the **"SMA"**) and Nicolina Bell, and their counsel

And to: the defendant Legal Services Society (the **"LSS"**), and their counsel

TAKE NOTICE that an application will be made by the applicants to the presiding judge or master at the courthouse at 800 Smithe St., Vancouver, BC on April 13th and 14th, 2022, at 10:00am for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. That the action be dismissed on the basis that the sole remaining plaintiff does not meet the test for public interest standing;
2. Costs; and
3. Such further and other relief as counsel may advise and this Honourable Court deem just.

Part 2: FACTUAL BASIS

4. Nicolina Bell and the SMA claim various provisions of the *Legal Services Society Act*, S.B.C. 2002, c. 30, the Memorandum of Understanding between the Province and LSS, and certain LSS policies (the "**Impugned Scheme**"), and/or the manner in which the Impugned Scheme is applied, unjustifiably infringe ss. 7 and 15 of the *Charter* and impede access to the superior courts in "Family Law Proceedings" a manner inconsistent with s. 96 of the *Constitution Act, 1867*.

5. In their pleadings, the plaintiffs define "Family Law Proceedings" as proceedings under the *Family Law Act*, S.B.C. 2011 c. 25, or the *Family Relations Act*, R.S.B.C. 1996, c. 128 in the provincial or superior courts, and under the *Divorce Act*, R.S.C. 1985 c. 3, or at common law or equity, for orders:

    a. to protect a woman or her children, or both, from family violence or abuse;

    b. concerning guardianship, custody, parenting or support arrangements, where there is a history of family violence or abuse; or

    c. to prevent or repair disruption to the parent-child bond.

Further Amended Notice of Civil Claim, Part 1, para. 3

6. With regard to s. 7 of the *Charter*, the plaintiffs allege that the Impugned Scheme deprives women of "limited and moderate means" who are engaged in Family Law Proceedings of the right to life and security of the person in two ways.

7. First, they say that s. 7 of the *Charter* is infringed because women of limited and moderate means are denied access under the Impugned Scheme to the legal representation that they require in order to effectively participate in those proceedings and obtain remedies to protect themselves and their children from family violence or abuse by their male ex-spouses. Second, they say that inadequate state funded legal representation under the Impugned Scheme violates the security of the person interests of women of limited or moderate means by causing them serious psychological stress.

Further Amended Notice of Civil Claim, Part 3, paras. 6-10

8. The plaintiffs allege the Impugned Scheme infringes s. 15 of the *Charter* because 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 to be able to afford lawyers and because, 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. The plaintiffs allege that the inability of women of limited or moderate means to access state funded legal representation through the Impugned Scheme constitutes differential treatment, which widens the gap between such women and other members of society.

Further Amended Notice of Civil Claim, Part 1, para. 1, Part 3, paras. 12-14

9. The plaintiffs allege that the Impugned Scheme infringes s. 96 of the *Constitution Act, 1867* because it creates a barrier to individuals to come to court and resolve legal issues by denying access to legal services necessary to give effect to substantive rights and obligations at law.

Further Amended Notice of Civil Claim, Part 3, paras. 22, 23 and 26-28

10. The SMA describes itself in its pleadings as a "member-driven, non-profit community and advocacy organization created by and for single mothers in British Columbia." It describes its mandate as: "build[ing] community and promot[ing] empowerment among single mothers," "develop[ing] leadership skills for single mothers to participate in public policy-making," and "advocat[ing] for the rights of single mothers and their children to live free of poverty and discrimination."

Further Amended Notice of Civil Claim, Part 1, paras. 12-13

11. The claim was initially filed with two personal plaintiffs: A.B. and Ms. Bell. A.B. discontinued her claim in July 2018.

Notice of Discontinuance filed July 16, 2018

12. The Province began its discovery of Ms. Bell on October 6, 2021. Prior to resuming the discovery, the Province sought production of certain documents from Ms. Bell. The plaintiffs did not provide those documents, and the Province asked the plaintiffs for the names of third parties to begin seeking documents from them.

13. The Province understands that Ms. Bell now intends to discontinue her claim, and that the SMA intends to proceed with the claim as the sole plaintiff.

14. The SMA has indicated it intends to call three witnesses to give evidence about their "experience of having no or inadequate legal aid in Family Law Proceedings." However, the SMA has refused to identify two of the three witnesses.

Plaintiffs' Trial Brief filed January 24, 2022

15. The SMA has not sought nor been granted public interest standing in this action. Further, the plaintiffs' Further Amended Notice of Civil Claim does not plead that the SMA qualifies for public interest standing.

Part 3: LEGAL BASIS

Summary trial applications

16. A party may apply for judgment under Rule 9-7(2) of the *Supreme Court Civil Rules* either on an issue or generally in any action in which a response to civil claim has been filed. Factors to consider in determining whether it is appropriate to grant summary judgment on a discrete issue include whether the issues can be resolved justly on the evidence before the court, the amount involved, the complexity of the matter, the cost of a conventional trial, and whether the application will save time and complexity.

17. There is no utility in proceeding with a 40-day trial on a sweeping and complex constitutional challenge if the SMA does not qualify for public interest standing. The question of SMA's standing can be resolved on the pleadings and the other material before the Court, without the need for a full argument on the merits. Resolving this question ahead of trial promotes efficiency in the conduct of litigation and the administration of justice.

The test for public interest standing

18. In deciding whether to exercise its discretion to grant public interest standing, the Court must consider: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts. A plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favor granting standing. The onus is on the party seeking public interest standing to establish that it meets the test. The decision whether to grant standing is a discretionary one.

Canada v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45 [***Downtown Eastside***], para. 37

19. This case is distinguishable from *Council of Canadians with Disabilities v. British Columbia (Attorney General)*, 2020 BCCA 241 [***Council of Canadians***], in which the Court of Appeal granted standing to a particular public interest advocacy organization to bring a broadly based constitutional challenge. On the facts before the Court, the SMA simply lacks the capacity to bring a reasonably effective constitutional challenge in this case.

20. The SMA thus does not meet the second and third steps of the standing test as set out by the Supreme Court of Canada in *Downtown Eastside*, and as interpreted by the Court of Appeal in *Council of Canadians*. A purposive and flexible application of the test militates against granting the SMA public interest standing.

No genuine interest in the claim

21. This factor is concerned with whether the plaintiff has a real stake in the proceedings or is engaged with the issues they raise.

Downtown Eastside, para. 43

22. It is not enough that a potential would-be plaintiff feels strongly about an issue: an organization must show it is sufficiently engaged with a given issue in a substantive way, so it can properly carry out the role of a plaintiff.

23. The evidence put forward by the SMA shows that it is a relatively new organization with virtually no experience as a public interest plaintiff or intervener and virtually no history of engagement, study or advocacy in respect of legal aid in family law proceedings. In short, it does not have the necessary substantive engagement with the factual issues pled that an organization must have in order to meet this step in the test for public interest standing.

24. The SMA has not disclosed sufficient evidence to substantiate the material facts that it has pled. For example, it has not disclosed any documents which show a quantitative study or data analysis of the legal aid experiences of its membership.

25. In order to learn more about the subject, the SMA did conduct a year-long "listening campaign" to gather information from women about their experiences with legal aid in the context of family law litigation. Approximately 20 women responded to this campaign, and the SMA interviewed a number of them. It is unable to say how many.

26. Despite this, the SMA's deponent, who conducted all of the interviews, was not able to answer discovery questions about the legal aid experiences of any of the listening campaign participants. The SMA does

not appear to be calling as witnesses any of the women who participated in this project.

Not a reasonable and effective way to bring the issue before the Court

27. The SMA's lack of concrete information about the core factual issues is reflected in its pleadings, demonstrated in its document production, underscored in the transcripts of the examination for discovery of its provincial organizer, and continued into its trial brief. This is a fatal flaw to any claim by SMA that it should be granted public interest standing in this case. This absence of concrete information pervades each of the considerations that courts typically consider at the third step of the test for public interest standing (i.e., whether the proposed suit is a "reasonable and effective" means of bringing the issue before the courts).

28. In assessing this factor, the Court may consider:

> (a) the plaintiff's capacity to bring forward a claim, examining the plaintiff's resources, expertise, and whether the issue will be developed in a sufficiently concrete and well-developed factual setting;
>
> (b) whether the case will provide access to justice for disadvantaged persons, which should not be equated with licence to grant standing to whoever decides to set themselves up as the representative of the disadvantaged;
>
> (c) whether there are realistic alternative means that would present a context more suitable for adversarial determination, taking into consideration whether the plaintiff brings any useful or distinctive perspectives to the resolution of the issues; and
>
> (d) the potential impact of the proceeding on others whose rights are more directly affected, including whether those with a more direct and personal stake have deliberately refrained from suing.
>
> *Downtown Eastside,* paras. 49, 51

29. An examination of each of these considerations makes clear that the SMA ought not to be granted public interest standing.

(a) *The SMA does not have the requisite expertise to assume the role of sole plaintiff*

30. A potential public interest plaintiff must plead, and be in a position to substantiate with evidence, concrete and material facts regarding the nature and potential impact of the challenged legislation on the members of a defined and identifiable group.

31. The SMA is not a plaintiff capable of doing so. It cannot ensure that the Court has sufficient concrete facts before it for a full, adversarial determination of the issues. There are several aspects of the case which highlight this incapacity.

32. First, the SMA seeks to bring this action on behalf of "women of limited and moderate means" who are involved in Family Law Proceedings, which the plaintiffs have defined to include litigation "seeking orders to prevent or repair disruption to the parent-child bond." But its understanding of this group confirms that it is neither defined nor identifiable. The SMA's deponent testified, for example, that it is "impossible to draw a line, because there are many, many factors" to be considered when trying to identify women of "moderate means."

33. Similarly, the SMA's deponent testified that "disruption to the parent-child bond" could have "a million" meanings and "every case is unique. Every case. What 'disruption to the parent-child bond' is for one unit, family could be very different, very different from what it is for another family." The SMA has brought the case on behalf of an amorphous group, not an identifiable one.

34. Second, the SMA has not pleaded concrete and material facts regarding the impact of an alleged lack of access to legal aid on a defined and identifiable group. After one removes the alleged facts that pertain to the Ms. Bell and A.B., each aspect of the material facts alleged in Part 1 of the Further Amended Notice of Civil Claim is vague and abstract. There are no material and concrete facts pleaded that would show the impact of the lack of access to counsel in family law proceedings in any particular case. There are no material and concrete facts pleaded that would show relevant experiences of any identifiable individual with the Impugned Scheme.

35. Third, it is clear from the discovery and the document production that the SMA does not have the facts necessary to ground the type of challenge it seeks to bring. It is not in possession of sufficient evidence to provide the concrete and material factual context to properly adjudicate the issues it has raised.

36. Fourth, the absence of a concrete and well-developed factual context flows through into the SMA's trial brief. The trial brief lists three lay witnesses who will speak to experiences of having no or inadequate legal aid in family law proceedings. Two of these witnesses are unidentified. Despite the Province's request, the SMA has not provided the names of these unidentified lay witnesses.

37. It is not appropriate nor open to the plaintiffs to replace Ms. Bell's story as the central factual matrix of the claim with the as-yet unrevealed stories of

three lay witnesses. Ms. Bell's story was pleaded. Some of her documents were disclosed and the Province was in the process of seeking more when she decided to discontinue. The Province had the opportunity to partially examine her for discovery. The plaintiffs cannot replace this individualized factual matrix with the unpled stories of unidentified lay witnesses, without any related documents and no right of discovery. This is trial by ambush.

38. In the absence of individualized facts that could be tested through pre-trial discovery (or even identifiable fact witnesses), the plaintiffs also rely in their trial brief on the evidence of four expert witnesses. Opinion evidence in expert reports does not meet the requirement that a public interest plaintiff must provide a concrete and well-developed factual setting. It cannot supplant the role of individual fact patterns.

39. Such an approach invites the Court to abandon its judicial rule as an impartial arbiter of an adversarial process for that of a public inquiry or parliamentary subcommittee. This is not a proper use of the court's limited resources and risks usurping the constitutional role of the executive and legislative branches of government.

Downtown Eastside, paras. 29-30

40. By proceeding in this fashion, the SMA has demonstrated it does not have the capacity to discharge the role of a plaintiff litigating the issues it has raised.

(b) *The SMA should not be given licence to represent people whose situations it does not know*

41. While the SMA asserts that granting it public interest standing will further access to justice for marginalized people, as noted above, the group on whose behalf it purports to act is amorphous and difficult to define.

42. Additionally, as demonstrated by the discovery of its founding member and provincial organizer, the SMA does not have concrete information about the actual experiences of those on whose behalf it purports to act.

43. The SMA can be contrasted with other public interest litigants who have brought actions on behalf of clear and identifiable groups of people, and who demonstrate that they actually know the facts that underpin the claims that they make.

(c) *There is a realistic alternative means that would present a more suitable context for adversarial consideration*

44. The SMA essentially claims a *Charter* right to counsel for women of limited and moderate means in certain family law proceedings. Such an argument requires individual facts.

45. There is no reason to suggest that individual women litigants who have been denied legal aid representation in their own family law cases could not realistically launch a constitutional challenge to the Impugned Scheme. Indeed, this has already occurred.

P.D. v. British Columbia, 2010 BCSC 290

46. The courts have rejected claims for a general constitutional right to counsel in civil proceedings. Not every proceeding affecting a person's rights requires counsel. Without the specific facts required to establish that an individual's *Charter* rights were infringed by a lack of access to legal aid, there is no basis to determine a causal connection between the legislative scheme and the alleged breach.

Canadian Bar Assn. v. British Columbia, 2006 BCSC 1342 at paras. 112-115, aff'd 2008 BCCA 92, para. 49
British Columbia (Minister of Forests) v. Okanagan Indian Band, 2001 BCCA 647, paras. 24-28
British Columbia (Attorney General) v. Christie, 2007 SCC 21, paras. 23-27

47. Once the allegations pertaining to Ms. Bell are removed, the remaining pleadings do not contain the individual facts required to ground what is essentially a claim for a right to counsel for women of limited and moderate means in a broad array of private family disputes. The SMA is not in a position to now amend their pleadings to ameliorate this issue.

(d) Allowing the SMA to proceed could negatively impact those more directly affected

48. Given the deficiencies in the SMA's capacity to act as a public interest plaintiff, it would be inappropriate to let the action continue. A flawed plaintiff bringing a diffuse, poorly defined and ungrounded challenge could impair subsequent challenges brought by plaintiffs who do have specific and factually grounded complaints.

49. As a result, the Province says that the SMA does not meet the test for public interest standing and the action should be dismissed.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Michelle Vukosavic, made February 1, 2022;
2. The pleadings filed in this action.

The applicant estimates that the application will take two days.

[ ] This matter is within the jurisdiction of a master.

[X] This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to the application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

(a) file an application response in Form 33,

(b) file the original of every affidavit, and of every other document, that

(i) you intend to refer to at the hearing of this application, and

(ii) has not already been filed in the proceeding, and

(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

(i) a copy of the filed application response;

(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on the person,

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

Date: February 1, 2022

for Zachary Froese, counsel for the defendant
Her Majesty the Queen in right of the
Province of British Columbia

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs ..... of Part 1 of this notice of application

[ ] with the following variations and additional terms:

.....

.....

.....

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

Signature of [ ] Judge [ ] Master

APPENDIX

[*The following information is provided for data collection purposes only and is of no legal effect.*]

THIS APPLICATION INVOLVES THE FOLLOWING:

[*Check the box(es) below for the application type(s) included in this application.*]

[ ] discovery: comply with demand for documents

[ ] discovery: production of additional documents

[ ] other matters concerning document discovery

[ ] extend oral discovery

[ ] other matter concerning oral discovery

[ ] amend pleadings

[ ] add/change parties

[ ] summary judgment

[X] summary trial

[ ] service

[ ] mediation

[ ] adjournments

[ ] proceedings at trial

[ ] case plan orders: amend

[ ] case plan orders: other

[ ] experts

This **NOTICE OF APPLICATION** is prepared by Zachary Froese, Barrister & Solicitor, of the Ministry of Attorney General, whose place of business and address for service is P.O. Box 9280, Stn Prov Govt, 1001 Douglas Street, Victoria, British Columbia, V8W 9J7; Telephone: (778) 974-3373; Facsimile: (250) 356-9154.