COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Canadian Bar Assn. v. British Columbia,***
2008 BCCA 92

Date: 20080303
Docket: CA034484

Between:

Canadian Bar Association

Appellant
(Plaintiff)

And

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

Respondents
(Defendants)

And

BC Coalition of People with Disabilities
and National Anti-Poverty Organization

Intervenors

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Thackray
The Honourable Mr. Justice Lowry

J.J. Camp, Q.C.,
S. Matthews,
M. Buckley and
G. Brodsky — Counsel for the Appellant

G.H. Copley, Q.C. and
J. Penner — Counsel for the Province of British Columbia

H.J. Wruck, Q.C., A.J. Semple and S.C. Postman	Counsel for the Attorney General of Canada
J. Conkie, Q.C. and M. Giles	Counsel for the BC Coalition of People with Disabilities and the National Anti-Poverty Organization
Place and Date of Hearing:	Vancouver, British Columbia October 22 & 23, 2007
Place and Date of Judgment:	Vancouver, British Columbia March 3, 2008

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Mr. Justice Lowry

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] In this action, the Canadian Bar Association challenges the legal aid system in British Columbia. On a preliminary motion, Chief Justice Brenner dismissed the action on the dual bases that the Association lacks standing to bring the claims and that the statement of claim should be struck under Rule 19(24) of the *Rules of Court* as disclosing no reasonable claim.

[2] The action commenced by the Association is far-reaching. Broadly speaking, the Association claims that the legal aid system is so inadequate as to offend the Constitution of Canada, written and unwritten, as well as international human rights instruments. It seeks declarations to that effect, an order directing the Federal and Provincial Crowns to establish and maintain legal aid consistent with the norms it says have been breached, and an order that the court retain ongoing supervisory jurisdiction to ensure compliance.

[3] The Association is the national bar organization. It does not have a direct interest in the action. Rather, success in the action, in addition to enhancing legal aid to members of the community, would increase the quantum of legal fees paid to lawyers, many if not most of whom are members of the Association.

[4] The action is against Her Majesty the Queen in Right of British Columbia and the Attorney General of Canada, between them said by the Association to have responsibility for the inadequate funding. It has joined as well the Legal Services Society. The Legal Services Society is responsible for administering the legal aid scheme in the province. As the real issues raised are between the Association and

the two levels of government, the Legal Services Society made no submissions on the appeal.

[5] We did hear from intervenors, the BC Coalition of People with Disabilities and the National Anti-Poverty Organization, in support of the Association.

[6] This appeal is from the order of Chief Justice Brenner dismissing the action and from the order of costs. His reasons for judgment dismissing the action are indexed at 2006 BCSC 1342. His reasons for judgment ordering the Association to pay costs are indexed at 2007 BCSC 182.

[7] Chief Justice Brenner had before him two applications, one from Canada contending that the Association lacked standing and that the claim should be struck under Rule 19(24)(a), (b) and (d), and one from British Columbia contending that the Association lacked standing and that the claim should be struck under Rule 19(24)(a). He approached the applications by first considering the issue of standing, and then moved to the pleadings and Rule 19(24).

[8] In considering the issue of standing Chief Justice Brenner reviewed the quartet of cases: ***Thorson v. Canada (Attorney General)***, [1975] 1 S.C.R. 138; ***Nova Scotia (Board of Censors) v. McNeil***, [1976] 2 S.C.R. 265; ***Canada (Minister of Justice) v. Borowski***, [1981] 2 S.C.R. 575; and ***Finlay v. Canada (Minister of Finance)***, [1986] 2 S.C.R. 607, and extracted three questions as those that must be asked in analyzing a party's standing to seek a declaration:

> (1) whether there is a serious issue as to the invalidity of the legislation;

(2) whether the plaintiff is affected directly by or has a genuine interest in the validity of the legislation; and

(3) whether there is no other reasonable and effective manner by which the issue may be brought before the court.

[9] The Association contended unsuccessfully before Chief Justice Brenner, and repeated the submission before us, that it need establish only a serious issue, that it has a genuine interest in the issue, and that there is no other reasonable and effective manner by which the issue may be brought before this Court. In other words, the Association contends that an attack on government action is not required to be against legislation, but rather can be, as here, against a scheme. The Association explains the formulation of the criteria in the quartet and the reference to "the legislation" or to "the Act" in those cases as fit for the quartet, all of which involved legislation, but says there is no need in principle for standing to be determined by the role legislation plays in the claim.

[10] Although the reasons for judgment addressed the issue of standing before the Rule 19(24) application and the state of the pleadings, I would address the issues in the other order. I recognize, in addressing the pleadings as the first issue, that the issues of standing and pleadings are related. Chief Justice Brenner correctly acknowledged the relationship between the concepts of standing, justiciability and reasonable cause of action.

[11] In the absence of valid pleadings, I find it difficult to see clearly the content of "the issue" referred to in the three questions posed by Chief Justice Brenner. This cloud between the issue of standing and its answer persuades me that I should not

express an opinion on the matter of standing without first considering the validity of the claims raised in the pleadings. In other words, I do not consider that this Court should resolve the Association's standing to bring the action absent a statement of claim that satisfies the minimum standards of Rule 19(24).

[12] In this case, Chief Justice Brenner assumed for the purpose of discussing Rule 19(24) that the Association had standing. He correctly observed, at para. 97, that "there is a particular need for generous reading [of pleadings] in constitutional or *Charter* litigation". Likewise, he correctly described the distinctive aspects of a declaratory action:

> [98] In the traditional formulation, a cause of action consists of a right, a breach of the right, and consequential damage. But an action seeking declaratory relief may arise precisely because the existence of the right is not yet established:
>
> > A declaratory judgment is a formal statement by the courts pronouncing upon the existence or non-existence of a legal state of affairs. It declares what the legal position is and what are the rights of the parties.
> >
> > Stanley A. De Smith, *Judicial Review of Administrative Action*, 5th ed. (London: Sweet & Maxwell, 1995), at 735.
>
> [99] Wilson J. expanded on the anomalous qualities of the declaratory judgment in *Operation Dismantle* [*v. The Queen*, [1985] 1 S.C.R. 441] at 480:
>
> > Borchard, *Declaratory Judgments* (2nd ed. 1941), at p. 27, suggests that declaratory relief in cases which are not susceptible of any other relief is distinctive in that:
> >
> > > ... no "injury" or "wrong" need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty …

[13] Yet even recognizing a highly generous approach to the pleadings, I cannot say the Chief Justice erred in his conclusion that, as pleaded, the statement of claim does not disclose a reasonable cause of action. I consider that the statement of claim does not meet the requirements of the *Rules of Court*. In so saying, I do not foreclose the possibility that, properly pleaded, a claim addressing perceived deficiencies in legal aid may satisfy Rule 19(24).

[14] Only then, when a reasonable claim is pleaded, can one see whether the party bringing the claim has standing to engage the question through the court process, and consider cases such as ***Canadian Assn. of the Deaf v. Canada***, 2006 FC 971, [2007] 2 F.C. 323.

[15] In the present case, the pleadings are simply too general to permit the enquiry sought or the relief contended for.

The Statement of Claim

[16] The statement of claim begins with an overview. It then describes the parties, the history of legal aid, the alleged faults of Canada and British Columbia, and the role of the Legal Services Society. It moves on to allege inadequacies in coverage, eligibility and quality of service, and asserts the various breaches of the constitutional and international obligations earlier referred to. I am not going to repeat its entire contents, but it is necessary to replicate some passages to illustrate the content of the pleading these reasons consider.

[17] The persons on whose behalf the Association advance its claims are described in the statement of claim:

> *8 The CBA brings this claim on behalf of people living on low incomes as defined by Statistics Canada Low Income Cut-offs ("LICOs") and who lack sufficient means to obtain proper advice and to obtain redress, including legal representation if necessary, in matters where their Fundamental Interests are threatened. ("Poor People").*

[18] The rights that are said to be systemically infringed are described in this way:

> *2. The inadequacies in BC Civil Legal Aid are particularly pronounced in the areas of family law, poverty law, and immigration and refugee law, and effectively deny access to justice to people who cannot afford legal counsel in matters that threaten their fundamental interests as follows:*
>
> *(a) life;*
>
> *(b) liberty;*
>
> *(c) livelihood;*
>
> *(d) equality;*
>
> *(e) health;*
>
> *(f) housing;*
>
> *(g) safety;*
>
> *(h) security; and*
>
> *(i) sustenance.*
>
> *(collectively, "Fundamental Interests").*
>
> *3. BC Civil Legal Aid does not comply with the Canadian Constitution and obligations under international human rights law because it:*

> *(a) is inconsistent with the rule of law, a foundational constitutional principle which guarantees:*
>
> *(i) meaningful access to the courts; and*
>
> *(ii) equal access to the courts;*
>
> *(b) is inconsistent with the norm of constitutional equality, a foundational constitutional principle which further guarantees equal and meaningful access to the courts;*
>
> *(c) undermines independence of the judiciary, a foundational constitutional principle;*
>
> *(d) violates s. 7 of The Canadian Charter of Rights and Freedoms (the "Charter");*
>
> *(e) violates s. 15(1) of the Charter;*
>
> *(f) violates s. 28 of the Charter;*
>
> *(g) violates s. 36(1) of the Constitution Act, 1982; and*
>
> *(h) is inconsistent with Canada's obligations under international human rights law.*
>
> *4. BC Civil Legal Aid results in a systemic denial of access to justice to, and systemic discrimination against, Poor People who cannot afford legal assistance and representation in matters that threaten their Fundamental Interests.*
>
> *5. The Canadian Bar Association ("CBA") brings this claim in the public interest on behalf of Poor People who are denied access to justice in matters where their Fundamental Interests are threatened by the unconstitutional inadequacies in BC Civil Legal Aid.*

[19] The statement of claim alleges the legal needs of Poor People in these terms:

> *16. Poor People experience legal problems that are:*
>
> *(a) multi-dimensional in nature;*
>
> *(b) frequent;*

(c) not necessarily confined to discrete disputes; and

(d) systemic.

17. Poor People experience legal problems:

(a) accessing work and/or resolving disputes with public and private income support programs including:

(i) social assistance or welfare;

(ii) disability benefits;

(iii) employment insurance;

(iv) Canada Pension Plan benefits;

(v) Old Age Pension Plan benefits;

(vi) workers' compensation; and

(vii) work permits for refugees;

(b) accessing housing, including housing disputes:

(i) with landlords;

(ii) with residential housing authorities; and

(iii) pertaining to foreclosures.

18. Poor People are subject to extra layers of regulation as compared to people who do not live in poverty. For example, embedding social assistance in legislation and regulations greatly increases the legal needs of Poor People in the interpretation and application of such legislation and regulations.

19. Income support programs have complex bureaucracies and regulatory schemes. Obtaining benefits to which a person is entitled under law may involve complex judicial or quasi-judicial proceedings. Similar complexities frequently arise regarding access to housing. Administrators of income support programs, landlords and residential housing authorities are usually represented by counsel in any legal dispute that arises.

20. In addition, Poor People are exposed to the same type of civil legal problems as people who are not living in poverty but with greater frequency because of inherent vulnerabilities caused by their poverty.

[20] The faults on the part of Canada are alleged to be:

30. The Federal Crown has failed to fulfill its BC Civil Legal Aid obligations, particulars of which include:

(a) the Federal Crown has severely reduced the funding for civil legal aid;

(b) the Federal Crown has failed to stipulate minimum national standards for civil legal aid;

(c) the Federal Crown does not stipulate mandatory areas of civil legal aid coverage;

(d) the Federal Crown does not adequately stipulate how immigration and refugee legal aid funding shall be spent;

(e) the Federal Crown does not require that the Provincial Crown expend any of the funds intended for civil legal aid on civil legal aid; and

(f) the Federal Crown no longer tracks or reports on how much it contributes to civil legal aid nor is it able to account for its contribution.

[21] The faults on the part of British Columbia are alleged to be:

32. The Provincial Crown has failed to fulfill its BC Civil Legal Aid obligations. Particulars of its failure include:

(a) the Provincial Crown has severely reduced the funding for civil legal aid;

(b) the Provincial Crown has imposed restrictive financial eligibility requirements such that many Poor People are ineligible to receive any civil legal aid;

> *(c) the Provincial Crown has restricted coverage for legal aid such that matters that threaten the Fundamental Interests of Poor People are excluded from civil legal aid coverage;*
>
> *(d) the Provincial Crown has restricted legal aid services such that Poor People who do receive civil legal aid do not receive meaningful legal aid in cases where the service provided does not include legal representation; and*
>
> *(e) the Provincial Crown has restricted the amount of counsel time and/or services provided such that the legal representation provided to Poor People is inadequate.*

[22] In similarly unspecific language, the statement of claim alleges inadequacies in legal aid:

> *41. BC Civil Legal Aid is inadequate in the following ways:*
>
> *(a) matters that engage Fundamental Interests are excluded from BC Civil Legal Aid coverage, either expressly or by omission from inclusion;*
>
> *(b) financial eligibility guidelines for BC Civil Legal Aid are too restrictive in that they exclude many Poor People; and*
>
> *(c) where a matter is covered by BC Civil Legal Aid, the services provided and litigation expenses, including disbursements, are too restrictive.*
>
> *42. Inadequacies in BC Civil Legal Aid are the result of the failures of the Federal Crown, the Provincial Crown and [Legal Services Society] to discharge their obligations to provide BC Civil Legal Aid.*
>
> *43. BC Civil Legal Aid is broadly inadequate in many areas and these inadequacies are profoundly experienced in the following areas where Fundamental Interests of Poor People are engaged:*
>
> *(a) family law;*
>
> *(b) poverty law; and*

> *(c) immigration and refugee law.*
>
> *44. Each of these areas of law involves complex and sophisticated substantive law and procedural rules which cannot be accessed in a meaningful way in the absence of assistance from a lawyer. Further particulars of the inadequacies in BC Civil Legal Aid in these areas of law follow.*

[23] In addition to the three areas of law referred to in para. 43, by particulars the Association added prison law, and alleged deficiencies in it.

[24] The three areas of law referred to in para. 43 are individually addressed in the statement of claim, but again in general terms. For example, deficiency of legal aid in the area of family law is alleged in this fashion:

> *45. Many family legal issues and disputes are excluded from coverage under BC Civil Legal Aid. As a result, many Poor People proceed without legal representation in family law disputes each year.*
>
> *46. Where coverage for a family law matter is provided, the legal aid services provided are severely restricted and Poor People receive inadequate representation due to:*
>
> *(a) time limits placed on the amount of funded legal aid representation; and*
>
> *(b) limits placed on aspects of the case for which funded legal aid representation will be provided.*
>
> *47. Unequal access to justice for Poor People results in the following inappropriate, unfair and unjust circumstances in family law proceedings, especially where the litigants are unrepresented or receive inadequate representation:*
>
> *(a) they do not understand the legal issues involved and their legal rights;*
>
> *(b) they must self-represent in court, and/or in mediations and negotiations;*
>
> *(c) they are unable to articulate their positions;*

(d) they may agree to inappropriate and unworkable custody and access arrangements, or inadequate spousal or child support due to their ignorance of their rights or their inability to articulate them;

(e) they may intentionally or unintentionally abandon their rights with no remedy; and

(f) courts make orders that are flawed because of the inadequacies in the case presented.

48. The risks and the harm associated with the inadequacies in BC Civil Legal Aid in family law matters are particularly acute where the opposing party is represented by counsel.

49. These problems are compounded for Poor People who are also Aboriginal or who face language or cultural barriers, who are disabled, or who face racism, homophobia and other forms of discrimination.

50. Women are disproportionately poor compared to men and are disproportionately reliant on legal aid in family law matters. Therefore, inadequacies in BC Civil Legal Aid in family law matters result in disproportionately unequal access to justice by poor women and disproportionately expose poor women to certain adverse effects, such as the risk of continued abuse in domestic relationships.

51. Inadequacies in BC Civil Legal Aid in family law matters impair the Fundamental Interests of Poor People, particulars of which include:

(a) financial impoverishment and attendant deprivations, including the lack of adequate sustenance;

(b) an abused spouse being financially compelled to remain in an abusive relationship;

(c) reduced financial security and access to the means to meet basic needs;

(d) being forced to rely on social assistance;

(e) the risk of incarceration and the loss of other civil liberties;

(f) lack of control over the determinations of marital and family status which affect other rights including the right to marry;

> *(g) the right to be legally recognized through adoption and the rights and obligations which flow therefrom;*
>
> *(h) impairment of equality and dignity; and*
>
> *(i) threats to physical and psychological security of themselves and their children.*

[25] Similarly, the particulars allege general faults with legal aid in matters of prison law, including:

> *(e) as [a] result of exclusions from coverage, many Poor People who are prisoners proceed without legal representation in prison law matters each year;*
>
> *(f) [Legal Services Society] prioritizes coverage of prison law matters to inmates in provincial institutions and as a result coverage of prison law matters for inmates in federal institutions within British Columbia are severely restricted and more restricted than for inmates in provincial institutions;*
>
> *[…]*
>
> *(h) unequal access to justice for Poor People in prison law matters results in the following inappropriate, unfair and unjust circumstances, especially where the litigants are unrepresented or receive inadequate representation:*
>
> *(i) they do not understand the legal issues involved and their legal rights;*
>
> *(ii) they must self-represent in hearings;*
>
> *(iii) they are unable to articulate their positions;*
>
> *(iv) they may intentionally or unintentionally abandon their rights with no remedy; and*
>
> *(v) hearing bodies and courts make orders that are flawed because of the inadequacies in the case presented;*
>
> *(i) these problems are compounded for particularly vulnerable segments of the prison population including Aboriginal inmates,*

> *female inmates, inmates serving life sentences and inmates with mental health problems;*
>
> *(j) inadequacies in BC Civil Legal Aid in prison law matters impair the Fundamental Interests of Poor People, particulars of which include:*
>
> *(i) deprivations of liberty;*
>
> *(ii) threats to physical and psychological security; and*
>
> *(iii) impairment of equality and dignity.*

[26] The statement of claim then pleads violation of the principle of judicial independence; breach of s. 7 (life, liberty and security of the person), s. 15 (equality rights), and s. 28 (equal rights for males and females) of the ***Canadian Charter of Rights and Freedoms***; breach of s. 36(1) (equalization and regional disparities) of the ***Constitution Act, 1982***; and breach of international human rights laws.

The Decision of the Supreme Court of British Columbia

[27] In its application, British Columbia contended that the statement of claim should be struck as disclosing no reasonable claim (Rule 19(24)(a) of the *Rules of Court*) and the action accordingly should be dismissed. In its application, Canada agreed and contended as well that the pleadings should be struck and the action dismissed under Rules 19(24)(b) and (d), that is, that the pleadings were "unnecessary, scandalous, frivolous or vexatious" and were "otherwise an abuse of the process of the court".

[28] Chief Justice Brenner dismissed the action under Rule 19(24)(a). He acknowledged that the Association said it was advancing a "systemic claim", but said:

> [102] The statement of claim does not, in fact, seek a declaration that there is a constitutional right to civil legal aid. Had it done so, the claim would almost certainly have been struck in view of the ample authority that there is no general constitutional right to legal aid, but only a right arising in specific circumstances: see *G. (J.)* [*New Brunswick (Minister of Health and Community Services) v. G. (J.),* [1999] 3 S.C.R. 46] at para. 86; *British Columbia (Minister of Forests) v. Okanagan Indian Band* (2001), 95 B.C.L.R. (3d) 273 (C.A.) at paras. 24-28.
>
> [103] In oral submissions, the plaintiff emphasized that it is advancing a "systemic claim", not a right to counsel claim "writ large". Saying it is so, however, does not make it so. In my view, the plaintiff has simply attempted to circumvent the unequivocal state of the law in Canada by framing the claim as a review for constitutional compliance.
>
> [Emphasis added.]

[29] Chief Justice Brenner concluded that there were two fundamental flaws to the Association's position: (i) unwritten constitutional principles do not rise to the level of free-standing rights; and (ii) ***Charter*** breaches can only be established in the context of individual breaches.

[30] As to the specific allegations of breaches of unwritten constitutional principles, Chief Justice Brenner referred to ***Reference re Secession of Quebec***, [1998] 2 S.C.R. 217, and this Court's decision in ***Christie v. British Columbia (Attorney General)***, 2005 BCCA 631, 48 B.C.L.R. (4th) 267 (since rev'd [2007] 1 S.C.R. 873, 2007 SCC 21) ["***Christie (BCCA)***"] and concluded:

> [109] Unwritten constitutional principles are not free-standing rights that are capable of being breached. In my view no reasonable claim is

disclosed by those paragraphs of the statement of claim that allege breaches of "foundational constitutional principles" or "implicit" provisions of the Constitution. Accordingly, I would strike all portions of the statement of the claim referring to such breaches on that basis.

[31] Turning to the allegation of ***Charter*** breaches, Chief Justice Brenner held as to ss. 7 and 15:

> [112] But not every legal proceeding affecting a person's s. 7 rights requires representation by counsel: *G. (J.)* at paras. 86-91. The plaintiff has failed to plead material facts for the three elements (the right, the breach, and the consequential damages) comprising the alleged breach that would give rise to a reasonable claim in particular circumstances. On the contrary, the CBA claims that:
>
> > 78. Particulars of the breaches of s. 7 include:
> >
> > (a) the Provincial Crown repealed s. 3 of the Former [Legal Services Society] Act;
> >
> > (b) the Provincial Crown and [Legal Services Society] are in violation of s. 7 through the exclusions and limitations on eligibility, coverage, and quality of service which systematically deny state funded counsel in situations that put into jeopardy the rights to life, liberty and the security of the person of Poor People;
> >
> > (c) the Federal Crown is in violation of s. 7 by failing to provide adequate BC Civil Legal Aid to Poor People for civil matters within its jurisdiction; and
> >
> > (d) the Federal Crown is in violation of s. 7 by failing to establish, monitor and enforce minimum national standards for civil legal aid for Poor People.
>
> [113] These "particulars", with the exception of (a), are conclusions of law and not particulars. Similarly, the particulars pleaded at para. 81 of the statement of claim in support of the claimed breaches of s. 15(1) of the *Charter*, with the exception of (b), are conclusions of law, not particulars.

> [114] The requirement that *Charter* breaches be pleaded for particular individuals in particular circumstances is not merely a formal requirement arising from the wording of s. 24(1). Without a pleading of individual circumstances, there is no basis on which to make the required causal connection between the government conduct and the alleged breach: see *Operation Dismantle* at paras. 9-10 and 37-38.
>
> [115] As currently framed, the statement of claim in my view discloses no reasonable claim in relation to the alleged ss. 7 and 15 *Charter* breaches.

[32] As to s. 28 of the ***Charter***, Chief Justice Brenner concluded:

> [117] Sections 7 and 15 are the underpinning of the plaintiff's *Charter* claim. Section 28 is ancillary to any other *Charter* rights claim and since I have concluded that the ss. 7 or 15 claims fall, the s. 28 claim falls as well.

[33] On the matter of s. 36 of the ***Constitution Act, 1982***, Chief Justice Brenner replicated s. 36 and said, at para. 118:

> … In my view this constitutional provision cannot form the basis of a claim since it only contains a statement of "commitment".

[34] On the pleading of breach of international human rights standards, Chief Justice Brenner said:

> [121] It is doubtful that the international agreements pleaded by the CBA would create enforceable domestic rights that do not exist under the *Charter*. Individuals may seek direct adjudication of their rights under international human rights instruments from the appropriate UN or other relevant agency, but agreements entered into by Canada do not create enforceable rights unless and until they have been incorporated into domestic Canadian law: Kent Roach, *Constitutional Remedies in Canada*, looseleaf (Aurora, Ont.: Canada Law Book, 2005) at ¶2.700-2.720.

[35] Finally, Chief Justice Brenner rejected the Association's submission that the inherent jurisdiction of the Court allowed the remedies sought, saying:

> [123] … I am reluctant to extend the common law remedy far beyond its accepted purpose, for precisely the same reasons as I am not prepared to extend the concept of public interest standing. In any event, I adopt the words of Wilson J. who concluded in *Operation Dismantle*:
>
> > I believe, therefore, that the appellants, even on the common law action for a declaration, must establish at least a threat of violation, if not an actual violation, of their rights under s. 7 of the Charter in order to bring a viable claim for declaratory relief against governmental action. (at 486.)
>
> [124] I have already found, at paras. 106 to 114 that the alleged breaches of unwritten constitutional principles and *Charter* rights fail. It follows that there is no right or legal interest that could form the basis for a common law declaratory action.

Discussion

[36] Rule 19(24)(a) of the *Rules of Court* states:

> 19(24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> > (a) it discloses no reasonable claim or defence as the case may be, […]

[37] In considering whether a reasonable claim is alleged under Rule 19(24)(a), the court considers the case on the basis the facts alleged are true. That is, this enquiry does not engage any of the evidence adduced by the parties, and the case is taken at its highest for the plaintiff: ***Hunt v. Carey Canada Inc.***, [1990] 2 S.C.R. 959.

[38] On this appeal, the Association contends that Chief Justice Brenner erred in the conclusions relating to the unwritten and written constitution. It says it is not plain and obvious that its claim, based on unwritten constitutional norms, is not justiciable. On the alleged ***Charter*** breaches the Association says that particular claimants and particular circumstances are not essential for judicial review of government action. As to its claim under s. 36 of the ***Constitution Act, 1982***, the Association agrees that its claim is novel, but says that such character does not mean it is doomed to fail. As well, the Association emphasizes the systemic nature of its claim, and says that as a systemic claim, it is not easily amenable to review through individual cases.

[39] As to the claims based on unwritten constitutional principles, the Association points to cases such as ***British Columbia v. Imperial Tobacco Canada Ltd.***, [2005] 2 S.C.R. 473, 2005 SCC 49; ***Roncarelli v. Duplessis***, [1959] S.C.R. 121; ***Lalonde v. Ontario (Commission de restructuration des services de santé)*** (2001), 56 O.R. (3d) 505 (C.A.); ***Pleau (Litigation Guardian of) v. Canada (Attorney General)*** (1999),182 D.L.R. (4th) 373 (N.S.C.A.); and ***Polewsky v. Home Hardware Stores Ltd.*** (2003), 66 O.R. (3d) 600 (Sup. Ct. J.).

[40] In its defence of the ***Charter*** claims, the Association relies upon well-known cases including ***Chaoulli v. Quebec (Attorney General)***, [2005] 1 S.C.R. 791, 2005 SCC 35; ***Vriend v. Alberta,*** [1998] 1 S.C.R. 493; ***Christie (BCCA)***; ***Canadian Bar Assn. v. British Columbia (Attorney General)*** (1993), 101 D.L.R. (4th) 410 (B.C.S.C.); ***R v. Morgentaler***, [1988] 1 S.C.R. 30; ***Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)***, [2004] 1 S.C.R.

76, 2004 SCC 4; and ***Law v. Canada (Minister of Employment and Immigration)***, [1999] 1 S.C.R. 497.

[41] And in support of its claim under s. 36(1)(c) of the ***Constitution Act, 1982***, the Association refers to ***Manitoba Keewatinowi Okimakanak Inc. v. Manitoba Hydro-Electric Board*** (1992), 78 Man. R. (2d) 141 (C.A.) and Aymen Nader, "Providing Essential Services: Canada's Constitutional Commitment Under Section 36" (2003), 19 Dal. L.J. 306.

[42] The first pleaded claim of the Association is based upon unwritten constitutional principles said by the Association, in para. 73 of its statement of claim, to be violated:

> (a) directly, by interfering with [Poor People's] access to courts and tribunals; and
>
> (b indirectly, by their failure to remove impediments to their access to the courts and tribunals.

[43] In para. 75, the Association further invokes an unwritten constitutional principle, judicial independence, saying it is violated by:

> (a) drawing judges and tribunals into assisting unrepresented or under-represented Poor People in a way that undermines the appearance of judicial impartiality;
>
> (b) compromising the adversarial system; and
>
> (c) creating a conflict between the duty to ensure a fair hearing and the duty to ensure impartiality.

[44] It is a valid argument to say that unwritten constitutional principles may give rise to substantive legal obligations or legal remedy. Such was the case in the landmark decision of ***Roncarelli***, and is affirmed in ***Reference re Secession of Quebec***.

[45] However, the invocation of unwritten constitutional principles in this case is in the context of a dispute over the funding of legal aid. In this, the statement of the Supreme Court of Canada in ***British Columbia (Attorney General) v. Christie***, [2007] 1 S.C.R. 873, 2007 SCC 21 ["***Christie (SCC)***"] rules out, in my view, a broad-based systemic claim to greater legal services based on unwritten principles:

> [23] 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.
>
> […]
>
> [26] Nor has the rule of law historically been understood to encompass a general right to have a lawyer in court or tribunal proceedings affecting rights and obligations. The right to counsel was historically understood to be a limited right that extended only, if at all, to representation in the criminal context: M. Finkelstein, *The Right to Counsel* (1988), at pp. 1-4 to 1-6; W. S. Tarnopolsky, "*The Lacuna in North American Civil Liberties — The Right to Counsel in Canada*" (1967), 17 Buff. L. Rev. 145; Comment, "*An Historical Argument for the Right to Counsel During Police Interrogation*" (1964), 73 Yale L.J. 1000, at p. 1018.
>
> [27] We conclude that the text of the *Constitution*, the jurisprudence and the historical understanding of the rule of law do not foreclose the possibility that a right to counsel may be recognized in specific and varied situations. But at the same time, they do not support the

> conclusion that there is a general constitutional right to counsel in proceedings before courts and tribunals dealing with rights and obligations.
>
> [Emphasis in original.]

[46] Whether there are unwritten principles that may be invoked in an individual case, I leave to another day. This statement of claim does not purport to advance individual cases that may resonate more loudly on the issues mentioned.

[47] In my view, the broadly-directed pleadings of a systemic problem violating unwritten constitutional principles do not raise a reasonable claim, and I see no basis upon which to interfere with the Chief Justice's conclusion on this question.

[48] Likewise, in my view, the ***Charter*** challenges fail to raise a reasonable claim. As to s. 7, the matter is answered in ***Christie (SCC)***:

> [25] Section 10(*b*) does not exclude a finding of a constitutional right to legal assistance in other situations. Section 7 of the *Charter*, for example, has been held to imply a right to counsel as an aspect of procedural fairness where life, liberty and security of the person are affected: see *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053, at p. 1077; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46. But this does not support a general right to legal assistance whenever a matter of rights and obligations is before a court or tribunal. Thus in *New Brunswick*, the Court was at pains to state that the right to counsel outside of the s. 10(*b*) context is a case-specific multi-factored enquiry (see para. 86).

[49] In other words, a s. 7 ***Charter*** challenge in respect to legal services must be brought in the context of specific facts of an individual's case because not every legal proceeding affecting a person's rights requires counsel. For example, in ***New***

Brunswick (Minister of Health and Community Services) v. G.(J.), [1999] 3 S.C.R. 46, Lamer C.J., writing for the majority, said:

> [86] I would like to make it clear 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. In particular, a parent need not always be represented by counsel in order to ensure a fair custody hearing. The seriousness and complexity of a hearing and the capacities of the parent will vary from case to case. Whether it is necessary for the parent to be represented by counsel is directly proportional to the seriousness and complexity of the proceedings, and inversely proportional to the capacities of the parent.

[50] This statement of claim, devoid of particulars of individuals, their cases, and their jeopardy, does not raise a justiciable issue on s. 7. The pleading is simply too general to permit the enquiry sought or the relief contended for.

[51] I have come to the same conclusion on the other allegations of breach of the ***Charter***. In particular, a s. 15 enquiry requires the court to not only review the particular deficiency alleged, but to do so in the context of a comparator group that is chosen bearing in mind the characteristics of the individual. Although the Association contends that it is for the trial judge to determine whether there is a ***Charter*** breach justifying the relief sought, the plaintiff is still required to plead material facts that warrant the court’s enquiry into the matter. This means there must be a pleading that, if all facts are taken as true, can lead to the relief sought. Such is not the case here.

[52] The third claim in issue before us is brought under s. 36(1)(c) of the ***Constitution Act, 1982***. Section 36, not often mentioned in jurisprudence, provides:

> **36.** (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to
>
> (*a*) promoting equal opportunities for the well-being of Canadians;
>
> (*b*) furthering economic development to reduce disparity in opportunities; and
>
> (*c*) providing essential public services of reasonable quality to all Canadians.
>
> (2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

[53] I accept that "a reasonable argument might be advanced that the section could possibly have been intended to create enforceable rights" (***Manitoba Keewatinowi Okimakanak*** at para. 10), but more than that is required of a statement of claim. Material facts must be pleaded to create an informed environment for consideration of that question. The statement of claim in this case does not accomplish that end. On these pleadings, this claim is not justiciable — there is no reasonable claim to try.

[54] It follows that I see no basis upon which to differ with Chief Justice Brenner on the issue raised by Rule 19(24)(a) and I would not interfere with the order made

dismissing the action on that basis. In reaching this conclusion, I express no opinion on the general issue of the standing of the Association to press litigation that may raise a reasonable claim, if such is pleaded, on aspects of the legal aid scheme.

Costs

[55] The Association also appeals the order that it pay costs of the proceedings in the Supreme Court of British Columbia, and seeks costs of the appeal in any event, or, in the alternative, an order that each party bear their own costs. It bases its submission on these propositions: this is public interest litigation; the case raises novel claims; the Association has no pecuniary interest in the outcome; the Association has not engaged in conduct deserving sanction; and Canada and British Columbia have a greater ability to pay.

[56] In exercising his discretion to award costs to the successful parties, Chief Justice Brenner considered ***Smith v. Canada (Attorney General)***, 2006 BCCA 407, 56 B.C.L.R. (4th) 333. In ***Smith***, this Court at paras. 6-10 gave five reasons for ordering costs against a plaintiff whose class action was dismissed prior to certification:

(1) the action had been struck out before it crossed the no costs threshold;

(2) the litigation was doomed to fail, and such claims should be discouraged;

(3) the claim was a hodgepodge of issues;

(4) the claim could not be characterized as public interest litigation and the group who had brought the action had a direct financial interest in the case; and

(5) the greater financial resources of the defendant alone did not justify the order.

[57] Chief Justice Brenner concluded in making the order:

> [27] In my view, the reasoning in *Smith* is consistent with the proposition that litigation which cannot survive a motion to strike under Rule 19(24) should not be considered on an access-to-justice basis.
>
> [28] In addition, in my reasons, I referred to other options which the CBA chose not to use in order to have these issues determined.

[58] The circumstances presented differ from those in ***Smith*** in that, taking the word of the Association that the action is prompted by concern for those unable to obtain representation or legal advice, the case is true public interest litigation. But the action was dismissed at a very early stage because the fundamental requirement of every plaintiff in litigation to plead a reasonable claim was not met by the Association. Although the action is intended to assist low-income members of the public and its spirit is commendable, I do not consider that the altruistic nature of the action should be afforded much weight until at least the plaintiff has established it can meet the minimal test of disclosing a reasonable claim.

[59] The purpose of pleadings was described by Smith J. in ***Homalco Indian Band v. British Columbia*** (1998), 25 C.P.C. (4th) 107 (B.C.S.C.):

> [5] The ultimate function of pleadings is to clearly define the issues of fact and law to be determined by the court. The issues must be defined for each cause of action relied upon by the plaintiff. That process is begun by the plaintiff stating, for each cause, the material

> facts, that is those facts necessary for the purpose of formulating a complete cause of action: *Troup v. McPherson* (1965), 53 W.W.R. 37 (B.C.S.C.) at 39.

[60] The history of pleadings is well described by Parrett J. in ***Keene v. British Columbia (Ministry of Children and Family Development)***, 2003 BCSC 1544, 20 B.C.L.R. (4th) 170. The rules on pleading are not overly technical. Pleadings prevent expansion of the issues, give notice of the case required to be met, and provide certainty of the issues for purposes of appeal. Complexity and confusion that can be created by a moving target is avoided by pleadings correctly drawn, as are subsequent quarrels in this Court as to the issues before the trial court. Pleadings are an elegant solution to issue definition and notice and are well-serving of the ultimate purpose of efficient resolution of a dispute on its merits (Rule 1(5) of the *Rules of Court*). Ideally, they avoid the "loose thinking" decried by Lord Denning in his foreward to I.H. Jacob, *Bullen and Leake and Jacob's Precedents of Pleadings*, 12th ed. (London: Sweet & Maxwell, 1975).

[61] Notwithstanding Lord Denning's lament, pleadings do not always display rigour of analysis. Yet the trial court, in whom is vested responsibility for its own process, is not hasty to strike a claim under Rule 19(24) of the *Rules of Court*. Only where, as here, it is plain and obvious the claim cannot succeed is that step taken. That this test results in dismissal of this action is germane to the issue of costs. A case that cannot survive the application of Rule 19(24)(a) rests upon the weakest of foundations for an order of costs.

[62] I see no error in the approach taken to costs of the proceedings in the Supreme Court of British Columbia, and I see no valid basis to depart from the order, as is usual in this Court, that the successful parties should have their costs.

Summary

[63] I would dismiss the appeal with costs to the respondents.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Lowry"

Note:

Mr. Justice Thackray's date of retirement pursuant to s. 99(2) of the ***Constitution Act, 1867*** was 28 October 2007. In January 2008, after obtaining a practicing certificate, he returned to the practice of law in British Columbia. Subsequent to the hearing of the appeal, Mr. Justice Thackray did not participate in the preparation of these reasons for judgment.

The majority reasons are being filed under the ***Court of Appeal Act***.

> **4.1** (1) A justice who resigns his or her office, is appointed to another court or ceases to hold office under section 99 (2) of the *Constitution Act, 1867*, may, within 6 months after the resignation, appointment or ceasing to hold office, give judgment in a proceeding he or she heard while holding office, and the judgment is effective as though he or she still held office.
>
> (2) A justice who is appointed to another court may continue with the hearing of any proceeding of which he or she was seized, and the jurisdiction to hear the proceeding and give judgment is effective as though he or she still held office.

13(1) Three justices constitute a quorum of the court.

(2) The court may sit in one or more divisions, each composed of not fewer than 3 justices.

(3) The court must not hear an appeal with an even number of justices sitting.

(4) The judgment of a majority of a division is the judgment of the court.

(5) Despite this section, if, after the commencement of a hearing by a division, a justice becomes unable to act, the remaining justices may continue to hear the appeal and, if justices constituting a majority of the division are in agreement on the judgment that should be given,

(a) they may give that judgment, and

(b) it is the judgment of the court.

(6) If, after a hearing continued under subsection (5), it appears that no majority judgment is possible, the remaining justices must order that a new hearing commence.

21(1) All judgments of the court must be delivered in open court.

(2) If the court chooses to give written opinions respecting the outcome of the appeal, each justice who heard the appeal must give a signed opinion to the registrar, who must give the opinions to a justice.

(3) After receiving the opinions, the justice must pronounce judgment in accordance with the opinions of the majority and that judgment constitutes the delivery of the judgment of the court.

(4) If judgment has been reserved at the hearing, the registrar must give reasonable notice to all parties of the time and place where judgment will be delivered.

(5) If judgment on an appeal has been reserved and

(a) a justice who heard the appeal is incapacitated from giving the justice's opinion on the appeal, or

(b) a majority of justices who heard the appeal are of the opinion that delivery of the judgment should no longer be delayed,

> the remaining justices or majority, as applicable, must, if they are agreed on what the judgment should be, pronounce judgment and that judgment constitutes the judgment of the court.
>
> (6) If a justice who heard an appeal ceases to hold office after the justice has handed his or her opinion to the registrar, the opinion has effect as though the justice had not ceased to hold office.

Corrigendum to the reasons of
The Honourable Madam Justice Saunders – 4 March 2008

[1] In reasons for judgment dated March 3, 2008, the last sentence in paragraph 60 should read; as follows:

> [60] … Ideally, they avoid the “loose thinking” decried by Lord Denning in his foreword to I.H. Jacob, *Bullen and Leake and Jacob's Precedents of Pleadings*, 12th ed. (London: Sweet & Maxwell, 1975).

“The Honourable Madam Justice Saunders”

CORRECTION – 7 March 2008

The Honourable Mr. Justice Thackray has been added to the list of presiding judges on the first page.

CORRECTION – 22 April 2008

In the list of presiding judges on the first page, “The Honourable Mr. Justice Thackery” has been corrected to read “The Honourable Mr. Justice Thackray”.

CORRECTION – 9 May 2008

In the second sentence of paragraph 49, McLachlin J. has been changed to Lamer C.J.