



File No. S053359
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH
COLUMBIA**

BETWEEN:

The Canadian Bar Association

PLAINTIFF

AND:

**Her Majesty the Queen in Right of the Province of British Columbia,
The Attorney General of Canada and
Legal Services Society**

DEFENDANTS

STATEMENT OF DEFENCE

1. The Defendant, Her Majesty the Queen in Right of the Province of British Columbia ("Provincial Crown/Province"), denies each and every allegation in the Statement of Claim and put the Plaintiff to the strict proof thereof.
2. The Defendant admits the allegations of fact contained in paragraphs 6, 9, 10, 11, 22, 74, 76, 79, 82 and 84 of the Statement of Claim.

3. In answer to the Statement of Claim as a whole, the Defendant denies: the premise advanced by the Plaintiff that BC Civil Legal Aid is the only means by which a person can access justice, that BC Civil Legal Aid is limited solely to the provision of legal representation, that BC Civil Legal Aid is inadequate, that the Province has a positive constitutional obligation to provide civil legal aid, and that the Province is in breach of any constitutional obligations, or any international human rights law.

4. In further answer to the Statement of Claim as a whole, the Defendant denies that any facts of the Defendant as alleged or at all constituted either an infringement or denial of the Plaintiff's guaranteed rights and freedoms.

5. In further answer to the Statement of Claim as a whole, the Defendant says that the Statement of Claim discloses no right to the relief claimed and fails to plead the necessary material facts and particulars to disclose a cause of action against the Defendant.

6. In further answer to the Statement of Claim as a whole, the Defendant says that the facts as pleaded are too vague and political and consequently are not justiciable.

7. In response to paragraph 1, of the Statement of Claim, the Defendant says that the *Charter of Rights and Freedoms*, (the "Charter") not legal aid, ensures that all people, regardless of income level, are equal beneficiaries of the rule of law and enjoy the equal benefit and protection of the law.

8. In further response to paragraph 1, the Defendant denies that BC Civil Legal Aid is characterized by exclusions and severe restrictions that result in inadequacies that frustrate the goal of civil legal aid. The Defendant says that BC Civil Legal Aid should not be viewed in isolation but in the context of the overall range of activities and services provided or funded by the Defendant to facilitate access-to-justice in BC. BC Civil Legal Aid is a key component of this larger access-to-justice picture. BC Civil Legal Aid helps to ensure that low income individuals are not denied

access-to-justice due to their inability to pay. The goal of BC Civil Legal Aid is to assist low-income individuals to resolve problems and disputes through a combination of legal and non-legal solutions proportionate to the issues at stake. This assistance encompasses a spectrum of services that promotes the low income individual's effective participation in the justice system. The services include: information, education, advice, advocacy, and representation in various service areas.

9. In specific response to paragraph 2 of the Statement of Claim, and to the Statement of Claim as a whole, the Defendant says that the civil justice system is primarily a dispute resolution system, not a "litigation" system. Therefore, BC Civil Legal Aid services are not solely limited to the provision of legal representation. Rather, legal aid encompasses a continuum of services which includes legal representation, advice, information, education, and advocacy. Many of these services are funded by the Province and provided by the Legal Services Society ("LSS"), a non-profit organization created by the *Legal Services Society Act* ("LSS Act") and governed by a board of directors. Many others are funded in whole or in part by the Province and provided outside the scope of the civil legal aid program administered by LSS. All are specifically directed at assisting low income persons resolve their legal issues.

10. The Defendant denies the allegations contained in paragraphs 3 and 4 of the Statement of Claim.

11. In response to paragraph 5, the Defendant says that the Canadian Bar Association (the "CBA") does not have standing to bring this application. The CBA is not affected by the legal aid policy either directly or as a member of the general public and this proceeding is not a class action. In addition, a conflict of interest exists between the CBA and the interests of the persons on whose behalf they bring this claim. The Defendant denies the remaining allegations contained in paragraph 5.

12. In response to paragraph 7, the Defendant says that although the CBA's mandate may include those items listed in paragraph 7 of the Statement of Claim that paragraph fails to list the CBA's primary purpose which is to serve its members. It is committed to enhancing the professional and commercial interests of its membership and promoting their interests. The Defendant denies the remaining allegations contained in paragraph 7.

13. The Defendant denies the allegations contained in paragraph 8 of the Statement of Claim.

14. In response to the Statement of Claim as a whole and in particular to paragraphs 12, 31 and 32 the Defendant says the Provincial Crown and the Federal Crown are not jointly responsible for the provision of BC Civil Legal Aid as there is no constitutional obligation to provide civil legal aid. Furthermore, LSS does not administer BC Legal Aid on behalf of the Provincial and Federal Crowns. LSS is an independent statutory corporation with a statutory mandate to:

- i. assist low-income individuals to resolve their legal problems and facilitate access to justice for low-income individuals;
- ii. establish and administer an effective and efficient system for providing legal aid (defined in the LSS Act as "legal and other services") to low-income individuals in British Columbia; and
- iii. provide advice to the Attorney General respecting legal aid.

15. In further response to paragraph 12, the Defendant says that the Ministry of Attorney General has administrative responsibility for LSS; however, while the provincial ministry is LSS's primary funder, LSS remains operationally independent of government and is responsible for the day to day decisions regarding legal aid services. The Ministry of Attorney General cannot interfere with those decisions. The nature of LSS' relationship with government is outlined in s. 10(4) of the LSS Act which specifically states that LSS is not an agent of the Province or the Law Society.

16. The Defendant denies the allegations contained in paragraphs 13 to 20 and refers to paragraphs 5 and 6 of this Statement of Defence.

17. In response to paragraph 21, the Defendant states that the *Magna Carta* expresses the rule of law in general terms; however, it does not recognize that the integrity of the justice system requires that the state provide funding for counsel as a necessary prerequisite for a person to access justice. The principle of access to justice is addressed in the Statute of 1495 2 Henry VII, c. 12 which contemplates that both state and counsel have a role in assisting poor people to access the courts in the following ways. The State's role is to provide administrative/clerical assistance without fee to "poor persons". Counsel's role is to assist the poor person in the redress of alleged wrongs by acting without fees.

18. In further response to paragraph 21, the Defendant says that the principle of access to justice does not include an obligation or responsibility on the Provincial Crown to establish or maintain a civil legal aid program. The principle of access to justice means no more than a responsibility on the Provincial Crown to make courts of law and judges available to all persons.

19. The Defendant says paragraph 23 of the Statement of Claim misstates the provisions of the former *LSS Act*. s. 3(1) of the former Act set out the statutory objectives of LSS, being:

- To ensure that services ordinarily provided by a lawyer are afforded to "individuals" who would not otherwise receive them because of financial or other reasons; and
- To ensure that education, advice and information about law are provided for the people of British Columbia.

These statutory objectives identified the purposes and activities which LSS (a corporation created by statute) could legitimately pursue in the exercise of the powers granted to it under the statute. However, the Act did not define these "individuals" by reference to the Statistics Canada Low Income Cut-offs. Thus, being a poor person as defined by the Plaintiff (i.e., a person living on low income

as defined by Statistics Canada Low Income Cut-Offs) did not in and of itself render an individual eligible for legal aid, as suggested in paragraph 23 of the Statement of Claim.

20. In further response to paragraph 23, LSS' statutory objectives did not require or "mandate" LSS to perform any specific activities, nor to exercise any specific powers, as suggested in paragraph 23 of the Statement of Claim.

21. In further response to paragraph 23, the Defendant says that s. 3(2) of the former Act required LSS to ensure that legal services were available to a "qualifying individual" who met specified criteria, for example, a defendant in a criminal proceeding leading to imprisonment. However, that provision did not guarantee a minimum level of legal aid to all poor people, as stated in paragraph 23 of the Statement of Claim. Moreover, LSS retained the discretion to determine the appropriate type and level of service to provide in the circumstances, which would not necessarily amount to legal representation at all hearings. This is reflected in s. 9 of the former Act which contemplated the provision of legal aid by persons other than lawyers, demonstrating that the provision of legal aid was intended to include resolution of legal issues by means other than just the provision of legal counsel.

22. The Defendant says that paragraph 24 of the Statement of Claim misstates the events that occurred around the time that the LSS Act was enacted. The events are more accurately described as follows: In late 2001 the Province commenced an extensive examination of its financial and service priorities in light of a serious financial crisis. As a result of that examination, the Government implemented a number of budget constraints including a reduction to the legal aid grant to LSS. Due to these reductions, LSS reduced services and established a new service delivery model in the 2002/03 fiscal year. LSS also developed a number of new approaches to delivering legal aid including the use of duty counsel and advice lawyer services. The restructured service delivery model focused more funds for service delivery by reducing administrative costs and implementing a continuum of

services that included legal information, education, advice, advocacy and representation.

23. In further response to paragraph 24 of the Statement of Claim, the Defendant says that following the funding reductions to LSS the Government amended the *LSS Act* to provide LSS with the flexibility needed to implement the service changes. LSS participated in consultations and made proposals for the amendments to the former Act. These changes allowed LSS to provide legal aid based on public need for services and available funding, with an emphasis on maintaining flexibility, high quality services and LSS's independence.

24. In further response to paragraph 24 of the Statement of Claim, the Defendant says that the new *LSS Act* introduced in May 2002 did not radically alter or reduce the provision of BC Civil Legal Aid; rather, it changed the focus of how LSS provided legal aid coverage. The current *LSS Act* does not contain any provision which requires LSS to provide legal aid coverage in any particular criminal or civil proceeding. It does, however, provide principles to guide LSS in its objectives including: incorporating the perspectives of both justice system service providers and the general public, that LSS coordinate legal aid with other aspects of the justice system and with community services, and that LSS be flexible and innovative in the manner in which it provides legal aid.

25. Section 11 of the current *LSS Act* encourages LSS to provide legal aid by any method, including providing services ordinarily provided by a lawyer or other services. The focus of the provision of legal aid is, therefore, geared towards providing alternate assistance such as dispute resolution services, legal education and information, in addition to legal representation.

26. In further response to paragraph 24, the Defendant says that the Province has no obligation to provide or fund a legal aid program, however, even if the Province provided funding for a legal aid program which had the features or characteristics under the former *LSS Act*, the Province would retain the authority to modify or

withdraw funding for such a program in any subsequent year. The Province's decision to implement a remedial program does not "constitutionalize" it so as to fetter its repeal.

27. The Defendant denies the allegations contained in paragraph 25 of the Statement of Claim. Furthermore, the Defendant says that the Plaintiff's allegations are based on the mistaken assumption that the effectiveness of publicly funded access to justice programs is a function of the amount of money spent by government on those programs; that if the provincial or federal crown spends more money on civil legal aid programs, individuals will automatically benefit from more effective programs. However, equating the expenditure of dollars to successful program outcomes is a false equation. Spending money on a problem doesn't necessarily make the problem go away.

28. In response to paragraph 29 of the Statement of Claim, the Defendant says that the Federal Crown currently contributes towards the Defendant's expenditures in respect of immigration and refugee legal aid under the *Agreement Respecting Legal Aid in Criminal Law, Youth Criminal Justice Act and Immigration and Refugee Matters* made between the Defendant and the Federal Crown.

29. The Defendant denies the allegations contained in paragraph 30 of the Statement of Claim.

30. The Defendant denies the allegations contained in paragraphs 31 and 32 of the Statement of Claim and refers to paragraph 14 and 15 of this Statement of Defence.

31. The Defendant denies the allegations contained in paragraphs 33 and 34 of the Statement of Claim.

32. The Defendant denies the allegations contained in paragraphs 35 and 36 of the Statement of Claim and refers to paragraphs 14 and 15 of this Statement of Defence.

33. The Defendant denies the allegations contained in paragraph 37 of the Statement of Claim.

34. In response to paragraphs 38 and 39 of the Statement of Claim, the Defendant says that the role of LSS and its relationship to the Defendant are described in paragraphs 9, 14, 15 and 19 of this Statement of Defence. The Defendant denies the remaining allegations contained in paragraphs 38 and 39 of the Statement of Claim.

35. The Defendant denies the allegations contained in paragraphs 40 to 44 of the Statement of Claim.

36. In response to paragraphs 45 and 46 of the Plaintiff's Statement of Claim, the Defendant says that BC Civil Legal Aid goes beyond just providing legal representation in family law matters. BC Civil Legal Aid recognizes that access to justice for economically disadvantaged people should involve a multidisciplinary approach using a continuum of legal and non-legal strategies and services to address problems depending on the nature of the interest at stake. These will include a wide spectrum of services ranging from public legal information, to non-litigation (alternative dispute resolution) strategies such as mediation and family case counseling, to the use of "unbundled" legal information, advice and assistance services where lawyers provide limited advice and representation dealing with only certain components or aspects of legal matters (e.g., duty counsel services; limited advice services), to legal representation services in some cases. BC Civil Legal Aid includes the civil legal aid programs, supports and services that the Defendant has established and administers outside the scope of the "traditional" civil legal programs administered by the Legal Services Society.

37. In further response to paragraphs 45 and 46 of the Plaintiff's Statement of Claim, the Defendant also says that BC Civil Legal Aid provides legal counsel services for serious legal problems, including situations where:

- financially eligible persons need a restraining order, or a change to a current custody or access order because their children are at risk of physical violence;
- financially eligible persons need a supervised access order because their children are at risk;
- financially eligible persons need a non-removal order because the other parent is threatening to take a child out of the Province permanently;
- the Ministry of Child and Family Development has taken away or threatens to take away a financially eligible person's child;
- financially eligible persons cannot represent themselves due to a serious condition or disability and their family matter must be resolved in order to avoid further harm;
- court documents reveal past sexual, physical, or emotional abuse and the offending parent or partner is back in the community;
- a child is kidnapped by an access parent and there is an existing custody order or separation agreement;
- the financially eligible person is a respondent in a maintenance enforcement committal proceeding and would be sent to jail as a result of failure to pay maintenance;
- there has been a complete denial of access for three months or more in breach of a court order or a separation agreement;
- the financially eligible person is a victim of litigation harassment.

38. In further response to paragraphs 45 and 46, the Defendant says that in the 2005/2006 fiscal year, the Defendant increased its legal aid grant to LSS by \$4.6 million to support family legal aid services in British Columbia. The additional funding was allocated to providing a broader range of services for families, including making the Provincial court family duty counsel pilot project a permanent legal aid program, extending the family duty counsel program into the Supreme Court, providing additional family legal representation services in cases involving domestic violence, and establishing a limited advice referral program for eligible clients who cannot avoid taking their case to the Supreme Court. These referrals provide clients with a lawyer who can assist them with the drafting of legal

documents, negotiation with opposing parties or counsel, representation at judicial case conferences, and assistance with mediation or collaborative law processes.

39. In further response to paragraphs 45 and 46, the Defendant says that numerous changes have taken place within the family law sphere which underscores the movement towards settlement oriented resolution. For example, revisions have been made to legislation and rules that govern the resolution of family law disputes in the court system. In 1997 the *Divorce Act* was amended to include mandatory Child Support Guidelines (which were also adopted under the *B.C. Family Relations Act*). These changes were designed to make the calculation of child support fair, predictable and consistent so as to reduce conflict and tension between parents and improve the efficiency of the legal process. In the last several years, the Supreme Court rules and the Provincial Court rules in B.C. were also changed to put more focus on settlement oriented procedures and make the court process more accessible to the public. The Defendant denies the remaining allegations contained in paragraphs 45 and 46.

40. The Defendant denies the allegations contained in paragraphs 47 to 51 of the Statement of Claim and in particular says British Columbia Civil Legal Aid does not cause impairment of the fundamental interests of the Plaintiff or any other person.

41. In response to paragraphs 52 and 53 of the Statement of Claim, the Defendant says that BC Civil Legal Aid continues to provide assistance in the area of poverty law matters. The goal of BC Civil Legal Aid is to assist low-income individuals to resolve problems and disputes through a combination of legal and non-legal solutions proportionate to the issues at stake (see paragraph 8 above). The "traditional" model of legal aid focused primarily on providing lawyers to assist people with poverty law matters. The new model of BC Civil Legal Aid now focuses on providing people with a broad range of information, support and advice services to help solve their own problems. The Defendant provides LSS approximately \$2.0 million per year for public legal education and information

services, and LSS continues to provide or contribute towards numerous legal information, support and advice services to assist low-income individuals with poverty law matters, including:

- Publication of numerous poverty law related information pamphlets and booklets.
- Creation of a summary advice telephone service called LawLINE, which is a toll-free hotline providing information about print and website materials and resources, referrals to other services, and limited legal advice that may include written opinions and advice, correspondence, help writing documents, and contact with third parties (but does not include being represented in court or other hearing).
- Creation of LawLINK, a website designed to help low income people and their advocates find current, relevant, and usable self-help legal information on the Internet.
- Maintaining website services, such as LSS website and LSS' Family Law website with extensive public legal information content and updated details on legal aid services.
- Contributing funding for PovNet, a website developed specifically for poverty law issues and for individuals involved in this sphere, such as people on welfare, advocates, community groups and those involved in anti-poverty work.

42. In further response to paragraphs 52 and 53, the Defendant says that making access to justice a reality for low-income individuals also requires broader legislative, institutional and process reform. To that end, the Defendant has undertaken a number of initiatives with the objective to make the civil justice system simpler and more accessible. One initiative particularly relevant to poverty law matters due to its focus on administrative tribunal processes to facilitate access to justice is the Defendant's recently completed a system-wide review of British Columbia's administrative justice system, culminating in the new *Administrative Tribunals Act*. This initiative will substantially improve the experience of low income people whose lives are affected every year by tribunals by making the administrative justice system fairer, more open and accessible. The Defendant denies the rest of the allegations contained in these paragraphs.

43. The Defendant denies the allegations in paragraphs 54 to 57 of the Statement of Claim and in particular says British Columbia Civil Legal Aid does not cause the impairment of the fundamental interests of the Plaintiff or any other person.

44. In response to paragraphs 58 to 60, the Defendant says that BC Civil Legal Aid provides assistance for eligible clients who need help initiating refugee claims. This assistance includes preparation of personal information forms and legal representation at hearings in merit tested cases. Legal representation is also provided for merit tested judicial review and appeal cases. The Defendant denies the rest of the allegations contained in these paragraphs.

45. The Defendant denies the allegations contained in paragraphs 61 to 66 of the Statement of Claim and in particular says British Columbia Civil Legal Aid does not cause the impairment of the fundamental interests of the Plaintiff or any persons who are immigrants and refugees.

46. The Defendant denies the allegations contained in paragraphs 67 and 68 of the Statement of Claim.

47. In response to paragraphs 69 to 72 of the Statement of Claim, the Defendant says the meaning of the rule of law is misstated. The rule of law is contained in the preamble of the *Charter* but, it is not a substantive *Charter* provision, it does not give any independent rights, and it is not a source of positive law. The right of access to justice is a component of the rule of law, an unwritten constitutional principle. It is, therefore, subject to regulation by the legislature and consequently may be overridden by an enactment of the legislature. The rule of law in and of itself cannot be used as a basis for striking down otherwise valid legislation or as a means of imposing a positive obligation on a government. The Defendant denies the remaining allegations contained in those paragraphs.

48. In response to paragraph 75 of the Statement of Claim, the Defendant says that the principle of judicial independence is not compromised simply because

someone appears in court unrepresented. People of all income levels regularly attend and participate in court proceedings without legal representation. Indeed, some people simply do not want the assistance of a lawyer and prefer to represent themselves in court. The Defendant denies the rest of the allegations contained in paragraph 75.

49. The Defendant denies the allegations contained in paragraphs 73, 77, and 78 of the Statement of Claim.

50. The Defendant denies the allegations contained in paragraphs 80, 81, 83, 85 86 and 87 of the Statement of Claim.

51. In response to the Statement of Claim as a whole and in particular, to paragraphs 88 to 90 and paragraphs 3 and 31 of the Statement of Claim, the Defendant denies that there are violations of international human rights laws and alternatively, the Defendant says that even if there were any violations of international human rights laws, which is not admitted but specifically denied, the international human rights laws in issue are not enforceable in Canadian law.

52. The Defendant says that paragraph 84 misstates the meaning of s. 36(1) of the *Constitution Act*. This section deals primarily with the provision of equalization payments to the provinces. It does not, as suggested by the Plaintiff, impose a positive obligation on government to implement a specific public service such as civil legal aid. Moreover, the type of public services the provincial or federal governments decide to fund is an exercise of legislative power and as such is non-justiciable. Therefore, the Defendant says there is no jurisdiction to grant the relief sought by the Plaintiff.

53. In response to the Statement of Claim as a whole, the Defendant denies that any acts of the Defendant's as alleged or at all constituted either an infringement or denial of the Plaintiff's guaranteed rights and freedoms.

54. In the alternative, even if such actions did so constitute either an


infringement or denial of the Plaintiff's guaranteed rights and freedoms, which is not admitted, but specifically denied, the Defendant says that actions taken are reasonable limits prescribed by law which can be demonstrably justified in a free and democratic society, pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c 11*.

55. In the further alternative, the Defendant says that even if such actions did so constitute either an infringement or denial of the Plaintiff's guaranteed rights and freedoms, which is not admitted, but specifically denied, the Constitution does not authorize this Honourable Court to impose by court order a legal responsibility on government to fund and oversee a legal aid program that has no limits imposed by government and has no regard to other governmental priorities.

56. The Defendant therefore submits:

- (a) the action herein be dismissed;
- (b) the Defendants be entitled to costs;
- (c) this Honourable Court grant such further and other relief counsel may advise and the Court permit.

DATED at Victoria, British Columbia, this 7th day of October, 2005.


GEORGE H. COPLEY Q.C.,
Ministry of Attorney General, Legal
Services Branch
Solicitor for the Defendant, Her
Majesty the Queen in Right of the
Province of British Columbia

This STATEMENT OF DEFENCE is filed by George H. Copley Q.C., Barrister and Solicitor, Ministry of Attorney General, Legal Services Branch, P.O. Box 9280, Stn Prov Gov't, 6th Floor, 1001 Douglas Street, Victoria, B.C. V8W 9J7 (Facsimile (250) 356-9154 or Phone: (250) 356-8875).

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**STATEMENT OF DEFENCE OF
HER MAJESTY THE QUEEN IN RIGHT OF THE
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