NO. S231251
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

LORRAINE DAVIS and STEPHANIE ROY

PLAINTIFFS

AND:

HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

DEFENDANT

Brought pursuant to the *Class Proceedings Act*, RSBC 1996, c. 50

RESPONSE TO CIVIL CLAIM

Filed by: the Defendant, His Majesty the King in right of the Province of British Columbia, (the "**Province**")

Part 1: RESPONSE TO AMENDED NOTICE OF CIVIL CLAIM FACTS

Division 1 – Defendant's Response to Facts

1. The facts alleged in paragraphs 32 and 33 (as qualified herein) and 34 of Part 1 of the notice of civil claim (the "**Claim**") are admitted.

2. The facts alleged in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 28, 29, 30, 31, 36, 37, 38, 39, 40, 41, 42, 43 and 44 of Part 1 of the Claim are denied.

3. The facts alleged in paragraphs 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 35 of Part 1 of the Claim are outside the knowledge of the defendant and are not admitted.

Division 2 – Defendant's Version of Facts

4. The plaintiffs do not plead the material facts necessary to support each of the alleged causes of action. For example:

    a. paragraphs 2, 4, 5, 37, 38, 39, 40, 42 and 43 of Part 1 of the Claim plead bare assertions that are not supported by material facts. Those pleadings are not admitted and are not responded to in this response to civil claim ("**Response**"), except as set out herein; and

    b. paragraphs 7, 8, 9 and 10 of Part 1 of the Claim plead argument rather than material facts. Those pleadings are not admitted and are not responded to in this Response, except as set out herein.

5. As a result of these pleading deficiencies, unless expressly admitted herein, the Province denies each and every allegation of fact or law made in the Claim, including that the plaintiffs or any proposed class members, as defined in Part 1, paragraphs 28 – 29 of the Claim, are entitled to the relief sought out at paragraph 45, or that the criteria for certification of this action as a class proceeding pursuant to s. 4 of the *Class Proceedings Act*, RSBC 1996, c. 50, can be met.

6. In response to paragraphs 1 and 3 of Part 1 of the Claim, *An Act respecting Sexual Sterilization,* SBC 1933, c. 59 (the "**Historical Sterilization Legislation**") authorized the sexual sterilization of "inmates", as defined in section 2, in circumstances where the appointed board unanimously opined "procreation by the inmate would be likely to produce children who by reason of inheritance would have a tendency to serious mental disease or mental deficiency" (section 5(1) of the Historical Sterilization Legislation).

7. However, in response to paragraph 36 of Part 1 of the Claim, the Province says the procedures once authorized by the Historical Sterilization Legislation, as determined appropriate by the board with statutory decision-making authority, did not continue after the Historical Sterilization Legislation was repealed in 1973 respecting Indigenous women in particular, or at all.

8. Alternatively, if such unauthorized procedures did continue after the Historical Sterilization Legislation was repealed, and as set out herein, then the Province had no knowledge of it, and did not authorize or otherwise condone it.

9. In response to the whole of the Claim, consent to any medical procedure is always a matter specific to the relationship between a patient (and/or their legal guardian, as applicable) and the attending physician or healthcare provider. The Province has no management, control, oversight, supervision, or direction over that relationship.

10. The determination of whether or not a person should undergo a sexual sterilization or abortion procedure is ultimately made by the person themselves in consultation with their treating physician(s), who are under a professional and legal duty to ensure they have obtained their patient's informed consent to the procedure, absent exigent circumstances.

11. In further response to the whole of the Claim, the Province is not involved in the determination of what medical procedures, if any, are performed on any given person, save and except for instances where the person is under the legal guardianship of the Province and the Province is required to be involved.

12. In response to the whole of the Claim, the Province was not complicit in creating an atmosphere of institutional and system racism in hospitals throughout British Columbia.

13. In further response to the whole of the Claim, the Province was not complicit in and/or did not carry out or condone, encourage, authorize, or permit its agents, servants or employees to perform coerced or unlawful sterilizations and/or coerced or unlawful abortions on Indigenous women, and was not willfully blind to such procedures, as alleged or at all.

14. In further response to the whole of the Claim, the Province did not have knowledge that such procedures were being carried out as alleged, or at all.

15. In further response to the whole of the Claim, physicians and other providers of healthcare services in British Columbia are not the Province's agents, servants, or employees and, as such, the Province is not vicariously liable at common law for their alleged tortious conduct, if any.

16. Because the Province does not manage, control, oversee, supervise, or direct the relationship between patients and their healthcare providers, the Province has no knowledge of:

    a. the plaintiff, Lorraine Davis', circumstances as pleaded in Part 1, paragraphs 11 – 19 of the Claim; or

    b. the plaintiff, Stephanie Roy's, circumstances as pleaded in Part 1, paragraphs 21 – 26 of the Claim,

and can neither admit those pleadings nor the allegations against the Province respecting same, as pleaded in paragraphs 20 and 27 of Part 1 of the Claim, respectively.

17. Paragraph 6 of Part 1 of the Claim pleads alleged harms, none of which are admitted because the underlying basis for the alleged harms, and the Province's knowledge of and/or role in causing or contributing to those harms, is not admitted for the reasons set out in this Response.

18. In response to paragraphs 35 and 43 of Part 1 of the Claim, because the Province does not manage, control, oversee, supervise, or direct the relationship between patients and their healthcare providers, the Province similarly:

    a. has no knowledge of how many Indigenous and non-Indigenous women were "inmates" who underwent sexual sterilization procedures authorized under the *Act*;

    b. does not know how the plaintiffs quantify "many" in paragraph 35; and

    c. does not admit these pleadings.

19. The Province does not admit the pleadings in paragraphs 41 and 44 of Part 1 of the Claim and, in any event, the Province says the requirement to plead a notice of civil claim with sufficient particularity rests with the plaintiffs under the *Supreme Court Civil Rules*, BC Reg. 168/2009.

British Columbia's Public Health Care System and Its Various Actors

20. In response to paragraph 9 of Part 1 of the Claim, under the *Constitution Act*, 1867, 30 & 31, Vict, c. 3, the Province has the authority to make laws, at its discretion, in relation to, among other things, "The Establishment, Maintenance, and Management of Hospitals ..." However, the Province disagrees with the plaintiffs' characterization of this constitutional authority as pleaded.

21. In answer to the whole of the Claim, the Province provides funding for and acts as a steward of the delivery of many healthcare services to British Columbia residents. However, in response to paragraph 30 of Part 1 of the Claim, the Province plays no role in the day-to-day operation of hospitals, in the oversight or management of the conduct of hospital staff, or in the determination of what procedures should be performed on, or what treatment should be provided to, any given person, save and except for instances where the person is under the legal guardianship of the Province and the Province is required to be involved.

22. In response to paragraph 31 of Part 1 of the Claim, British Columbia's public healthcare system is a complex network of programs and services currently managed or delivered by various entities and individuals including five regional health authorities (the "**Regional Health Authorities**"), the Provincial Health Services Authority (the "**PHSA**"), hospitals, healthcare facilities, independent healthcare professionals, and others such as the First Nations Health Authority (the "**FNHA**") and the Nisga'a Valley Health Authority. The FNHA, among other things, takes responsibility for the programs and service formerly delivered by Health Canada, and works with health partners in British Columbia to improve health outcomes for Indigenous persons.

The Delivery of Healthcare Services in British Columbia

Regional Health Authorities and PHSA

23. Over the years, there have been a number of structural changes in the delivery of healthcare services in British Columbia. Presently, the planning, management and actual delivery of healthcare services in British Columbia is the responsibility of six provincial health authorities, as follows:

    a. Five Regional Health Authorities established pursuant to the *Health Authorities Act*, RSBC 1996, c. 180, each of which is a distinct legal entity responsible for the design and delivery of health services to the population within their respective geographic regions, namely:

        i. Fraser Health Authority;

        ii. Interior Health Authority;

        iii. Northern Health Authority;

        iv. Island Health Authority; and

        v. Vancouver Coastal Health Authority;

    b. the PHSA, which is a legal body established pursuant to the *Societies Act*, SBC 2015, c. 18, and is responsible for managing the quality, coordination, and accessibility of certain services and province-wide health programs.

24. The five Regional Health Authorities are required to plan and deliver, either directly or through contracted service providers, a range of programs and services appropriate to the needs of individuals resident in their geographic area.

25. With the exception of certain denominational hospitals, acute care hospitals are owned and operated by the Regional Health Authorities. Neither the Campbell River Hospital nor the Vernon Jubilee Hospital are denominational hospitals.

26. The Regional Health Authorities and the PHSA establish the rules and bylaws which govern medical staff at their respective facilities, including the process for obtaining privileges.

27. In response to paragraph 32 of Part 1 of the Claim, and in accordance with Section 2 of the *Hospital Act,* RSBC 1996, c. 200, all hospitals operating within British Columbia are required to have bylaws or rules for the administration and management of their affairs and the provision of a high standard of care.

28. In response to paragraph 33, section 24.1 of the *Hospital Act* ensures there is access to abortion services at hospitals listed in the Schedule to the *Hospital Act*, but the Province has no involvement in the determination of who ultimately accesses those services.

29. Prior to the establishment of the Regional Health Authorities in 1996, each hospital in British Columbia had a "board of management", as defined in section 1 of the *Hospital Act*, RSBC 1979, c. 176, that was responsible for the control and management of that hospital. The Province has never, at any material time, had control or management over either hospitals or the physicians and healthcare professionals providing healthcare services in British Columbia in the manner alleged by the plaintiffs.

Island Health Authority and the Campbell River Hospital

30. In response to Part 1, paragraph 14 of the Claim, the Campbell River Hospital, which the plaintiff Lorraine Davis alleges she attended, is one of the acute care hospitals owned and operated by the Island Health Authority ("**Island Health**").

31. From time to time, Island Health enacts policies, procedures and guidelines with application at Island Health facilities, including the Campbell River Hospital. Those policies, procedures and guidelines issued by Island Health govern many different operational aspects, including obtaining patient consent to procedures being performed at Island Health hospitals. Those policies, procedures and guidelines have varied over the years, and are the subject of regular review.

32. In addition to the Island Health policies, procedures or guidelines, individual Island Health hospitals may have from time to time developed their own forms for use within the hospitals. Such forms may have included specific forms relating to obtaining patient consent to procedures.

33. The Province does not have any management, supervision, oversight or control over the Campbell River Hospital as alleged, or at all.

34. The Province had no involvement whatsoever in Ms. Davis' sterilization procedure, and in particular, in the determination that she should undergo such a procedure, whether directly or indirectly, as alleged or at all.

Interior Health Authority and the Vernon Jubilee Hospital

35. In response to Part 1, paragraph 24 of the Claim, the Vernon Jubilee Hospital, which the plaintiff Stephanie Roy alleges she attended, is one of the acute care hospitals owned and operated by the Interior Health Authority ("**Interior Health**").

36. From time to time, Interior Health enacts policies, procedures and guidelines with application at Interior Health facilities, including the Vernon Jubilee Hospital. Those policies, procedures and guidelines issued by Interior Health govern many different operational aspects, including obtaining patient consent to procedures being performed at Interior Health hospitals. Those policies, procedures and guidelines have varied over the years, and are the subject of regular review.

37. In addition to the Interior Health policies, procedures or guidelines, individual Interior Health hospitals may have from time to time developed their own forms for use within the hospitals. Such forms may have included specific forms relating to obtaining patient consent to procedures.

38. The Province does not have any management, supervision, oversight or control over the Vernon Jubilee Hospital as alleged, or at all.

39. The Province had no involvement whatsoever in Ms. Roy's abortion procedure, and in particular, in the determination she should undergo such a procedure, whether directly or indirectly, as alleged or at all.

Consent to Individual Procedures

40. The determination of which procedures are ultimately performed on a given patient is subject to that patient's individual consent upon consultation with their physician(s). The process for obtaining and documenting such consent is informed and subject to the policies and procedures established by the various hospitals or health authorities and in compliance with part 2 of the *Health Care (Consent) and Care Facility (Admission) Act,* RSBC 1996, c. 181, and the practice standards set by the College of Physicians and Surgeons of British Columbia, including the "Consent to Treatment" Practice Standard.

41. The Province expects that the plaintiff Lorraine Davis would have been informed by her treating physician about the pros and cons of her sterilization procedure, and further, that she would have been asked to confirm her consent to such procedure.

At Part 1, paragraph 15 of the Claim, Ms. Davis pleads she was provided with some consent forms; *i.e.*, "paperwork authorizing a 'tubal ligation'". The Province has no access to her medical records and no knowledge of what occurred in the plaintiff's individual circumstances.

42. Similarly, the Province expects that the plaintiff Stephanie Roy would have been informed by her treating physician about the pros and cons of her abortion procedure, and further, that she would have been asked to confirm her consent to such procedure. The Province has no access to her medical records and no knowledge of what occurred in the plaintiff's individual circumstances.

43. Absent the plaintiffs' authorization, the Province does not have access to the plaintiffs' hospital records. Before delivering this Response, the Province asked the plaintiffs to either provide those records directly or authorize the Province to obtain same, but as of the date of the filing of this Response, the plaintiffs have provided neither the requested records nor the authorization(s). The Province has thus been unable to investigate the allegations of the plaintiffs or to provide a specific response to same. The Province reserves the right to amend this Response and to address the plaintiffs' specific allegations once further information is provided regarding their individual circumstances.

The *Declaration on the Rights of Indigenous Peoples Act*

44. There are no material facts pleaded in Part 1 of the Claim respecting the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c. 44 (the "***Declaration Act***"). However, in response to paragraphs 46 – 47 of Part 3 of the Claim, the Province says the *Declaration Act* does not ratify the UN Declaration on the Rights of Indigenous Peoples ("**UN Declaration**"). Rather, the *Declaration Act* affirms the application of the UN Declaration to the laws of British Columbia and obliges the Province to work in consultation and cooperation with Indigenous peoples in British Columbia to bring its laws into alignment with the UN Declaration.

Division 3 – Additional Facts

45. Physicians, nurses and others providing services in hospitals in British Columbia are independently employed or contracted, and are not employees, servants, or agents of the Province.

46. The Regional Health Authorities and the PHSA establish the rules and bylaws that govern medical staff at their respective facilities, including the process for physicians to obtain privileges at specific hospitals: *Health Authorities Act*, s. 5.

47. To be eligible to practise at a hospital, a physician must first obtain hospital privileges. Those privileges can be revoked or withheld for a number of reasons.

48. Island Health, Interior Health and the other Regional Health Authorities conduct periodic reviews of physician privileges. The Province expects that compliance with policy and procedure and with standards of care is taken into account during such reviews.

49. Moreover, under the *Health Professions Act*, RSBC 1996, c. 183, and the regulations promulgated thereunder, there are 22 different types of healthcare professionals who are regulated by a similar number of professional colleges (the "**Colleges**").

50. Every College is governed by a board of directors, some of whom are elected from among the profession and some of whom are appointed by the Minister of Health: *Health Professions Act*, s. 17.

51. Every College, for the purposes of exercising its powers and performing its duties under the statute, has the powers and capacity of a natural person. The Colleges, among other things, control entry to their profession; establish, monitor, and enforce standards of practice and professional ethics among their members; and oversee and discipline their members: *Health Professions Act*, ss. 15(3), 16(2), 33 – 39. As with the Health Authorities, the Province plays no role in these day-to-day operations of Colleges established under the *Health Professions Act*.

52. Ms. Davis has not identified the physician she alleges performed a sterilization procedure on her without her consent. Similarly, Ms. Roy does not identify the physician she alleges performed an abortion procedure on her without her consent. The Province is thus unable to investigate whether any of those physicians have been the subject of any complaints alleging failure to obtain informed consent from their patients, and is generally unable to know the case it is expected to meet.

Part 2: RESPONSE TO RELIEF SOUGHT

53. The Province consents to the granting of the relief sought in none of the paragraphs of Part 2 of the Claim.

54. The Province opposes the granting of the relief sought in all of the paragraphs of Part 2 of the Claim.

55. The Province takes no position on the granting of the relief sought in none of the paragraphs of Part 2 of the Claim.

Part 3: LEGAL BASIS

The Claims Are Statute-Barred

56. The plaintiffs' claims in negligence, breach of fiduciary duty, and for *Charter* damages, and the claims for same on behalf of those members of the proposed class (as defined in Part 1, paragraph 28 of the Claim) that predate February 22, 2021, are statute-barred. There are no pleaded material facts in Part 1 of the Claim alleging a postponement of the limitation period respecting these claims.

57. The plaintiff Lorraine Davis' claim for (medical) battery, and the claims for same of any members of the proposed class (as defined in Part 1, paragraph 28 of the Claim) who were not minors at the material time(s), are statute-barred. There are no pleaded material facts in Part 1 of the Claim alleging a postponement of the limitation period respecting these claims.

58. If the plaintiffs' allegations that the Province "carried out" coerced sterilizations and coerced abortions (as pleaded in Part 1, paragraphs 40 and 42 of the Claim) constitute a sexual assault, neither of which is admitted, then those claims are not statute-barred per section 3(1)(j) of the *Limitation Act*, SBC 2012, c. 13.

59. The Province pleads and relies on the provisions of the *Limitation Act*, including but not limited to sections 3(1)(k) and 6(1).

60. Alternatively, if none of the plaintiffs' claims are statute-barred by the *Limitation Act*, which is not admitted, then the Province pleads as follows.

Claims Exceed the Scope of Government Liability

61. No claim in damages lies against the Province for any act or omission of:

    a. the Regional Health Authorities or the PHSA;

    b. hospitals or healthcare facilities that are not owned and/or operated by the Province; or

    c. healthcare professionals who are not employed, credentialed, or subject to discipline by the Province.

62. The Province pleads and relies on the provisions of the *Crown Proceeding Act*, RSBC 1996, c. 89.

No Private Law Duty of Care

63. There are no pleaded material facts in Part 1 of the Claim that are capable of establishing that the Province owes a private law duty of care to the plaintiffs as alleged.

64. The Province does not owe a private law duty of care to the plaintiffs and to individual recipients of healthcare services, as alleged or at all.

65. Alternatively, and to the extent the Province owed a private law duty of care to the plaintiffs and to individual recipients of healthcare services, which is not admitted but expressly denied:

    a. such duty did not extend to monitoring medical procedures conducted at hospitals throughout British Columbia and determining whether individual persons should undergo or be denied specific medical procedures; and

    b. the Province did not breach any such duty, as alleged or at all.

66. The Province is not liable in negligence for the alleged losses of the plaintiffs and proposed class members.

No Fiduciary Duty

67. The Province does not owe the plaintiffs and any other individual recipients of healthcare services a fiduciary duty of the nature and scope alleged in the Claim.

68. Alternatively, and to the extent that the Province owed the alleged fiduciary duty to individual recipients of healthcare services, which is not admitted but expressly denied:

    a. such duty did not extend to monitoring procedures conducted at hospitals throughout British Columbia and determining whether individual persons should undergo or be denied specific medical procedures; and

    b. the Province did not breach any such duty, as alleged or at all.

69. The Province is not liable to the plaintiffs or proposed class members for breach of fiduciary duty as alleged.

No Reasonably Foreseeable Harm

70. It was not reasonably foreseeable that the plaintiffs or other individual recipients of healthcare services would suffer the alleged harm, as such harm would only arise

as a result of the wrongdoing of individual physicians and other healthcare professionals at hospitals across British Columbia.

71. It was at all material times reasonable for the Province to assume and expect that physicians and other healthcare professionals, including hospital staff, would act reasonably, ethically, and in compliance with the standards of their particular governing bodies and the various policies and procedures in effect at the hospitals where services were provided, ultimately discharging any and all duties owed to their individual patients.

No Vicarious Liability

72. The Province is not vicariously liable at common law, or at all, for any assault or battery perpetrated by physicians, healthcare professionals, or hospital staff, as alleged or at all.

No *Charter* Breach

73. There are no pleaded material facts in Part 1 of the Claim capable of grounding the plaintiffs' claim for breach of their rights under ss. 7, 12 and 15 of the *Charter*.

74. The Province did not breach the plaintiffs' *Charter* rights or those of other individual recipients of healthcare services, as alleged or at all.

75. In the alternative, any infringement of the *Charter* rights of the plaintiffs, or those of other individual recipients of healthcare services, is the result of individual circumstances and is not systemic or common, as alleged or at all.

76. In the further alternative, if the plaintiffs' *Charter* rights, or those of other individual recipients of healthcare services, were infringed, which is denied, then any such infringement was justified under s. 1 of the *Charter*.

77. In the further alternative, if there has been an unjustified infringement of the plaintiffs' *Charter* rights, or those of other individual recipients of healthcare services, which is denied, then a damage award under s. 24(1) of the *Charter* is not a just and appropriate remedy. At all material times, the Province acted reasonably, in good faith, and with appropriate regard for the *Charter* rights of the plaintiffs and of other individual recipients of healthcare services.

78. The Province says that *Charter* damages are not functionally required to fulfill the objectives of compensation, vindication of rights, or deterrence and says further that countervailing policy considerations render an award of *Charter* damages inappropriate.

Not Suitable for Certification

79. The Province says that the plaintiffs' Claim does not meet the criteria for certification in s. 4(1) of the *Class Proceedings Act*.

80. All aspects of the plaintiffs' Claim, including the proposed class definition, revolve around the question of consent, and invariably lead to the need for a determination as to whether or not each of the plaintiffs or the individual members of the proposed class consented to their procedures.

81. The need to examine consent is inevitable given that, even if the Province had done any of the alleged wrongdoing, none of which is admitted but expressly denied, the plaintiffs and the other members of the proposed class, if identifiable, could only be harmed in the event that a physician decided to perform a sterilization procedure on them without obtaining their informed consent. The issue of consent is thus woven through the totality of the proceedings.

82. Consent is an inherently individual issue that requires a case-by-case determination that cannot be done within the structure of a class proceeding.

83. Further, and in any event, to the extent the plaintiffs or other members of the proposed class may not have given informed consent to sterilization procedures or abortions, their Claims are more properly directed at the individual physicians whom they allege did not seek or obtain their respective informed consent.

Defendant's address for service:

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Date: February 15, 2024

per: Meghan Butler
Solicitor for the defendant

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

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

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

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

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

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