IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *P.D. v. British Columbia,*
2010 BCSC 290

Date: 20100309
Docket: S098457
Registry: Vancouver

Between:

P.D.

Plaintiff

And

Her Majesty the Queen in Right of the Province of British Columbia and Legal Services Society

Defendants

An order has been made in this proceeding pursuant to the inherent jurisdiction of the Court prohibiting publication of any information that could disclose the identity of the plaintiff, her son, or her husband.

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for the Plaintiff:	S.Y. Khan G.E. Brodksy R. Salvador M. Buckley P. Lee, A/S
Counsel for the Defendant Her Majesty the Queen in Right of the Province of British Columbia:	L. Greathead J.M. Walters T.A. Mason
Counsel for the Defendant Legal Services Society:	D. MacAdams, Q.C. C. Darnay
Place and Date of Hearing:	Vancouver, B.C. February 1,3,4,15 and 16, 2010
Place and Date of Judgment:	Vancouver, B.C. March 9, 2010

Nature of Application

[1] In this application the plaintiff seeks:

> an interim order that the Defendants or either of them immediately provide the Plaintiff with state-funded counsel to continuously represent the Plaintiff in her ongoing family law proceedings (BC Supreme Court Action # E082978) up to and including the conclusion of the trial in May 2010, and necessary work following the conclusion of the trial, on the condition that the Plaintiff repay the reasonable costs of state-funded counsel in the event she is ultimately unsuccessful in this action

[2] The application is brought within a constitutional proceeding for which I am the case management judge. The application is based on the Court's inherent jurisdiction, s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, Rule 45 of the *Rules of Court*, and s. 24(1) of the *Canadian Charter of Rights and Freedoms*. It is an application for interlocutory injunctive relief pending a full hearing of the merits of the plaintiff's constitutional case.

[3] The plaintiff's constitutional claim, as set out in her statement of claim, asserts that the defendants' failure to provide the plaintiff with state-funded legal representation, and failure to establish and maintain a legal aid regime that ensures meaningful and effective access to justice by women in family law proceedings discriminates based on the grounds of sex and the intersection of sex and poverty contrary to s. 15(1) of the *Charter*, infringes s. 7 *Charter* rights to liberty and security of the person, is not in accordance with the principles of fundamental justice, and breaches foundational constitutional principles, in particular, the rule of law and the norm of equality.

Background and General Framework

a) P.D. and Her Circumstances

[4] P.D. is a 37 year-old woman of East Indian descent. She married H.D. in 1996. The parties have one son, V.H.D., who is presently 11 years of age. Until early 2007, when she first came to Canada to join her husband, P.D. lived in India.

[5] P.D. is an educated woman. She received a Bachelor of Science degree in 1992. She has done some post-graduate work. English is her second language, though it is the language in which she conducted her studies. She appeared before me in her matrimonial proceedings and is an obviously bright and articulate person.

[6] In August 2008, H.D. announced to P.D. that he wished to separate. Until that time, P.D. and her son had been largely financially dependent on H.D.

[7] On July 21, 2009, P.D. made an application for indigent status in her family proceedings. That application was granted. A similar application was made in November 2009 in these proceedings. It too was granted.

[8] In the materials filed in support of the latter application, P.D. deposed that she was unable to work due to medical conditions. She is presently a recipient of income assistance. She is entitled to a maximum of $375.58 for support and $570 for shelter monthly.

b) The Nature and Status of P.D.'s Matrimonial Proceedings

[9] Apparently H.D. married K. White in 2003 while he was still married to P.D. H.D. wants his son to live with him and Ms. White in his new home in California.

[10] H.D. filed a writ and statement of claim on September 3, 2008. P.D. filed a statement of defence and counterclaim on October 3, 2008 (collectively "the Matrimonial Proceedings").

[11] H.D. has contacted the B.C. Ministry of Children and Family Development in connection with various allegations of abuse. The investigation was inconclusive and the Ministry remains involved with P.D. as a result of ongoing allegations. Complaints of abuse have also been made to the police.

[12] A Custody and Access Report has been prepared by Dr. La Torre. The report is largely supportive of P.D.'s claim for primary residence. H.D. is contesting the validity of the report and has retained at least one other expert to prepare a responding report.

[13] H.D. owns some assets in the United States including property held jointly with Ms. White but purchased during his marriage to P.D. P.D. believes H.D. has some savings and undisclosed stocks. H.D. may also hold assets in India.

[14] A review of the relevant affidavits and pleadings in the Matrimonial Proceedings reveals that those proceedings will likely involve questions of custody and access, allegations of abuse, allegations of parental alienation, immigration issues, interjurisdictional issues, and issues of property division. The counterclaim filed on behalf of P.D. also advances an unjust enrichment claim.

[15] The trial of the Matrimonial Proceedings is to commence on May 10, 2010 and has been set for seven days.

c) The Legal Services Society and its Mandate

[16] The relevant portions of the *Legal Services Society Act*, S.B.C. 2002, c. 30 (the "LSSA") provide:

> Definitions
>
> 1 In this Act:
>
> ...
>
> "legal aid" means legal and other services provided under this Act;
>
> ...
>
> Objects
>
> 9 (1) The objects of the society are,
>
> (a) subject to section 10(3), to assist individuals to resolve their legal problems and facilitate their access to justice,
>
> (b) subject to section 10(3), to establish and administer an effective and efficient system for providing legal aid to individuals in British Columbia, and
>
> (c) to provide advice to the Attorney General respecting legal aid and access to justice for individuals in British Columbia.
>
> (2) The society is to be guided by the following principles:
>
> (a) the society is to give priority to identifying and assessing the legal needs of low-income individuals in British Columbia;

(b) the society is to consider the perspectives of both justice system service providers and the general public;

(c) the society is to coordinate legal aid with other aspects of the justice system and with community services;

(d) the society is to be flexible and innovative in the manner in which it carries out its objects.

Powers and capacity

10 (1) For the purposes of its objects, the society has, subject to subsections (2) and (3), all the powers and capacity of an individual and, without limiting this, may

(a) establish priorities for the types of legal matters and classes of persons for which it will provide legal aid,

(b) establish policies for the kinds of legal aid to be provided in different types of legal matters,

(c) determine the method or methods by which legal aid is to be or may be provided, with power to determine different methods for different types of legal matters and different classes of persons,

(d) determine who is and who is not eligible for legal aid based on any criteria that the society considers appropriate,

(e) undertake, inside or outside British Columbia, commercial activities that it considers appropriate for the purposes of obtaining funds for the pursuit of its objects,

(f) recover, through client contributions or any other methods it considers appropriate, its costs of providing legal aid, and

(g) facilitate coordination among the different methods, and the different persons and other entities, by which legal aid is provided.

(2) The society must not provide prescribed services to prescribed persons or classes of persons in prescribed circumstances unless it does so without using any of the funding provided to it by the government.

(3) The society must not engage in an activity unless

(a) it does so without using any of the funding provided to it by the government, or

(b) it does so in accordance with this Act, the regulations and the memorandum of understanding referred to in section 21 and money for that activity is available within the budget approved by the Attorney General under section 18.

(4) The society is not an agent of the government or of the law society.

[17] The relevant portions of s. 21 of the LSSA, under the heading “Memorandum of Understanding” provide:

> (2) The matters that may be negotiated as part of the memorandum of understanding include the following:
>
> (a) an estimate of the government funding that the Attorney General anticipates will be provided to the society in each of the 3 fiscal years to which the memorandum of understanding is to apply;
>
> (b) the types of legal matters in relation to which the society may provide legal aid, and those in relation to which the society must not provide legal aid, with government funding;
>
> (c) the priority to be accorded to the types of legal matters in relation to which the society may provide legal aid with government funding;

[18] The affidavit filed on behalf of the Legal Services Society (the “Society”) reveals that the most recent Memorandum of Understanding covers the period of April 1, 2005 to March 31, 2008 (the “MOU”). Apparently, a further or updated Memorandum of Understanding is now being negotiated.

[19] The MOU is described and structured as an agreement made between the Province of British Columbia and the Society. Consequently, the Society is required, both as a matter of contract and under the language of s. 21(2)(a)-(c) of the LSSA, to adhere to the requirements and restrictions of the MOU.

[20] Section 2.1 of Schedule “A” to the MOU, which deals with “Services in Respect of Family Law Matters” limits the instances where the Society will provide representation by a lawyer to eligible individuals to those circumstances where the applicant:

> (a) is a victim of domestic violence or is at risk of violence and likely needs a physical restraining order or other legal assistance to protect their safety;
>
> (b) has a child or children who are at risk and a supervised access order or restraining order is needed;
>
> (c) is in need of a change to the current custody or access order to ensure the safety of the applicant and/or the child or children;

> (d) requires a non-removal order to prevent the applicant's child or children from being permanently removed from the province;
>
> (e) is the respondent in a proceeding and faces an immediate and substantial prospect of going to jail;
>
> (f) has been denied access to their child or children; or
>
> (g) is unable to represent themselves due to a mental disability and the family law matter must be resolved to avoid further harm;
>
> (h) is approved for coverage on an exceptional basis by LSS management or their designate due to exigent circumstances;
>
> (i) seeks to appeal a decision in relation to the matters described in (a) to (h) and the Society deems it appropriate to fund the appeal, having regard to merit and other relevant factors.

[21] Thus, the Society is not authorized to and will not provide services to an applicant in a family law dispute whose concerns relate solely to the division of assets or where there is a concern assets may be liquidated or where child support or spousal support issues are raised and the applicant is on income assistance. Individuals on income assistance are required by virtue of the *Employment and Assistance Regulation*, B.C. Reg. 263/2002, to assign certain maintenance rights to the Minister.

[22] Importantly, and I will return to this, if an applicant's matrimonial proceedings raise multiple issues, the Society will only fully fund a lawyer to assist with those components of the claim that properly fall within the ambit of the MOU. Thus, for example, if an eligible applicant is involved in a proceeding that engages both custody and property division issues, the lawyer who assumes conduct of the matter will be paid an amount, from the relevant tariff, that is deemed adequate to address or prepare for the custody issue. No amount will be paid to that lawyer for preparation in respect of the property division issue.

[23] Schedule "A" to the MOU also establishes the specific dollar amounts allocated by the Province to the Society for various discrete categories of legal disputes in given years. Thus, for example, the Society was expressly limited to funding services "In Respect of Criminal Law Matters" to $31.680 million in fiscal year 2007/2008. The limit for family law matters in the same year was $10.299

million and for child protection matters was $4.471 million. Additional limits or caps are established for constitutional matters, for immigration matters, for public legal education and for "exceptional matters". Subsequent amendments to the MOU appear to have changed some of these figures.

[24] The Intake Policy and Procedures Manual of the Society establishes relevant criteria for intake workers who make decisions about when to provide representation by lawyers in each of these areas. The Society also has a set of General Terms and Conditions which provide the framework for contractual arrangements between the Society and lawyers who take legal aid cases. Section 41 of these General Terms and Conditions provides:

> 41. LSS may, at its discretion, pay further legal fees to referral lawyers. In reviewing requests for extra fees and additional preparation hours, LSS will consider factors such as the actual time expended, legal complexity, nature of legal services rendered, importance of the matter to a reasonable client of modest means, length of proceeding, amount of court time and/or LSS funding saved by the efforts of counsel, skill and efficiency of counsel, results achieved, and available tariff budget.
>
> (1) **Extra fees** may be requested at the conclusion of the case and require counsel to submit a final bill.
>
> (2) **Additional preparation** may be requested if it is recognized at the outset of the case, or during the course of the referral, that substantially more hours than permitted under the applicable tariff will be required to complete the case. To request additional preparation, counsel must submit an up-to-date account.

d) P.D.'s Dealings with the Society

[25] When P.D. was first served in the Matrimonial Proceedings she retained a lawyer with a $9,000 loan she received from a cousin. When these funds were expended, P.D. applied to the Society for legal assistance. The Society approved a referral to a lawyer named Mr. Voogd.

[26] The Society draws a distinction between Emergency Services and Extended Services. It has a family law tariff for each of these categories of services. Those tariffs, in turn, often establish the amount of time that given functions are allocated. For example, the "General Preparation" allocation is up to 14 hours. The tariff for

"Preparation for a Settlement Conference" is up to one hour. Actual attendance at a settlement conference, or at a discovery, or at trial is based on the "actual time" required for each of these functions.

[27] Mr. Voogd was provided with various approvals by the Society under the Emergency and Extended tariffs. Based on the Society's materials presented to me, which are not straight forward, and the assistance of counsel for the Society, I understood that Mr. Voogd was provided with a total of approximately 65 hours of preparation time. He used about 44 hours of that time in preparing for various motions, in organizing the preparation of the Custody and Access Report, and for other matters. In early July 2009, he had six hours remaining for preparation for discoveries and a total of 15 hours remaining for all other categories of preparation including preparation for trial. Based on the explanation provided to me by counsel for the Society, I understand that these various allocations of preparation time were deemed adequate to deal with the custody issues in the Matrimonial Proceedings. It is acknowledged that no express allocation was made for the preparation time necessary to address the other legal issues that arise in the Matrimonial Proceedings.

[28] On July 8, 2009, Mr. Voogd prepared an opinion letter for the Society. In that letter he stated:

> Client will need a further 15 hours general preparation (as significant time was expended to get discovery of documents). Discovery should be conducted in July 2009 and has previously been approved. Client requires further time for application preparation and attendance. Client does require approval for the upcoming 5 day trial which is now just 3 months away. Extra time will be required to deal with experts as the section 15 report is not helpful to the father and he has engaged at least one other expert to provide a responding report so far. Futhermore there are numerous collateral witnesses in the section 15 report who likely will have to be interviewed if the father contests the section 15 report. I am concerned that this matter no longer can be completed in 5 days of trial.

[29] Mr. Voogd's request for additional preparation time was rejected. Shortly thereafter he withdrew from representing P.D. In July 2009, the Society advised all counsel to whom it had made referrals that it would make no further extended

services referrals and would not approve additional hours on existing authorizations unless such additional time was “required to meet a professional obligation”.

[30] Mr. Voogd subsequently wrote to P.D. clarifying what legal aid coverage P.D. originally received and what additional coverage would be required for him to take the matter to trial. It is this letter, at least in significant part, which establishes the budget that underlies the plaintiff’s request for additional legal aid funding on this application and that is referred to in the Draft Order I was provided.

[31] At the time of Mr. Voogd’s request for approval for additional time, the request was also reviewed by external counsel for the Society whose notes include the following:

> Denied on basis: asset division no longer covered; custody and access report done and no risk to child apparently identified or alleged; interim situation stabilized; trial far enough off (that counsel could withdraw within ethical guidelines) and budget considerations of LSS re ongoing coverage;

e) P.D.’s Further Dealings with the Society and Her Efforts to Obtain Legal Assistance

[32] Both P.D. and Ms. Khan, who is one of the counsel for the plaintiff on this application and who works with the B.C. Public Interest Advocacy Centre, have approached the Society to have it revisit its decision. Those efforts have met with no success. One of the Society’s responses provided, in part:

> While we appreciate that there are issues that remain to be resolved in your case, we are unable to authorize further hours for your lawyer to represent you. We understand that this may put you in a very difficult position.

[33] P.D. is unable to borrow funds from family to assist in paying for a lawyer. She has tried, without success, to borrow money from a bank. She has returned to the Surrey Legal Aid office to apply for more coverage. Those efforts were unsuccessful. She has also made significant efforts, again without success, to obtain *pro bono* legal representation.

[34] Since Mr. Voogd’s withdrawal, P.D. has acted on her own behalf. She has appeared before me on an application, where H.D. was represented, to adjourn a

discovery. She has similarly appeared at other applications brought by H.D. where he was represented. She attended at her own discovery without counsel. She has not yet conducted a discovery of H.D.

[35] Two other matters merit mention. First, H.D. has now filed a Notice of Intention to Act in Person. This occurred after these proceedings were commenced and it was argued on behalf of P.D. that this was done for strategic reasons. H.D.'s financial status is unclear. He earns approximately $77,000 annually and owns some property and several vehicles. At the same time, there is some suggestion in the material that he is facing various financial difficulties.

[36] Second, P.D. has provided what is the equivalent, in the private law context, of an undertaking. The West Coast Legal Education and Action Fund ("West Coast LEAF"), in recognition of the challenges involved in establishing a constitutional right to state-funded legal representation, has established an Access to Justice Fund. Money from the fund will be used to repay the monies being sought on behalf of P.D. in this application if P.D. is ultimately required to make such payment. Furthermore, a prominent local lawyer has confirmed that subsidiary to the funds raised by West Coast LEAF, he is prepared to provide a letter of credit to pay up to $20,000 to the defendants on behalf of P.D. in the event that she is ultimately unsuccessful in this action.

ANALYSIS

a) Jurisdiction and Framework

[37] The defendants accept that the court has the jurisdiction to grant the interlocutory order for injunctive relief being sought by the plaintiff on the basis of the various grounds I identified at the outset.

[38] Very late in the application before me, the defendant Province of British Columbia raised a concern about the adequacy of the notice provided by the plaintiff under the *Constitutional Question Act*, R.S.B.C. 1996, c. 68. I have since been advised that the Province does not raise that issue on this application.

[39] The parties agree that the analytical framework established in *RJR-MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311, governs the present application. *RJR-MacDonald* also confirmed that s. 24(1) of the *Charter* provides the court with jurisdiction to grant interim or interlocutory relief. In *RJR-MacDonald*, at p. 348-9, the Court summarized its earlier comments:

> At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test, [1987] 1 S.C.R. 110.
>
> At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.
>
> The third branch of the test, requiring an assessment of the balance of inconvenience to the parties, will often determine the result in applications involving *Charter* rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

[40] Notwithstanding the temptation to follow distinct or precise steps in sequence, it is important to recognize that a court is not to adhere slavishly to any structure. Instead, in *B.C. (A.G.) v. Wale* (1986), 9 B.C.L.R. (2d) 333, [1987] 2 W.W.R. 331 (C.A.), Madam Justice McLachlin, as she then was, said at p. 346:

> Having set out the usual procedure to be followed in determining whether to grant an interlocutory injunction, it is important to emphasize that the judge must not allow himself to become the prisoner of a formula. The fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case.

b) The Serious Question

[41] In *RJR-MacDonald*, after referring at length to the reasons of Beetz J., in *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, the Court explained the underlying rationale for the "serious question" test (which is viewed as interchangeable with a "not frivolous or vexatious" test) in *Charter* cases.

[42] I consider it useful to review these various considerations and cautions about not delving too deeply into the merits of an application because they place the urgings of the defendants - that I engage in a robust merits based analysis or weighing of the plaintiff's claim at this first stage - into context.

[43] The following distinct factors or directions militate in favour of simply considering whether the application gives rise to a "serious question" rather than engaging in a more stringent review of the merits:

i) "The difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General": *RJR-MacDonald* at p. 335.

ii) "The complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim": *RJR-MacDonald* at p. 337.

iii) "What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test.

The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case": *RJR-MacDonald* at p. 337.

iv) "Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable": *RJR-MacDonald* at p. 337-8.

[44] These various cautions resonate in the context of the present application where the defendants have not yet filed statements of defence, where over the course of a five-day application the various parties filed several hundred pages of outlines, written submissions, written speaking notes and reply submissions, where a very significant number of authorities were provided to the court and where the court was advised that its decision was required with some urgency.

[45] There are, however, two exceptions to the general rule that a judge should not engage in a detailed review of the merits. These exceptions are both described in *RJR-MacDonald*. The Court, at p. 338, in relation to the first such exception, said:

> The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the *American Cyanamid* principle in such a situation in *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294, at p. 1307:
>
> > Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.
>
> Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

[46] The defendants argued this first exception is engaged in the circumstances of this case. They say that if P.D. is granted state-funded counsel on this application, the relief sought in her constitutional challenge will have been granted.

[47] I do not believe this is correct, but I also consider the issue to be somewhat academic in the circumstances of this case. In *RJR-MacDonald*, after confirming that the instances where this first exception arises will be "exceedingly rare", the Court also went on to say that when a more extensive review of the merits was undertaken, the results of that analysis should be "borne in mind" when the second and third stages of the test are considered. In this case, the plaintiff seeks a mandatory injunction. I will return to this, but this relief in and of itself, warrants a more complete review of the merits when the balance of convenience is considered. Accordingly, in the circumstances of this case, a more thorough consideration of the merits is justified when considering the balance of convenience regardless of whether the first exception is satisfied.

[48] The nature of the first exception recognized by the Court in *RJR-MacDonald* is narrower in scope than the defendants argue. This is made clear in the example of the exception provided by the Court at p. 338:

> In *Trieger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (Ont. H.C.), the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:
>
> > This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried <u>in the sense of a case with enough legal merit</u> to justify the extraordinary intervention of this court in making the order sought without any trial at all. [Emphasis in original]

[49] The examples of an applicant who seeks to restrain picketing and the applicant in *Trieger* who had no real interest in "any subsequent declaration of his rights" are different from the circumstances of P.D. in this case. The granting of the interim relief of state-funded counsel to the plaintiff is not a final determination of the

constitutional action. The granting of the relief sought is essential in order to minimize, on a temporary basis, the constitutional violations alleged by the plaintiff. However, the granting of such relief would not finally determine the *Charter* claim itself which seeks more broadly to have the Court determine the constitutional parameters of her right to counsel in family matters and to consider the broader declaratory and ancillary orders that she seeks. P.D.'s present application does not then amount "to a final determination of the action"; *RJR-MacDonald* at pp. 338 and 348.

[50] Instead this case is more akin to *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46, where the applicant sought state-funded counsel for a hearing where the Minister sought an extension of an earlier order granting the Ministry custody of the applicant's children. The applicant was in fact represented by counsel at the hearing, but the merits of the underlying constitutional issues continued to be argued by the parties. That appears, subject to other potential applications which may be brought by the defendants, to be the likely course of events in this matter.

[51] In a related vein, any potential order made in favour of P.D. on this application would not determine the underlying subject matter of the issues raised in the constitutional action. The present application has as its focus the question of whether it is "just and equitable" (*Wale* at p. 346) that an injunction be granted. It is this analysis that takes place within the *RJR-MacDonald* framework. The present application does not give rise to any final determination in legal terms. If P.D. were granted the remedy she seeks on this application and it was subsequently determined that that relief ought not to have been granted, that would be made clear and the flow of funds that had ensued from the interlocutory order would be returned by virtue of the commitments I have referred to.

[52] The second exception recognized in *RJR-MacDonald* was expressed in these terms at p. 339-40:

> The second exception to the *American Cyanamid* prohibition on an extensive review of the merits arises when the question of constitutionality

> presents itself as a simple question of law alone. This was recognized by Beetz J. in *Metropolitan Stores*, at p. 133:
>
> > There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the *Canadian Charter of Rights and Freedoms*, could not possibly be saved under s. 1 of the *Charter* and might perhaps be struck down right away; see *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.
>
> A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

[53] Two distinct questions arise from the application of this second exception. The first is whether the court should address the questions of law associated with each of the different grounds that underlie the plaintiff's statement of claim. Here, as I have said, P.D.'s claim asserts various breaches of each of s. 15(1) and s. 7 of the *Charter* as well as of certain foundational constitutional principles. It was argued by the defendants that none of the grounds raised a serious question and that each could and should be assessed under the second exception.

[54] In the recent case of *Mendoza v. Community Living British Columbia,* 2009 BCSC 932*,* Mr. Justice Sewell dealt with an interlocutory request for the funding of certain services sought by the petitioner who was a severely disabled young adult. The petitioner's claim alleged violations of s. 7 and s. 15(1) of the *Charter*. Under the heading of "A Serious Question to be Tried", Sewell J., for the reasons expressed by him at paras. 48-58, determined that the petitioner failed to raise a serious question under s. 15(1) of the *Charter*. He then considered the merits of the s. 7 claim and concluded, at para. 68, that that claim did raise a serious question. Based on that conclusion he moved on to address the second and third stages of the *RJR-MacDonald* analysis.

[55] Sewell J. did not appear to direct himself to the question I have posed and I do not consider myself bound by the form of analysis he relied on. Instead, I am of the view that if a court is satisfied that one of the grounds raised by the pleadings gives rise to a serious question, the court need not and, in fact, ought not to make merit-based determinations on the balance of the alternative legal claims or theories advanced in a statement of claim.

[56] The starting point is that the instances where the second exception arises will be “exceptional” or “exceedingly rare” and fall within very narrow confines. The exceptional nature of the example given by the Court in *RJR-MacDonald* reflects this.

[57] More important, however, is the role which the second exception is intended to serve. It functions in very limited circumstances as a threshold issue which may obviate the need for the court to move to consider the second and third stages of the *RJR-MacDonald* analysis. In this regard, it is different from the first exception which, as I have said, requires the court in its more thorough assessment of the merits to apply the product of that assessment to the second and third stages of the analysis. The second exception thus serves a gatekeeper function.

[58] Once it is recognized that the second exception can potentially give rise to a result that brings the *RJR-MacDonald* analysis to an end and determines the constitutional issue that has been raised, it becomes clear that that object is not served if one of several grounds raised in a claim does give rise to a serious question. In such circumstances the court must clearly continue on with the second and third stages of the *RJR-MacDonald* analysis. In such circumstances, to the extent a court draws conclusions about the merits of alternate legal grounds that are advanced in a statement of claim, it transforms its role. The role it would now serve would be to winnow potentially meritorious claims from non-meritorious claims. That role is conceptually at odds, for the reasons explained in *RJR-MacDonald* and for the reasons I have outlined earlier, with the task or object of the judge hearing the interlocutory motion. That winnowing function is properly served by other

applications that might be brought under Rule 19(24), Rule 18A, Rule 34 or other mechanisms directed to and better suited to merit-based determinations.

[59] Accedance to the suggestion that each ground or cause of action in a pleading should be analyzed to determine if it gives rise to a serious question not only transforms the role of the hearing judge, it is also not consonant with the admonitions that such analysis is only likely to arise in exceptional circumstances. Furthermore, it is not consonant with the recognition underlying such applications – that they are ill-suited to a proper consideration of the merits.

[60] The second issue which arises is whether the court, in addressing whether a serious question arises on a particular ground of challenge, is required to assess each of the constituent elements of that ground of challenge. For example, the relevant case law has established a framework for the analysis of s. 15(1) claims. In *Auton* (*Guardian ad litem of) v. British Columbia (Attorney General),* 2004 SCC 78, [2004] 3 S.C.R. 657, Chief Justice McLachlin, writing for the Court, said at paras. 21-23:

> 21 Different cases have formulated the requirements for a successful s. 15(1) claim in different ways. Nevertheless, there is "broad agreement on the general analytic framework": *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 58. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at pp. 168 *et seq*. -- this Court's seminal statement on the interpretation of s. 15(1) --, the s. 15 analysis was described in two steps: first, whether there is unequal treatment under the law; and, second, whether the treatment is discriminatory. Similarly in *Eldridge*, *supra*, which also concerned a claim for medical services, La Forest J., at para. 58, put the test as follows:
>
> > A person claiming a violation of s. 15(1) must first establish that, because of a distinction drawn between the claimant and others, the claimant has been denied "equal protection" or "equal benefit" of the law. Secondly, the claimant must show that the denial constitutes discrimination on the basis of one of the enumerated grounds listed in s. 15(1) or one analogous thereto.
>
> 22 The dual requirements of *Andrews*, *supra*, and *Eldridge*, *supra*, were broken into three requirements in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 88: (1) differential treatment under the law; (2) on the basis of an enumerated or analogous ground; (3) which constitutes discrimination.

> 23 There is no magic in a particular statement of the elements that must be established to prove a claim under s. 15(1). It is the words of the provision that must guide. Different cases will raise different issues. In this case, as will be discussed, an issue arises as to whether the benefit claimed is one provided by the law. The important thing is to ensure that all the requirements of s. 15(1), as they apply to the case at hand, are met.

[61] In addition to the various requirements of s. 15(1) that a litigant must address and the more specific questions that emerge when the s. 15(1) analysis is applied to given facts, s. 1 of the *Charter* must also be addressed. The issue of remedies is also relevant.

[62] The question that emerges is which or how many of these issues are to be addressed at the "serious question" stage in circumstances where a defendant, as in this case, argues that the plaintiff's claim is without merit at multiple stages of the analysis.

[63] I referred earlier to the recognition in *RJR-MacDonald* that the complex nature of most constitutional rights cases impedes the ability of a motions judge to engage in the necessary analysis of the merits of the applicant's claims. Thus, a detailed examination or dissection of a plaintiff's case is inimical with *RJR-MacDonald.* Nevertheless, if a defendant is able to establish that a central and necessary component of the ground or basis for challenge brought by an applicant cannot be supported at law then that defendant would have established that there was not a "serious questions to be tried".

[64] It appeared to be recognized by counsel for P.D. that it was the s. 15(1) challenge raised in the statement of claim that had the strongest foundation in existing case law. Any enquiry into the merits of the s. 15(1) claim raised by P.D. is constrained by the following considerations:

a) No disputed issue of fact arises. This is consistent with the terms within which the second exception is expressed – "the question of constitutionality presents itself as a simple question of law alone": *RJR-MacDonald* at p. 339.

b) The analysis should be mindful that an overly technical analysis of s. 15(1) rights is to be avoided: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 168-169; *Auton* at para. 25. Instead s. 15(1) is to be generously and purposively interpreted: *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at paras. 15 and 53; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at p. 156 and not in a way that gives rise to a "thin and impoverished vision of s. 15(1)", *Eldridge* at para. 73.

c) The innovative nature of a *Charter* claim should not in itself be a reason to dismiss a claim for interlocutory relief: Kent Roach, *Constitutional Remedies in Canada*, looseleaf (Aurora, Ont: Canada Law Book, 1994) para. 7.10.

[65] Paragraphs 107 to 110 of the plaintiff's statement of claim, under the heading "Section 15(1) of the *Charter*" provide:

> 107. The failure of the Defendants to provide the Plaintiff with adequate state-funded legal representation denies the Plaintiff the right to equality before and under the law, and the right to the equal benefit and protection of the law without discrimination based on the ground of sex and the intersection of the grounds of sex and poverty, contrary to s. 15(1) of the *Charter*.
>
> 108. In particular, the failure of the Defendants to provide the Plaintiff with adequate state-funded legal representation denies her the right to equality before and under the law and to the equal benefit and protection of the law, because it:
>
> a) denies the Plaintiff equal access to benefits provided pursuant to the *LSS Act*, the MOU, and the exercise of discretion by LSS pursuant to the *LSS Act*;
>
> b) denies the Plaintiff equal access to benefits conferred under the *Family Relations Act*, *Divorce Act*, the common law and the Court's equitable jurisdiction;
>
> c) denies the Plaintiff equal access to Court and Legal Services; and
>
> d) denies the Plaintiff equal access to the judiciary.
>
> 109. The failure of the Defendants to provide the Plaintiff with adequate state-funded legal representation arises from the inadequacy of Legal Aid for family law matters, which is a result of:

> a) LSS providing inadequate Legal Aid coverage for family law matters;
>
> b) the Defendants' disproportionate reductions, limitations and restrictions of family law Legal Aid services;
>
> c) the Defendants' inadequate allocation of resources for family law Legal Aid;
>
> d) the Defendants' disproportionate reductions in the allocation of resources for family law Legal Aid; and
>
> e) the exercise of discretion by LSS.
>
> 110. The inadequacy of Legal Aid for family law renders the Legal Aid scheme underinclusive in terms of the benefits and protections provided to women living in poverty, contrary to s. 15 of the *Charter*.

[66] The plaintiff's s. 15(1) claim rests on two alternate theories. The first is based on the plaintiffs' claim for equality before and under the law and the equal protection and equal benefit of the law in relation to the provision of state-funded counsel for low income individuals in legal matters where fundamental interests are at stake. This is said to be a benefit provided by law that the Province of British Columbia provides through the creation of a legal aid scheme and structured funding to the Society, pursuant to the LSSA and the MOU. This is also a benefit provided by law that the Society, which is charged with the implementation of the government's legal aid policy, provides by funding counsel for low income individuals in legal matters where fundamental interests are at stake, and circumstances are such that it would be unjust to deprive them of state-funded counsel. Included among the areas of law in which state-funded counsel is provided by the Society is family law. The Society also exercises discretion, pursuant to the LSSA, about priorities and policies for the provision of state-funded counsel (ss. 10 and 11 of the LSSA).

[67] Alternatively, it is argued that women are disadvantaged in seeking access to and obtaining the benefits provided by the courts. On the break-up of a marriage they are more likely to live in poverty and they are less likely to be represented by lawyers than their former spouses. Absent access to state-funded counsel they do not enjoy equal access to the benefits that arise under the *Family Relations Act*, R.S.B.C. 1996, c. 128, the *Divorce Act*, R.S.C. 1985 (2nd Supp.) c. 3, and from the courts. Instead, this access is impaired and rendered less effective or meaningful.

[68] Neither thesis challenges the validity of the LSSA. Instead, both are concerned with the effectiveness or adequacy of the coverage provided by the Society in family law matters. An important aspect of this concern is that the Society's policies and the MOU only provide funding for preparation of some issues or provide inadequate allowance for preparation time. Counsel who conduct trials must actually prepare for all issues. These policies inhibit the willingness or ability of counsel to act and of applicants to enjoy the benefits of counsel. The plaintiff believes the withdrawal of counsel from family law legal aid retainers as a result of inadequate preparation time being provided is widespread. It intends to develop this evidence through discovery.

[69] The defendants argue that there are at least five grounds on which the plaintiff's s. 15(1) claim fails to give rise to a serious question:

i) there is no general right to state-funded counsel;

ii) the *Charter* and, in particular, s. 15(1), does not require the Provincial Government to either establish a benefit or to fund a benefit to a given level;

iii) the Province has finite resources. Funding allocated to legal aid and the Society must be balanced against other social values;

iv) the plaintiff is unable to establish or point to an appropriate comparator group; and

v) the remedies the plaintiff seeks are not available as a matter of law.

i) No General Right to State Funded Counsel

[70] There are numerous authorities which establish that there is no general right to state-funded counsel under either s. 7 or s. 15(1) of the *Charter* or otherwise: *Pavlis v. HSBC Bank Canada*, 2009 BCCA 450, 98 B.C.L.R. (4th) 72; *British Columbia (Minister of Forests) v. Adam Lake Band*, 2001 BCCA 647, 95 B.C.L.R. (3d) 273 (also indexed as *British Columbia (Minister of Forests) v. Okanagan Indian Band*); *Canadian Bar Assn. v. British Columbia*, 2008 BCCA 92, 76 B.C.L.R. (4th)

48; *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873.

[71] None of these cases deal directly with the narrow and specific s. 15(1) claim raised by the plaintiffs. For example, in *Canadian Bar Assn.*, an appeal from a Rule 19(24) dismissal of the claim, the court was concerned with the generality of the pleadings and the breadth of the relief being sought. In the context of the s. 15(1) claim the court said at para. 51:

> [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.

[72] The plaintiff asserts that her statement of claim does not advance a general right to state-funded counsel or a right to counsel in all family cases. The plaintiff says, and I agree, that her claim is narrower and that that claim has not been expressly determined by any of the foregoing authorities. Thus, it cannot be said that the claim is frivolous or vexatious.

ii) <u>No Obligation to Create a Benefit</u>

[73] The defendants argued that s. 15(1) does not require government to create any particular benefit or to fund a benefit in any particular way. In *Auton*, the petitioners argued that they sought equal access to medical benefits. The Court, in turn, concluded that what they actually sought was access to a benefit that the law had not conferred. The Court, at para. 41, said:

> 41 It is not open to Parliament or a legislature to enact a law whose policy objectives and provisions single out a disadvantaged group for inferior treatment: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203. On the other hand, a legislative choice not to accord a particular benefit absent demonstration of discriminatory purpose, policy or effect does not offend this principle and does not give rise to s. 15(1) review. This Court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner: *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28, at para. 61; *Nova Scotia*

> *(Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, 2002 SCC 83, at para. 55; *Hodge, supra,* at para. 16.

[74] The Court went on to say at para. 46: “There can be no administrative duty to distribute non-existent benefits equally”.

[75] In terms of the evidence, the defendants argue that the average legal aid recipient, who is given access to counsel, is provided with funding of approximately $1,900. P.D. in this case, was provided with funding having a value of approximately $4,300, exclusive of disbursements. The defendants argue that the s. 15(1) jurisprudence does not enable a court to require government to increase the amount or value or extent of any benefit that it chooses to confer.

[76] The plaintiff responds with a number of distinct points, the first three of which were not contested by the defendants. First, legal aid is a program created, maintained and administered by the defendants in furtherance of the specific governmental policies of British Columbia in carrying out a governmental function. It is the result of various governmental activities including, *inter alia*: the LSSA, intergovernmental agreements made pursuant to statutory authority, public acts taken pursuant to statutory authority (notably the MOU) and delegated authority to an administrative agency. The *Charter* applies to legislatures, to governments, to all activities of government, to functions of government, to entities that are part of the apparatus of government, to agencies under the control of government and to specific governmental policies and programs, whether delivered by government or not: *Eldridge* at paras. 40-42; *Operation Dismantle v. The Queen,* [1985] 1 S.C.R. 441 at para. 28 (per Dickson C.J., for the majority) and at para. 50 (per Wilson J.). It was not disputed that the *Charter* applies to the LSSA, to the MOU and to the policies of the Society.

[77] Second, a statutory scheme or government policy can discriminate either directly or in its effect or application. Thus, a policy or benefit which is “facially neutral” may still discriminate: *Auton* at paras. 42 and 57; *Eldridge* paras. 60-64;

Andrews at p. 164; Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 1998) at para. 55.11.

[78] Third, it is not open to government to create a benefit that either singles out a disadvantaged group for inferior treatment or that gives rise to inferior treatment: *Auton* para. 41; *Eldridge* para. 73. Instead when government does create a benefit that benefit must comply with the *Charter*. In *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, in the context of a s. 7 challenge, McLachlin C.J. and Major J. said at para. 104: “The *Charter* does not confer a freestanding constitutional right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*.”

[79] Fourth, women, an identified group under s. 15(1), suffer adverse effect discrimination, both in terms of the exercise of discretion by the defendants on how much of the global amount of legal aid is allocated to family law funding, which is relied on more heavily by women, and in terms of their effective access to the courts. In relation to this first issue, paras. 108 and 109 of the statement of claim address the activity of the defendants, and in particular, the exercise of discretion in allocating resources to family law issues. Counsel for the defendant, the Province of British Columbia, conceded that at least this aspect of the statement of claim gave rise to factual issues which prevented the court from being able to say that no serious issue was raised by the pleadings.

[80] In *Eldridge*, a case the plaintiff relies on heavily, the Court was satisfied that deaf persons, who were not provided with sign language interpreters in emergency rooms or in hospitals or when interacting with their physicians and who were thus unable to communicate effectively with their doctors, were prevented from benefiting equally from the provision of medical services in comparison to hearing patients. Importantly, the plaintiffs had led evidence at trial about the significance of effective communication as an integral part of the provision of medical services and that miscommunication could lead to misdiagnosis or a failure to follow a recommended treatment.

[81] P.D. argues that, as in *Eldridge*, women in certain family cases require state-funded counsel in order to secure equal and effective access to the courts and to other benefits conferred by law. Absent such access to counsel, their enjoyment of equal access to and the equal benefit of the law is impaired.

[82] The reasoning which underlies *Eldridge* addresses several issues. To the extent P.D. requires further evidence, empirical or otherwise, to establish the factual proposition that the distinction between women and men has the adverse effect of causing a denial of equal protection to or equal benefit of the law, that issue remains for another day. The importance of the evidential record which supports a *Charter* violation was, however, also emphasized, for example, in each of *Victoria (City) v. Adams*, 2009 BCCA 563, 313 D.L.R. (4th) 29, at paras. 72-74, and *Chaoulli* at paras. 114-117. To the extent the defendants rely on *Auton* and argue that a court cannot, in the context of a s. 15(1) challenge or violation, augment a benefit or act positively to ameliorate the disadvantages that arise from an existing benefit, *Eldridge* militates against this. The Court in *Auton* explained the difference that underlines the two cases:

> 38 The petitioners rely on *Eldridge* in arguing for equal provision of medical benefits. In *Eldridge*, this Court held that the Province was obliged to provide translators to the deaf so that they could have equal access to core benefits accorded to everyone under the British Columbia medicare scheme. The decision proceeded on the basis that the law provided the benefits at issue -- physician-delivered consultation and maternity care. However, by failing to provide translation services for the deaf, the Province effectively denied to one group of disabled people the benefit it had granted by law. *Eldridge* was concerned with unequal access to a benefit that the law conferred and with applying a benefit-granting law in a non-discriminatory fashion. By contrast, this case is concerned with access to a benefit that the law has not conferred. For this reason, *Eldridge* does not assist the petitioners. [Emphasis in original]

[83] I will return to this when discussing remedies, but it seems at least arguable, having regard to the reasoning in *Eldridge*, that a government policy which created a limit on the number of sign language interpreters available to the deaf in circumstances where the evidence established that that limit was manifestly inadequate, might be challenged. So too, a policy which limited the right of a deaf

person to the services of a sign language interpreter to, for example, a maximum of five minutes, might well again be challenged. In either case, I am satisfied that a serious question about the constitutional validity of such a policy would exist.

iii) The Province Has Finite Resources

[84] The defendants filed various materials that dealt with budgetary issues and the pressures that exist for public funds for various social programs. Such factors are usually addressed when a court turns to a s. 1 analysis. In *Harper v. Canada (Attorney General)*, 2000 SCC 57, [2000] 2 S.C.R. 764, the Court confirmed at para. 4 that whether legislation can be justified under s. 1 of the *Charter* "is always a complex factual and legal analysis" that produces a serious question of law which is not frivolous or vexatious.

iv) The Plaintiff Cannot Point to an Appropriate Comparator Group

[85] In *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65, [2004] 3 S.C.R. 357, the Court dealt extensively with the law relating to the choice of appropriate comparators. In *Auton*, at paras. 51-54, the Court synthesized that discussion.

[86] Here, the plaintiff advanced three distinct possible comparators which were expressed in the following terms:

> (i) The plaintiff alleges that state funded counsel for family law matters is more often required by women than by men. Women are financially unequal to men, and more likely to live in poverty, especially following family breakdown – one of the factors being that women are more likely to have custody of the children. Therefore, women are disproportionately unable to afford to pay for counsel in family law proceedings;
>
> (ii) The effects of inadequate coverage for state funded counsel in family law matters have qualitatively different effects on women because they are likely to have more at stake in their family law cases being properly presented. In particular:
>
> a. their economic security is more often dependent on obtaining an appropriate division of assets and support payments;
>
> b. women, compared with men, are more likely to be the primary caregivers of children, during the relationship, and to have custody following relationship breakdown, and, therefore, to have

> urgent, material issues about how the children are to be provided for that need to be dealt with through family law proceedings.
>
> (iii) The plaintiff claims that the preference of the legal aid scheme for funding counsel in criminal law matters over family law matters, in effect prefers men over women.

[87] The defendants challenged the potential validity of each of these comparators. I do not consider that a court is in a position to properly assess and determine the appropriateness of given comparator groups at this early stage of the proceedings. This is for two related reasons. First, in *Hodge*, Binnie J., writing for the Court, said:

> 17 The identification and function of the "comparator group" in applying s. 15(1) of the *Charter* was encapsulated by Iacobucci J. in *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37, at para. 62, as follows:
>
> > … there are three basic stages to establishing a breach of s. 15. Briefly, the Court must find (i) differential treatment, (ii) on the basis of an enumerated or analogous ground, (iii) which conflicts with the purpose of s. 15(1) and, thus, amounts to substantive discrimination. Each of these inquiries proceeds on the basis of a comparison with another relevant group or groups, and locating the relevant comparison groups requires an examination of the subject-matter of the law, program or activity and its effects, as well as a full appreciation of the context. [Emphasis added by Binnie J.]
>
> It is worth repeating that the selection of the comparator group is not a threshold issue that, once decided, can be put aside. On the contrary, each step in the s. 15(1) analysis proceeds "on the basis of a comparison". Indeed in many of the decided cases, the characteristics of the "comparator group" are only developed as the analysis proceeds, especially when considering the "contextual factors" relevant at the third stage, i.e., whether discrimination, as opposed to just a "distinction", has been established.

[88] The foregoing qualifications on selecting an appropriate comparator group – the need to fully understand the particular program, its effects and its context - are all incompatible with undertaking that exercise in an interlocutory application.

[89] Second, Binnie J., in *Hodge*, dealt with the role of the court in determining the appropriate comparator group:

> 21 In my view, with respect, the Federal Court of Appeal erred in concluding that a court is required to "adopt the comparator group chosen by the applicant unless it can be shown that there is a paucity of evidence or a failure to plead that comparator" (para. 23). While it is up to the claimant to

> make an initial choice of "the person, group, or groups with whom he or she wishes to be compared" (emphasis added by Binnie J.), the correctness of that choice is a matter of law for the court to determine: *Granovsky, supra*, at paras. 47, 52 and 64.
>
> 22 Where "the differential treatment is not between the groups identified by the claimant, but rather between other groups" (*Law, supra*, at para. 58), accordingly, it is the duty of the court to step in and measure the claim to equality rights in the proper context and against the proper standard.

[90] The requirement that the court be satisfied with the identification and selection of an appropriate comparator group, and potentially "step in" to substitute its view of an alternate or more appropriate comparison, does not accord with the role of the court on this application nor is it realistic in terms of the adequacy of the court's understanding or appreciation of the full context within which that selection would be made.

v) The Remedies the Plaintiff Seeks Are Not Available at Law

[91] The Court in *Schachter v. Canada*, [1992] 2 S.C.R. 679, explained the distinction between the potential remedies available under s. 52 and s. 24(1) of the *Charter* and established a framework for considering and applying each of these provisions. The defendants raise two distinct arguments with regards to remedies. First, they argue it is not open to a court in the normal course to award damages for harm suffered as a result of the application of a law that is subsequently declared to be unconstitutional. Second, the defendants say that even if P.D. has an arguable s. 15(1) claim the remedy would not be to order the relief sought by the plaintiff but rather to allow the government to determine how to remedy the discrimination that had been established.

[92] In relation to the first argument the defendants emphasized *Wynberg v. Ontario* (2006), 82 O.R. (3d) 561, 269 D.L.R. (4th) 435 (Ont. C.A.), leave to appeal ref'd [2006] S.C.C.A. No. 441, where the court said:

> [191] Based on her finding of constitutional and statutory violations, the trial judge ordered that certain declarations would issue. She also ordered the appellant to pay damages to the infant respondents for past and future intensive behavioural intervention. She dismissed all of the other damage

> claims of the respondents. As we have concluded that the appeal should be allowed, it follows that the relief ordered is set aside. However, the issue of the availability of damages warrants comment.
>
> [192] The general rule against combining declaratory relief with pecuniary damages was enunciated in *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 720. The Supreme Court reaffirmed the rule in *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*, [2002] 1 S.C.R. 405. At paras. 78-81 of *Mackin*, the Court explains the rationale for the rule:
>
> > [78] According to a general rule of public law, absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional (*Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957; *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42). In other words "[i]nvalidity of governmental action, without more, clearly should not be a basis for liability for harm caused by the action" (K. C. Davis, *Administrative Law Treatise* (1958), vol. 3, at p. 487). In the legal sense, therefore, both public officials and legislative bodies enjoy limited immunity against actions in civil liability based on the fact that a legislative instrument is invalid.
> >
> > ...
> >
> > [80] Thus, it is against this backdrop that we must read the following comments made by Lamer C.J. in *Schachter, supra*, at p. 720:
> >
> > > An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with an action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available.
> >
> > [81] In short, although it cannot be asserted that damages may never be obtained following a declaration of unconstitutionality, it is true that, as a rule, an action for damages brought under s. 24(1) of the *Charter* cannot be combined with an action for a declaration of invalidity based on s. 52 of the *Constitution Act, 1982* [all emphasis in original].

[93] I do not consider that the foregoing comments are relevant either to the plaintiff's prayer for relief in her statement of claim or to the relief sought on this application. The court's comments in *Wynberg* are placed into context by its reference to the trial judge's award of damages for past and future care requirements. The statement of claim filed on behalf of P.D. includes no claim for damages. Instead, the relief sought in paragraphs (A) to (G) of the prayer for relief

are limited to requests for various forms of declatory relief. The ambit and substance of that declatory relief would be determined at trial. This is not a case that raises the question of when *Charter* damages may be combined with s. 52 declaratory relief.

[94] In the present motion, whose terms I described earlier, P.D. seeks an order that she be provided with state-funded counsel. In the form of draft order that was prepared by P.D., a dollar figure, referable to the expected cost of state-funded counsel, has been included. I do not, however, consider this to be in the nature of a damage claim. If P.D. is not successful on this application there is no suggestion in the pleadings or otherwise that she would still seek that sum of money at the conclusion of trial.

[95] The second issue raised by the defendants is that it is not open to the plaintiff to dictate the specific remedy that would arise on a *Charter* violation.

[96] This is so for two reasons. The first and more specific reason is that the court has no ability to expressly compel the expenditure of public funds to rectify a *Charter* violation. Thus, in *R. v. Ho*, 2003 BCCA 663, 21 B.C.L.R. (4th) 83, after an extensive review of various constitutional sources, and in the context of an argument that an accused should be able to retain and have the state pay for counsel of his choice, Southin J.A., for the majority, said at para. 70:

> [70] With the greatest respect for my colleague, the principle in issue is part of the Constitution. I see nothing in the enactments of 1982 which, expressly or by necessary implication, gave the courts the power to create or confer, in the absence of an appropriation or a specific statutory authorization, a power in the Crown, whether in right of Canada or of a province or any minister thereof, to expend public funds and then to require some officer or servant of the Crown to exercise that power. If a court does so, and Parliament or the Legislature, as the case may be, chooses, as, in my opinion, it has every right to do, not to appropriate funds to meet the judgment, the court's judgment becomes a mere *brutum fulmen*. In so saying, I do not overlook s. 24(1) of the *Canadian Charter of Rights and Freedoms*. I cannot accept that the framers of the *Charter* intended that the courts should have the power, whether by direct or indirect means, to subvert parliamentary control of the public purse.

[97] A related but more general concern is that a court should not unduly restrict how government chooses to address an identified *Charter* violation. It is for this

reason that in successful *Rowbotham* applications the court makes an order staying the proceedings unless the necessary funding for counsel is provided by the state: *R. v. Malik*, [2003] B.C.J. No. 2167 (S.C.).

[98] In *Eldridge* under the heading "Remedy" the Court said:

> 95 I have found that where sign language interpreters are necessary for effective communication in the delivery of medical services, the failure to provide them constitutes a denial of s. 15(1) of the *Charter* and is not a reasonable limit under s. 1. Section 24(1) of the *Charter* provides that anyone whose rights under the *Charter* have been infringed or denied may obtain "such remedy as the court considers appropriate and just in the circumstances". In the present case, the appropriate and just remedy is to grant a declaration that this failure is unconstitutional and to direct the government of British Columbia to administer the *Medical and Health Care Services Act* (now the *Medicare Protection Act*) and the *Hospital Insurance Act* in a manner consistent with the requirements of s. 15(1) as I have described them.
>
> 96 A declaration, as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this Court's role to dictate how this is to be accomplished. Although it is to be assumed that the government will move swiftly to correct the unconstitutionality of the present scheme and comply with this Court's directive, it is appropriate to suspend the effectiveness of the declaration for six months to enable the government to explore its options and formulate an appropriate response. In fashioning its response, the government should ensure that, after the expiration of six months or any other period of suspension granted by this Court, sign language interpreters will be provided where necessary for effective communication in the delivery of medical services. Moreover, it is presumed that the government will act in good faith by considering not only the role of hospitals in the delivery of medical services but also the involvement of the Medical Services Commission and the Ministry of Health.

[99] Similarly, in *G.(J.)*, Lamer C.J., after concluding that the failure to provide the plaintiff with state-funded counsel violated her s. 7 rights, said:

> 101 There are only two possible remedies a judge can order under s. 24(1) to avoid a prospective s. 7 breach in circumstances where the absence of counsel for one of the parties would result in an unfair hearing: an order that the government provide the unrepresented party with state funded counsel, or a stay of proceedings. A stay of proceedings is clearly inappropriate in this case, as it would result in the return of the children to the appellant's custody. Children should not be returned to their parent's care when there is reason to suspect that they are in need of protection. Indeed, this would run contrary to the purposes of Part IV of the *Family Services Act*.

> The government must, therefore, provide the appellant with state funded counsel.
>
> 102 It is unnecessary, however, to direct the Government of New Brunswick to rectify the policy's constitutional infirmities through the adoption of a new policy. Directing the government to design a new policy would run contrary to Sopinka J.'s admonition in *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at p. 104, to "refrain from intruding into the legislative sphere beyond what is necessary" in fashioning remedies for *Charter* violations. It is not clear how often the operation of the policy will lead to an unconstitutional hearing. It may be only in rare cases. Accordingly, the least intrusive remedy would be to leave the policy intact, subject to a discretion vested in the trial judge to order state funded counsel on a case-by-case basis when necessary to ensure the fairness of the custody hearing. That having been said, there is nothing preventing the government from amending the policy -- for example reading in a discretion -- or providing respondents to custody applications with state funded counsel through means other than the Domestic Legal Aid program.

[100] Ultimately, both *Eldridge* and *G.(J.)* are examples of where the Court, at the conclusion of a trial or appeal, left the structure and content of the precise remedy to be determined by government. In each, however, the Court's direction in real terms was likely to have financial consequences. In *Eldridge*, sign language interpreters were to be provided to deaf persons who sought access to the medical system. To assist government in understanding the scope of its obligation the Court said:

> 82 This is not to say that sign language interpretation will have to be provided in every medical situation. The "effective communication" standard is a flexible one, and will take into consideration such factors as the complexity and importance of the information to be communicated, the context in which the communications will take place and the number of people involved; see 28 C.F.R. sec. 35.160 (1997). For deaf persons with limited literacy skills, however, it is probably fair to surmise that sign language interpretation will be required in most cases; see Chilton, at p. 886, and the many studies there cited.

[101] In *G.(J.)*, Lamer C.J. also explained the practical consequences of the Court's conclusion:

> 104 If the parent wants a lawyer but is unable to afford one, the judge should next consider whether the parent can receive a fair hearing through a consideration of the following criteria: the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the parent. The judge should also bear in mind his or her ability to assist the parent within the limits of the judicial role. If, after considering these criteria, the judge is not satisfied that the parent can receive a fair hearing and there is no

> other way to provide the parent with a lawyer (i.e., pursuant to a statutory power to appoint counsel), the judge should order the government to provide the parent with state funded counsel under s. 24(1) of the *Charter*. I hasten to add that I am limiting my comments here to child protection proceedings, and need not and should not comment as to other kinds of proceedings.

[102] I am therefore unpersuaded that there is no prospect that the court could fashion a remedy that was both consistent with *Ho* and *Schachter* and which addressed the issues raised by the plaintiff's statement of claim if those issues were ultimately determined to be meritorious. Specifically, I do not consider that the nature of the plaintiff's prayer for relief forecloses it from raising a serious issue.

[103] I am satisfied that the s. 15(1) challenge advanced by P.D. in her statement of claim raises an issue that is not frivolous but is, instead, a serious issue.

Irreparable Harm

[104] In Robert J. Sharpe, *Injunctions and Specific Performance*, 2nd ed. looseleaf (Toronto: Canada Law Book, 1992), the author observes at para. 3.1285 that "There has been relatively little discussion of irreparable harm in relation to interlocutory injunctions to restrain breaches of constitutional rights."

[105] In *RJR-MacDonald*, the Court's expression at p. 340-1 of what constitutes irreparable harm was succinct:

> Beetz J. determined in *Metropolitan Stores*, at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.
>
> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. ...

> The assessment of irreparable harm in interlocutory applications involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in *Charter* cases.

[106] Two relevant issues arise. First, is the harm alleged irreparable "in nature"? Second, what is the likelihood of that harm occurring?

[107] P.D. asserts that she will suffer at least two forms of irreparable harm if she is not provided with state-funded counsel. First, she asserts that her health, which is poor, will be further affected if she is required to act on her own behalf. P.D.'s affidavit material discloses that when her husband left her in 2008, she lost a quarter of her body weight. She deposes that she is depressed and that attendances in court have caused her significant stress. She is unable to eat or sleep. She is often dizzy. Even when she had a lawyer, she fainted on the way to court. Her affidavit has a number of clinical records or doctors' notes attached to it where various diagnoses, including P.D.'s depression resulting from family stress, are noted.

[108] The defendants argue that no weight should be given to such medical records. *Seaman v. Crook*, 2003 BCSC 464, 14 B.C.L.R. (4th) 132, at para. 14, confirms that the diagnoses made by doctors in clinical records or notes are admissible for the fact they were made but not for their truth. *Seaman* relates to records proffered at trial. The application before me is one for interlocutory relief. Rule 51(10) permits a litigant to rely on hearsay evidence on an interlocutory application. That rule is more nuanced on injunction applications: *Litchfield v. Darwin* (1997), 29 B.C.L.R. (3d) 203, 25 C.P.C. (4th) 403 (S.C.) at paras. 5 and 6, and is further refined in terms of the requirements for opinion evidence: *Trus Joist (Western) Ltd. v. United Brotherhood of Carpenters and Joiners of America Local 1598*, [1982] 6 W.W.R. 744 (B.C.S.C.) at p. 747. Here the various clinical records and notes largely support the evidence P.D. has given. She was not cross-examined on that evidence. Furthermore, as a result of the conclusion I have come to on this issue, I do not believe I have to directly address the admissibility of these records.

[109] The trial process is undoubtedly stressful for most self-represented litigants. That stress is likely to be exacerbated in a family proceeding that includes allegations of abuse and where the custody of a child is at issue. Nevertheless, I do not believe that such stress or anxiety would, without more, constitute irreparable harm to most litigants. Though P.D.'s anxiety and/or depression is more severe than the norm or than what one might expect, the evidence suggests that these problems, at least in large part, are attributable to her family dispute rather than to her being self-represented. Thus, many of P.D.'s references to her health, and most of the doctor's notes or records I have referred to, pre-date the point in time when she was self-represented. In *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, in the context of an alleged s. 7 violation, Bastarache J. said:

> 59 Stress, anxiety and stigma may arise from any criminal trial, human rights allegation, or even a civil action, regardless of whether the trial or process occurs within a reasonable time. We are therefore not concerned in this case with all such prejudice but only that impairment which can be said to flow from the delay in the human rights process. It would be inappropriate to hold government accountable for harms that are brought about by third parties who are not in any sense acting as agents of the state.
>
> …
>
> 65 ... I therefore find that the most prejudicial impact on Mr. Blencoe was caused not by the actions of the Commission but rather by the events prior to the Complaints which caused the respondent to be ousted from Cabinet and caucus as well as the result of actions by non-governmental actors such as the press, employers and a soccer association. The harm to the respondent resulted from the publicity surrounding the allegations themselves coupled with the political fall-out which ensued rather than any delay in the human rights proceedings which had yet to commence at the time that the respondent began to experience stigma.

[110] I do not consider that the evidence supports that a failure to provide P.D. with state-funded counsel would give rise to any risk to her health which, in turn, would constitute irreparable harm.

[111] The second form of irreparable harm addressed by P.D. arises from the concern that without state-funded counsel she will either not have equal access to the courts or may not receive a fair trial. The assertion that absent access to state-

funded counsel P.D. cannot effectively present her case, or that some women in some cases cannot effectively present their cases, is at the core of her s. 15(1) claim.

[112] Aspects of the parties' submissions suffered from a lack of precision. The defendants focussed on whether P.D. would, absent state-funded counsel, receive a fair trial – an analysis that has its roots in s. 11(d) and s. 7. The plaintiff also addressed the question of whether she would receive a fair trial, but the focus of the submissions made on her behalf dealt with whether, absent state-funded counsel, she would have effective or meaningful access to the courts. This emphasis had as its foundation the question of whether P.D., without state-funded counsel, would receive equal benefit of the law under s. 15(1). The interrelationship of these concepts was not developed or argued before me. It is not, however, clear to me that a government policy which impaired or diminished the efficacy of a party's access to the courts would have to be so severe as to give rise to a denial of a fair trial before it could be said to offend s. 15(1) of the *Charter*. To set the standard in that way would appear to conflate the issues that are engaged when a party seeks a fair trial under s. 7 and 11(d) with those of a party who argues its equal access to the benefit of the law is impaired under s. 15(1).

[113] The defendants argue that general resources such as duty counsel, publicly available information and the role a judge would serve in assisting a self-represented litigant all ensure that P.D. would receive a fair trial without the need for state-funded counsel. They say that a great many self-represented litigants involved in family law disputes appear before the courts on a daily basis and that it is to be assumed, in essence, that these proceedings give rise to "fair trials". Additionally, they argue that if this application were brought as a *Rowbotham* application, P.D. would not satisfy the criteria established by that case.

[114] In asserting that the court "would ensure P.D. got a fair trial" the defendants misapprehend the role a judge can or does play at trial. They also diminish what is embraced in that concept or in the concept of meaningful access to the courts. A

judge will most assuredly apply an even hand in dealing with the parties. He or she will provide guidance to a self-represented litigant on how trials take place and on what types of evidence may be led. He or she will determine the case before them on the basis of the evidence presented. To this extent the trial is "fair", but this is a much restricted view of what substantive or meaningful access to the courts entails. Chief Justice McLachlin, in a public address entitled "The Challenges We Face" given on March 8, 2007, said:

> To add to this, unrepresented litigants – or self-represented litigants as they are sometimes called – impose a burden on courts and work their own special forms of injustice. Trials and motions in court are conducted on the adversary system, under which each party presents its case and the judge acts as impartial decider. An unrepresented litigant may not know how to present his or her case. Putting the facts and the law before the court may be an insurmountable hurdle. The trial judge may try to assist, but this raises the possibility that the judge may be seen as "helping", or partial to, one of the parties. The proceedings adjourn or stretch out, adding to the public cost of running the court. In some courts, more than 44 per cent of cases involve a self-represented litigant. Different, sometimes desperate, responses to the phenomenon of the self-represented litigant have emerged. Self-help clinics are set up. Legal services may be "unbundled", allowing people to hire lawyers for some of the work and do the rest themselves. The Associate Chief Justice of the British Columbia Provincial Court is quoted as saying this is "absurd", not unlike allowing a medical patient to administer their own anaesthetic. [Emphasis added]

[115] There are numerous statements which describe the content of a fair trial and which develop the modern vision of what equal access may entail. In *Barrett v. Layton* (2004), 69 O.R. (3d) 384 (Ont. S.C.J.), Mr. Justice Macdonald said at pp. 391-2:

> The topic of trial fairness has many aspects. The aspect which arises here is ensuring that an unrepresented person is not denied a trial on the merits by her lack of knowledge of either the trial process or procedural and substantive law, or by the stress of appearing in court, or by a combination of these factors. Litigants have the right to appear in court without counsel, and the right to a fair hearing regardless of whether they are legally represented. In my opinion, since it is the trial judge who is required to give effect to these rights, doing so cannot amount to abandonment of the role of trial judge and assumption of a counsel-like role. For the same reason, giving effect to these rights cannot amount to a diminution of the role properly played by counsel opposing the unrepresented person.
>
> Ensuring that unrepresented persons do not lose their right to a fair trial on the merits of their case by reason of the aforesaid factors is also one aspect

> of access to justice, in the modern conceptualization of that principle. As Mary Jane Mossman and Heather Ritchie discuss in their essay entitled "Access to Civil Justice: A Review of Canadian Legal Academic Scholarship, 1977-1987" which is found in *Access to Civil Justice* (Toronto: Carswell, 1990) edited by Alan C. Hutchinson, at page 59, the concept of access to justice has moved from one of formal equality of access, which entitles all persons to an equal opportunity to appear before the court, to one of effective equality of access which addresses the specific barriers which impede a specific litigant's pursuit of justice.
>
> ...
>
> In my opinion, the reason why this is the major challenge now facing the justice system is that the absence of adequate legal advice and legal representation for those appearing before the court is highly likely to impair their ability to conduct their trial on the merits. Thus, it is highly capable of impairing their right to a fair trial. The result, inevitably, will be the erosion of the high degree of public confidence in this system of providing justice, unless remedial steps are taken. As Cory J. stated in *R. v. S.(R.D.) supra*, at para. 91:
>
> > A system of justice, if it is to have the respect and confidence of its society, must ensure that trials are fair and that they appear to be fair to the informed and reasonable observer. This is a fundamental goal of the justice system in any free and democratic society.
>
> [Emphasis added]

[116] In *G.(J.)*, Lamer C.J. emphasized the importance of parties' ability to present their case effectively:

> 73 For the hearing to be fair, the parent must have an opportunity to present his or her case effectively. Effective parental participation at the hearing is essential for determining the best interests of the child in circumstances where the parent seeks to maintain custody of the child. The best interests of the child are presumed to lie within the parental home. However, when the state makes an application for custody, it does so because there are grounds to believe that is not the case. A judge must then determine whether the parent should retain custody. In order to make this determination, the judge must be presented with evidence of the child's home life and the quality of parenting it has been receiving and is expected to receive. The parent is in a unique position to provide this information to the court. If denied the opportunity to participate effectively at the hearing, the judge may be unable to make an accurate determination of the child's best interests. There is a risk that the parent will lose custody of the child when in actual fact it might have been in the child's best interests to remain in his or her care.

[117] The more complicated the case and the less sophisticated the litigant, the larger are the challenges faced by that litigant in organizing, preparing and presenting their case. In *G.(J.)*, Lamer C.J. said:

> 80 In proceedings as serious and complex as these, an unrepresented parent will ordinarily need to possess superior intelligence or education, communication skills, composure, and familiarity with the legal system in order to effectively present his or her case.

[118] These comments align with the issues and underlying concerns raised in *Rowbotham* applications. These applications are brought under and rely on ss. 7, 11(d) and 24(a) of the *Charter*. The general premise underlying such applications is that in given and very finite circumstances an accused who does not have the financial ability to fund their own defence may not receive a fair trial unless they receive state-funded counsel.

[119] The fact that the law allows for such applications is recognition that notwithstanding the role played by trial judges, and the many and varied forms of publicly available legal information or other public resources, an accused may not receive a fair trial without access to state-funded counsel.

[120] *G.(J.)* provides similar recognition that a party to a custody dispute involving the state may require state-funded counsel to ensure that their *Charter* rights are safeguarded. This, again, is notwithstanding the role played by the courts in dealing with self-represented litigants and the availability of public resources designed to assist such litigants.

[121] The potential entitlement to state-funded counsel in *Rowbotham* and *G.(J.)* applications exists because the application of s. 7 and 11(d) of the *Charter* create such an entitlement. This is very different, however, from saying that in all other private disputes, self-represented litigants, regardless of their skill set and of the complexity of the matter, are assured of a fair trial in the broad sense of that term.

[122] The plaintiff does not, as I have said, suggest that all women in all family law cases require state-funded counsel. Rather, using *G.(J.)* as a framework, she argues

that some women, depending on their skills, in some family cases, depending on their complexity and the issues that are engaged, may require state-funded counsel to effectively present their cases.

[123] The focus at the second stage of the analysis under *RJR-MacDonald* is on the "nature" of the harm that may be suffered. An inability to effectively present or advance a legal claim is harm which is irreparable in nature. It is harm which could not be remedied if the eventual decision on the merits does not accord with the results of the interlocutory applications: *RJR-MacDonald* at p. 341.

The Likelihood of Harm

[124] The second issue that must be addressed is the likelihood that the harm identified will, absent relief, be suffered. This is an issue that is not expressly addressed in *RJR-MacDonald* or in *Metropolitan Stores*. It cannot be, however, that it is sufficient for a plaintiff to identify a form of harm that is in nature or concept irreparable. There must also be some assessment of the prospect that that harm will materialize unless injunctive relief is ordered.

[125] There is no impediment to granting injunctive relief in the constitutional context for apprehended future harm. In *Horii v. Canada*, [1992] 1 F.C. 142, the Federal Court of Appeal said at p. 147:

> The fact that the harm sought to be avoided is in the future does not make it speculative. An applicant for an injunction does not have to wait for the damage to occur before seeking relief. In fact, the principal purpose of an interlocutory injunction is to prevent threatened harm before it happens. It is the likelihood of harm, not its futurity, which is the touchstone.

[126] In *Wale*, McLachlin J.A., as she then was, said at p.346, "It is important to note that clear proof of irreparable harm is not required. Doubt as to the adequacy of damages as a remedy may support an injunction".

[127] Other cases suggest a more rigorous standard exists. In *Operation Dismantle*, the Court was concerned with a decision from the Federal Court of Appeal which had struck out the appellants' statement of claim and dismissed their

action. It was thus concerned with final relief. Dickson C.J. commented that the nature of the alleged infringement of the appellants' s. 7 rights was founded on the premise that allowing the United States to test a cruise missile system in Canada would cause an increased risk of war. He concluded by saying, at p. 456, "The point is that remedial action will not be justified where the link between the action and the future harm alleged is not capable of proof". In supporting this conclusion, however, he referred to authorities relevant to both *quia timet* and mandatory injunctions and said at p. 458, "It is clearly illustrated by the rules governing declaratory and injunctive relief that the courts will not take remedial action where the occurrence of future harm is not probable."

[128] I was also directed by the defendants to *R. v. Cai*, 2002 ABCA 299, 9 Alta. L.R. (4th) 28, where the court said:

> 6 At the time of the Queen's Bench hearing, no *Charter* breach had yet occurred. The respondents applied because they anticipated a breach of their right to a fair trial. But binding authority lets one seek relief based on a prospective *Charter* breach only if one can prove that "there is a sufficiently serious risk that the alleged violation will in fact occur": *Phillips v. Westray Mine Inquiry* [1995] 2 S.C.R. 97 at 158. The test has been said to require a "high degree of probability", or "a real and substantial risk": *Operation Dismantle v. R.* [1985] 1 S.C.R. 441 at 458, and *Canadian Broadcasting Corp. v. Keegstra* (1986), 77 A.R. 249, 35 D.L.R. (4th) 76 at 78 (C.A.). The essence of the test is that the court must be satisfied that there "is a very real likelihood that in the absence of that relief an individual's *Charter* rights will be prejudiced", as Cory J. concluded in *Phillips*, *supra* at 159.

[129] Most of the authorities referred to in the foregoing passage again deal with the standard relevant to the grant of final relief where a prospective *Charter* breach is alleged. That standard should not be the same as the standard relevant for interlocutory relief. *Canadian Broadcasting Corp. v. Keegstra* (1986), 77 A.R. 249, 35 D.L.R. (4th) 76 (Alta. C.A.), however, dealt with the appeal of an interlocutory injunction which enjoined the public airing of a production while the applicants' criminal conviction was pending appeal. The court said at p. 78, "The test rather is this: is there a real and substantial risk that a fair trial will be impossible in the circumstance of the case if publication is allowed?"

[130] The confusion in this area of the law is recognized in an article by David A. Crerar, “The Death of the Irreparable Injury Rule in Canada” (1998) 36 Alta. L. Rev. 957 at paras. 26-29. My review of the cases reflects a consensus that the harm identified cannot be speculative. It also appears that the risk should be “real and substantial”. I consider “real” to confirm that the harm is not to be speculative. The Shorter Oxford English Dictionary provides several definitions or meanings for “substantial”. Most have no relevance. One meaning confirms that one is dealing with something that is not “imaginary”, but instead is “real”. Another meaning is of “significance” or of being “material”. It is in this sense that I use the word substantial.

[131] I also draw some guidance from the cases that deal with *Rowbotham* and *G.(J.)* applications. Though not brought as interlocutory injunction applications, these cases assess the risk that a given indigent accused or person, given their particular circumstances and given the complexity of the particular case they face, may not get a fair trial without state-funded counsel. Once again, this may be different from not receiving or being denied equal benefit of the law. I consider that it would be anomalous if an applicant for state-funded counsel, through an interlocutory application where the *Charter* right to such counsel had not yet been established, faced a lower threshold requirement than that required on an application where the *Charter* right had been established.

[132] The factors relevant to *Rowbotham* applications are well known. I have focussed, however, on *G.(J.)* because it dealt with substantive issues that align more closely with the issues that P.D. will face in the Matrimonial Proceedings. In addition, in the recent case of *British Columbia (Attorney General) v. T.L.*, 2010 BCSC 105, [2010] B.C.J. No. 131, Adair J. expressed the view, at paras. 61 and 62, that the “exceptional” or “rare” standard used for *Rowbatham* applications does not pertain to *G.(J.)* applications.

[133] In *G.(J.)*, Lamer C.J. said:

> 79 At issue in this appeal is whether the custody hearing would have been sufficiently complex, in light of the other two factors, that the assistance of a lawyer would have been necessary to ensure the appellant her right to a fair hearing. I believe that it would have been. Although perhaps more

> administrative in nature than criminal proceedings, child custody proceedings are effectively adversarial proceedings which occur in a court of law. The parties are responsible for planning and presenting their cases. While the rules of evidence are somewhat relaxed, difficult evidentiary issues are frequently raised. The parent must adduce evidence, cross-examine witnesses, make objections and present legal defences in the context of what is to many a foreign environment, and under significant emotional strain. In this case, all other parties were represented by counsel. The hearing was scheduled to last three days, and counsel for the Minister planned to present 15 affidavits, including two expert reports.

[134] L'Heureux-Dubé J., in concurring reasons, said:

> 122 Second, as my colleague points out, the complexity of the proceedings is also an important factor in evaluating whether a hearing without counsel proceeded in accordance with the principles of fundamental justice. The more complex the proceedings are, the more difficult it will be for the parent to participate effectively without assistance. As eloquently noted by Bastarache J.A., the complexity of the proceedings in the present case placed the appellant at a significant disadvantage:
>
> > All other parties are represented. Ms. G. must be able to adduce evidence and cross-examine witnesses. There were 15 witnesses. Proceedings consumed three days. The interpretation of the legislation and of the powers of the Minister were in issue. The rules of evidence were at play. ((1997), 187 N.B.R. (2d) 81, at p. 139)
>
> The length of the proceedings, the type of evidence that is presented, the number of witnesses and the complexity and technicality of the proceedings must be important considerations in evaluating this factor.

[135] Also relevant is the seriousness of the issues at stake in the Matrimonial Proceedings. Of importance is that those proceedings involve the custody of V.D. The serious nature of custody issues is recognized in the MOU and the Society's guidelines. It was also recognized in *G.(J.)*, though there the analysis was undertaken in large part with reference to the considerations that are engaged when the state seeks to obtain or retain custody of a child.

[136] I have described the numerous and varied legal issues that are likely to be dealt with over the course of the seven-day trial scheduled for the Matrimonial Proceedings. There are expected to be numerous witnesses and competing expert reports. There will have to be cross-examination of such witnesses. A number of the issues will require legal research. Using *G.(J.)* as a barometer, I consider the Matrimonial Proceedings to be complex.

[137] P.D. is indigent and on social assistance. She has made significant efforts to obtain either state-funded or *pro bono* counsel. She is a recent immigrant to this country. She has deposed that she finds many processes alien. Though she received her schooling in English, English is her second language. Her health is relatively fragile. At the same time, she is an intelligent and well educated person.

[138] Using the factors identified in *G.(J.)*, I am of the view that there is a real risk, one which is not speculative, that without state-funded counsel P.D. may not be able to obtain a fair determination of the issues in her Matrimonial Proceedings and in particular of the custody issues in that proceeding. Paraphrasing the conclusion of Lamer C.J. at para. 81 of *G.(J.)*, without the benefit of counsel, P.D. will likely not be able to participate effectively at the hearing, creating an unacceptable risk of error in determining her child's best interests.

[139] Accordingly, I consider that P.D. has established both that she may suffer harm which is irreparable in nature and that the likelihood of that harm is not speculative but rather is real and substantial. In saying this I make no comment on the underlying merits of the plaintiff's constitutional claim. While one can consider the merits of that claim at the second stage of the *RJR-MacDonald* analysis, I have deferred that analysis to a weighing of the balance of convenience.

Balance of Convenience

[140] In *RJR-MacDonald* the Court said at pp. 342-3:

> The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.
>
> The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid*, Lord Diplock cautioned, at p. 408, that:
>
> > [i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the

> balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.
>
> He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."
>
> The decision in *Metropolitan Stores*, at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry."

[141] A number of specific factors relevant to the balance of convenience arise in this application. First, the applicant seeks a mandatory injunction. A mandatory injunction is defined in *Sharpe*, *Injunctions and Specific Performance*, at para. 1.10 as "one which requires the defendant to act positively." Here P.D. seeks to compel or require the defendants to provide her with the funds required to retain counsel.

[142] It is common ground between the parties that the mandatory nature of the injunction being sought does not impose a higher initial standard of proof on an applicant. Rather the nature of the order being sought is relevant to the question of irreparable harm and the balance of convenience: *Hedstrom v. Manufacturers Life Insurance Co.*, 2002 BCSC 1502, 8 B.C.L.R. (4th) 192; *Powerscreen of Canada (Western) Ltd. v. Powerscreen International Distribution Ltd.*, 2003 BCSC 1353, 36 C.P.C. (5th) 342.

[143] Most recently, in *Mendoza*, under the heading "Balance of Convenience" Sewell J. said:

> [75] In considering the balance of convenience, I also think that I am entitled to take into account the novel nature of the petitioners' claims and the fact that in my view the petitioners have a low prospect of succeeding in obtaining the relief sought in the petition. In a case where a mandatory injunction is sought there is authority for requiring more than a serious question to justify the injunction. Sharpe, *Injunctions and Specific Performance*, Looseleaf ed., para. 2.650; *United Taxi Drivers v. Calgary*, [1997] 7 W.W.R. 707 (Alberta Queens Bench).

[144] The applicants concede that the various grounds of P.D.'s claim are novel, at least in terms of their application. I am of the view that each of the grounds raised in the statement of claim faces significant hurdles. In the paragraphs that follow I have identified some of these difficulties.

[145] I start with the numerous authorities that establish that there is no constitutional right which supports a general entitlement to state-funded counsel. There is also no authority which supports a right to state-funded counsel in private disputes.

[146] Without addressing each element of a s. 7 challenge, P.D.'s s. 7 claim faces, *inter alia,* the very significant difficulty that there is no readily apparent state action involved in this matter. *Rowbotham* applications are premised on the state's involvement in seeking to incarcerate a party. In *G.(J.)* the Court took significant pains to emphasize that it was the involvement of the state, in seeking to take custody of a child, that both grounded the remedy and affected the seriousness of the issues raised.

[147] The plaintiff argued that each of *Chaoulli* and *Adams* have relaxed this requirement for s. 7 challenges. I do not read either of these cases as having served that purpose. In *Adams*, for example, at paras. 82-85 the court expressly addressed the question of whether there was "sufficient state action to engage Section 7".

[148] Furthermore, there are a significant number of decisions, from numerous courts, which confirm that a private dispute cannot support a s. 7 claim. The following cases establish the following propositions:

a) There is no constitutional right to provincially-funded legal fees and the courts do not have jurisdiction to order such funding. In addition, there is no authority for the proposition that the "principle of access to justice means more than a duty on the government to make courts of law and judges available to all persons or that it includes an obligation to fund a private litigant who is unable to pay for legal representation in a civil suit…": *Okanagan Indian Band* at para. 28.

b) The *Charter* does not apply to civil disputes and, therefore, cannot require the state to fund legal counsel in civil disputes: *Lawrence v. British Columbia (Attorney General)*, 2003 BCCA 379, 184 B.C.A.C. 26. Significantly, the Court of Appeal in *Lawrence* decided the question

in the context of an application for leave to appeal where the applicant, as in an injunction application, needed only to meet the relatively low threshold of a reasonably arguable case.

c) Section 7 does not apply to cases where there is no state action, including an application for state-funded counsel in a private family law dispute: *DeFehr v. DeFehr*, 2002 BCCA 139, 167 B.C.A.C. 235; *J.L.G. v. D.W.M*, 2002 BCSC 1727; *G.(J.); Miltenberger v. Braaten*, 2000 SKQB 443, [2000] S.J. No. 599; *S.A.K. v. A.C.*, 2001 ABCA 205, 19 R.F.L. (5th) 1; *Ryan v. Ryan*, 2000 NSCA 10, 181 N.S.R. (2d) 255. See also: *Blencoe* at para. 57.

[149] In addition, P.D. seeks in both this application and in her underlying claim, to argue an entitlement to state-funded counsel that would deal with issues such as spousal and child support as well as with property division. The courts have been clear that various economic interests are not protected by s. 7: *Lacey v. British Columbia*, [1999] B.C.J. No. 3168 (S.C.) at para. 6; *Walker v. Prince Edward Island* (1993), 107 D.L.R. (4th) 69 (C.A.), aff'd [1995] 2 S.C.R. 407; *Whitbread v. Walley* (1988), 26 B.C.L.R. (2d) 203, 51 D.L.R. (4th) 509 (C.A.), aff'd [1990] 3 S.C.R. 1273.

[150] P.D. must navigate through these cases to establish that issues of spousal and child support or of property division are critical to the ability of a parent to clothe, feed and house a child and therefore give rise to different considerations.

[151] As a result of time constraints, P.D.’s claim based on foundational constitutional principles, such as the rule of law and the norm of equality, was relatively undeveloped. Nevertheless, this claim also appears to face significant impediments. The Supreme Court of Canada has held that there is no general right to legal counsel as part of the rule of law: *Christie* at para. 21. The Court of Appeal of this province has confirmed that *Christie* ruled out any “broad-based systemic claim to greater legal services based on unwritten principles” such as the rule of law: *Canadian Bar Assn.* at para. 45. Still further, the Supreme Court of Canada has confirmed that the rule of law is not to be regarded as an invitation to supplant the

Constitution's written terms. Instead, the text of the Constitution is to be afforded primacy: *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 at paras. 64-67.

[152] While the plaintiff's claim based on foundational constitutional principles does not again seek a general right to legal counsel, but rather argues in favour of a narrower right, that claim remains difficult and is not directly supported by any authority.

[153] The plaintiff's s. 15(1) challenge also faces multiple impediments. I have chosen to deal with a few such impediments as illustrative. One thesis which underlies this claim is that women require increased levels of legal aid assistance to gain effective and meaningful access to the courts. The difficulties with arguing in favour of an enhanced level of a given benefit, both under s. 15(1) and in terms of a s. 1 analysis, are apparent. I was referred to no authority which directly supported such relief. Cases such as *Winnipeg (Child and Family Services) v. A.(J.)*, 2003 MBCA 154, 235 D.L.R. (4th) 292, admittedly a s. 7 case, highlight some of the difficulties associated with seeking to deviate from legal aid funding levels.

[154] This proposition is also inconsistent with cases in the *Rowbotham* context where applications to have access to counsel of choice have failed, as in *Ho*; as have applications to obtain higher rates, as in *Cai*; as have applications for two lawyers, as in *R. v. Crossman*, [1998] B.C.J. No. 2632 (S.C.); as have applications that there be no limit on counsel's hours, as in *R. v. Johal* (1998), 110 B.C.A.C. 146, 127 C.C.C. (3d) 273 or *Crossman*.

[155] The plaintiff's s. 15(1) claim is based on the alternative ground of alleged discrimination on the basis of "the intersection of sex and poverty". In *Boulter v. Nova Scotia Power Inc.*, 2009 NSCA 17, 307 D.L.R. (4th) 293, Fichaud J.A., for the court, at paras. 32 and 33, determined that poverty was not an analogous ground under s. 15(1). Counsel for P.D. argues that *Boulter* does not deal with the possibility of an alternate ground that combines sex and poverty and that it is permissible to combine grounds. This is illustrated by the Court having combined aboriginality and

residence in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203. Nevertheless this is still another area in which the plaintiff's claim is novel and is not yet directly supported by the case law.

[156] I do not propose to deal with each of the plaintiff's proposed comparator groups. However, a review of one of the comparators chosen by the plaintiff, that of a preference in the legal aid scheme for funding counsel in criminal law matters over private family law matters which is said to favour men over women, reveals certain difficulties. Leaving aside the relevance of s. 7, s. 11(d) of the *Charter* and s. 684 of the *Criminal Code*, R.S.C. 1985, c. C-46, to the entitlement to state-funded counsel in criminal matters, the foregoing comparison appears to focus on the nature of the proceeding involved rather than on the rights of men and women to funding within each such category of proceeding.

[157] Still further, the notice of motion filed by P.D. on this application seeks an order for state-funded counsel who would do "the necessary work following the conclusion of trial". This I was told might extend to the enforcement of orders made at trial. Such an order would further expand the meaning of what the plaintiff argues falls within effective access to the courts or equal benefit of the law, and is again, without precedent.

[158] The foregoing examples reveal that the claim faces numerous challenges of some substance.

[159] *RJR-MacDonald*, at p. 341, established that the consideration of any harm, including irreparable harm, to a defendant, is to be dealt with under the balance of convenience. *RJR-MacDonald* also confirmed, at pp. 343-7, the importance of considering the public interest, to both parties, at this stage of the analysis.

[160] P.D. asserts the public interest is furthered by the grant of the order being sought because it advances the object of having litigants pursue their constitutional rights, and of giving effect to 9(1)(a) of the LSSA which has as an object "assisting individuals to resolve their legal problems and facilitate their access to justice". I

consider that these interests are advanced primarily in the main action being brought by P.D. rather than in the present application.

[161] Several factors are relevant to a consideration of the public interest, particularly as it relates to the defendants. This is ostensibly an “exemption” case rather than a “suspension” case. That is, P.D. does not on this application seek a general suspension of the legal aid regime in terms of how that regime establishes who gets what assistance in the form of legal representation. Instead, the applicant seeks relief that relates to her alone. In *RJR-MacDonald*, at pp. 346-7, the Court said:

> Consideration of the public interest may also be influenced by other factors. In *Metropolitan Stores*, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law than when the application of the law is suspended entirely. See *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General Hospital v. Stoffman* (1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. v. Commission des licences et permis d'alcool*, [1986] 2 S.C.R. ix.
>
> Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected. Thus in *Ontario Jockey Club v. Smith* (1922), 22 O.W.N. 373 (H.C.), the court restrained the enforcement of an impugned taxation statute against the applicant but ordered him to pay an amount equivalent to the tax into court pending the disposition of the main action.

[162] Here the “undertaking” offered on behalf of P.D. has a parallel to the payment into court referred to above. Subject to the comments which follow, the nature of the “exemption” being sought is finite in scope. Thus, the adverse impact on the public interest of any potential order is modest. As a result of this conclusion, I do not believe I need to address the issue of whether the public interest remains a relevant consideration in cases where what is challenged is government policy as opposed to legislation or the various cases provided to me on this issue by each party.

[163] One other component of the public interest and the nature of the "exemption" being sought, does, however, have significant relevance. In *Metropolitan Stores*, Beetz J. said at pp. 143-7:

> The principles followed in the above-quoted cases have been summarized and confirmed for the greater part by this Court in *Gould, supra*. Gould, a penitentiary inmate prohibited from voting by s. 14(4)(e) of the *Canada Elections Act*, R.S.C. 1970 (1st Supp.), c. 14, had commenced an action in the Trial Division of the Federal Court seeking a declaration that the provision in question was invalid as contrary to s. 3 of the *Canadian Charter of Rights and Freedoms* which provides that every citizen of Canada has the right to vote. With a general election about to be held, the inmate applied for an interlocutory injunction, mandatory in nature, requiring the Chief Electoral Officer and the Solicitor General to allow him to vote by proxy. ...
>
> That the respondent inmate had thus a *prima facie* case was, however, not considered as conclusive. Mahoney J. went on to consider the general repercussions of the remedy sought by the respondent and dismissed his application for interlocutory injunction on the following grounds, *inter alia*, to be found at pp. 1139-40:
>
> > To treat the action as affecting only the rights of the respondent is to ignore reality. If paragraph 14(4)(e) is found to be invalid in whole or part, it will, to that extent, be invalid as to every incarcerated prisoner in Canada. That is why, with respect, I think the learned Trial Judge erred in dealing with it as though the application before her was a conventional application for an interlocutory injunction to be disposed of taking account of the balance of convenience as between only the respondent and the appellants.
>
> ...
>
> It has been seen from what precedes that suspension cases and exemption cases are governed by the same basic rule according to which, in constitutional litigation, an interlocutory stay of proceedings ought not to be granted unless the public interest is taken into consideration in the balance of convenience and weighted together with the interest of private litigants.
>
> The reason why exemption cases are assimilated to suspension cases is the precedential value and exemplary effect of exemption cases. Depending on the nature of the cases, to grant an exemption in the form of a stay to one litigant is often to make it difficult to refuse the same remedy to other litigants who find themselves in essentially the same situation, and to risk provoking a cascade of stays and exemptions, the sum of which make them tantamount to a suspension case.

[164] While the plaintiff argues that her application is unique and is to be determined on the particular "constellation of circumstances" before the court, this assertion is belied by the nature of the systemic relief sought in the statement of claim. There are many women in exceedingly difficult financial circumstances whose

entitlement or access to legal aid is significantly constrained by the Society's existing objects and policies. Many of these women are or will be engaged in matrimonial disputes of varying degrees of complexity and involving numerous legal issues including custody and access issues.

[165] I also do not consider that the "undertaking" offered by P.D. renders this application unique. Under Rule 45(6), even in the private law context, the requirement for an undertaking is discretionary: *Fountain v. Parsons* (1994), 92 B.C.L.R. (2d) 358 at 366 (C.A.).

[166] To treat this application as unique is "to ignore reality". Counsel for the plaintiff expressed the view that if the matter could proceed by way of Rule 18A, it might be ready for hearing by October of this year. Presumably if it is to be heard as a full trial that trial date will be still more distant. There is in my mind little doubt that in the interim, the present case, seemingly an exemption case, would be "assimilated" to a suspension case.

[167] I was referred to several decisions by counsel for the plaintiff which express the view that "slippery slope arguments" may have relevance to a final decision, but are not relevant to applications for interim relief: *Lowrey (Litigation Guardian of) v. Ontario*, [2003] O.J. No. 1197 (Ont. S.C.J.) at para. 23; *Burrows (Litigation Guardian of) v. Ontario*, [2003] O.J. No. 5858 (Ont. S.C.J.) at para. 33. I consider the comments in these cases to be inconsistent with the guidance and direction on the same issue that is provided in *Metropolitan Stores*.

[168] Having weighed and considered the foregoing factors, I do not believe that the balance of convenience favours the plaintiff. Accordingly, the plaintiff's application is dismissed.

[169] I was advised that counsel might wish to make submissions on costs after I had dealt with the merits of this application. Counsel can advise me through the Registry whether they wish to address the issue of costs orally or in writing.

"Voith J."