No. S168364
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

Mary Louise MacLaren, D.C., and
Council of Canadians with Disabilities

Plaintiffs

And:

Attorney General of British Columbia

Defendant

RESPONSE TO CIVIL CLAIM

Filed by: The Defendant, Attorney General of British Columbia (the "AGBC")

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 – Defendant's Response to Facts

1. The facts alleged in paragraphs 5-6 of Part 1 of the notice of civil claim are admitted.

2. The facts alleged in paragraphs 1, 7-16 of Part 1 of the notice of civil claim are denied.

3. The facts alleged in paragraphs 2-4, 17-52 of Part 1 of the notice of civil claim are outside the knowledge of the AGBC.

Division 2 – Defendant's Version of Facts

1. The Plaintiffs challenge the constitutionality of subsection 31(1) of the *Mental Health Act* (the "*Act*"), paragraphs 2(b) and (c) of the *Health Care (Consent) and Care Facility (Admission) Act,* R.S.B.C. 1996, c. 181 and paragraphs 11(1)(b) and (c) of the *Representation Agreement Act*, R.S.B.C. 1996, c. 405 (the "Impugned Provisions") under ss. 7 and 15 of the *Charter of Rights and Freedoms* (the "*Charter*").

2. In answer to paragraphs 7-11 and 16 of Part 1 of the Notice of Civil Claim, the *Health Care (Consent) and Care Facility Admission Act* and *Representation Agreement Act* do not apply to persons who are detained under the *Act*. The *Act* and *Mental Health Regulation*, B.C. Reg. 233/99 (the "*Regulation*") provide a comprehensive scheme for the detention and treatment of persons found to have met the statutory conditions for admission under the *Act*. This includes a legislative requirement that a physician assess an involuntary patient's capacity to consent to treatment at the time the consent is signed.

3. In answer to paragraphs 12-16 of Part 1 of the Notice of Civil Claim, the plaintiffs' review of the impugned provisions provides an incomplete picture of the process by which patients may be detained under the *Act*, and consent to treatment is provided by, or on behalf of an involuntary patient.

Consent to treatment for involuntary patients under the *Mental Health Act*

4. Where a patient is involuntarily detained under the *Act*, the director of a designated facility may sign a consent to treatment on behalf of the patient. As set out in s. 8(a) of the *Act*, the director must ensure:

> (a) that each patient admitted to the designated facility is provided with professional service, care and treatment appropriate to the patient's condition and appropriate to the function of the designated facility and, for those purposes, a director may sign consent to treatment forms for a patient detained under section 22, 28, 29, 30 or 42.

5. Under s. 31(1) (the "Deemed Consent Provision"), the psychiatric treatment authorized by the director pursuant to s. 8 is deemed to be given with the consent of the patient.

6. Under s. 1, treatment is defined to mean safe and effective psychiatric treatment. Treatment also includes any procedure necessarily related to the provision of psychiatric treatment.

7. In specific response to para. 12 of Part 1 of the Notice of Civil Claim, the AGBC denies that every involuntary patient is deemed to consent to "all psychiatric treatment". Rather, an involuntary patient is deemed to consent to treatment authorized by a director. A director may only sign consent to treatment forms for a patient for the purpose of fulfilling a director's duty under s. 8(a) of the *Act* to ensure that every patient is provided with professional service, care and treatment appropriate to the patient's condition.

8. Furthermore, before treatment is provided to an involuntary patient, Form 5 (Consent for Treatment – Involuntary Patient) in the *Regulation* must be completed. Form 5 may be signed by the patient, in which case a physician must attest that "To the best of my judgment, the above-named patient was capable of understanding the nature of the above authorization at the time it was signed."

9. If not signed by the patient, Form 5 may be signed by the physician alone. In that event, the physician must attest as follows:

> The above-named patient is an involuntary patient under section 22, 28, 29, 30 or 42 of the *Mental Health Act* and to the best of my judgment is incapable of appreciating the nature of treatment and/or his or her need for it, and is therefore incapable of giving consent.

10. Section 11(5) of the *Regulation* provides that a consent to treatment for a detained patient must be in Form 5.

11. In specific response to para. 13 of Part 1 of the Notice of Civil Claim, there is no presumption one way or the other in the *Act* as to the capability of an involuntary patient to provide consent. However, this fact is irrelevant given that an assessment of a patient's capability to provide consent is required by Form 5 before treatment can be provided to an involuntary patient.

12. In specific response to para. 14 of Part 1 of the Notice of Civil Claim, the plaintiffs are incorrect that there is no requirement to assess an involuntary patient's capability to give

consent. The *Regulation* mandates that a consent to treatment for an involuntary patient be in Form 5, and Form 5 requires an assessment of the patient's capacity to give consent.

Detention under the *Mental Health Act* and review of detention

13. Patients are most commonly detained under the *Act* pursuant to s. 22. Under s. 22, the director of a designated facility may admit and detain a person for up to 48 hours for examination and treatment on receiving on medical certificate completed by a physician in accordance with ss. 22(3) and (4) of the *Act*. The detention and treatment of a patient may extend beyond 48 hours, and up to one month, if a second medical certificate is completed by another physician in accordance with ss. 22(3) and (5) of the *Act*.

14. Each medical certificate provided by a physician under s. 22 of the *Act* must include, as required by s. 22(3)(a)(ii), the physician's opinion that the person is a person with a mental disorder. A person with a mental disorder is defined under s. 1 as a person who has a disorder of the mind that requires treatment and seriously impairs the person's ability

    a. to react appropriately to the person's environment, or

    b. to associate with others.

15. Each medical certificate must also include, as required by s. 22(3)(c), the physician's opinion that the person:

    (i) requires treatment in or through a designated facility,

    (ii) requires care, supervision and control in or through a designated facility to prevent the person's or patient's substantial mental or physical deterioration or for the protection of the person or patient or the protection of others, and

    (iii) cannot suitably be admitted as a voluntary patient.

16. After one month has elapsed from admission, the patient must be discharged unless the authority for the detention has been renewed through a review completed by the director or a physician authorized by the director, as prescribed by s. 24 of the *Act*. Section 24(1)

provides the authority for a further period of detention of one month, then three months, and then successive periods of six months.

17. Before the end of each period of renewal, s. 24(2) of the *Act* requires the director or a physician authorized by the director to examine the patient and either discharge the patient or record a written report of the examination of the reasons for the opinion that the patient continues to meet the criteria in s. 22(3)(a)(ii) and (c) of the *Act*. This examination must include (under s. 24(2.1)):

> (a) consideration of all reasonably available evidence concerning the patient's history of mental disorder including
>
> (i) hospitalization for treatment, and
>
> (ii) compliance with treatment plans following hospitalization, and
>
> (b) an assessment of whether there is significant risk that the patient, if discharged, will as a result of a mental disorder fail to follow the treatment plan the director or physician considers necessary to minimize the possibility that the patient will again be detained under s. 22.

18. Sections 28, 29, 30 and 42 of the *Act* (all referenced in the Deemed Consent Provision) are alternative means by which a patient may be involuntarily admitted to a provincial mental health facility under the *Act* (collectively, and including s. 22, the "Involuntary Detention Provisions"). Section 28 empowers a police officer to apprehend a person and take him or her to a designated facility for examination. A patient may also be transferred to a provincial mental health facility from a correctional or youth custody centre (s. 29), or from another province (s. 42). In each of these circumstances; the patient's detention in a designated facility must be supported by medical certificates completed in accordance with s. 22 of the *Act*.

19. Section 30 of the *Act* concerns patients admitted to a provincial mental health facility who are detained under the authority of the *Criminal Code*, having been found either unfit to stand trial or not criminally responsible on account of mental disorder. The continued detention of this group of patients, and the process for review of detention, is governed by the *Criminal Code* and not the *Act*.

20. Section 37 of the *Act* provides for the placement of detained patients in the community. Under this provision, a director may release a detained patient from a designated facility where the director considers that leave would benefit the patient, and appropriate community supports exist to meet the conditions of leave. Patients residing in the community on leave continue to be subject to the deemed consent provision in s. 31.

Reviews of detention under the *Mental Health Act*, and requests for a second opinion

21. A person who is involuntarily detained under the *Act* is entitled, at his or her request or the request of someone acting on the patient's behalf, to a hearing by a review panel to determine whether the detention should continue because the conditions of s. 22(3)(a)(ii) and (c) of the *Act* continue to describe the condition of the patient. Review panels are appointed under s. 24.1 of the *Act*, and must include a lawyer, a medical practitioner, and a third person who is not a lawyer or medical practitioner.

22. The timing of review panel hearings is set out in s. 25 of the *Act*, and s. 6 of the *Regulation*, and mirrors the timelines for director's reviews under s. 24 of the *Act*. As required by s. 25(2.1) of the *Act*, a hearing by a review panel must include consideration of the same matters as the director is required to review under s. 24(2.1).

23. In addition, where a patient is deemed to have consented to treatment authorized by the director, s. 31(2) of the *Act* provides that the patient may request a second medical opinion on the appropriateness of the treatment authorized by the director during each of the applicable review periods. On receipt of a second medical opinion, the director must consider whether changes should be made in the authorized treatment for the patient and authorize changes that the director considers should be made.

24. Finally, if a patient or a representative of a patient believes there is insufficient reason or legal authority for a certificate, including a medical certificate completed pursuant to s. 22(1), he or she is entitled under s. 33 of the *Act* to apply to the courts for a review of the certificate. If the court finds there is insufficient reason or legal authority for the certificate, the court may order that the patient be discharged or that the patient be re-examined and a new medical report be prepared for the director.

Legislative objectives of the Involuntary Detention and Deemed Consent Provisions

25. The Involuntary Detention Provisions in the *Act* are directly linked to s. 31(1), which governs deemed consent to treatment. The objective of the Involuntary Detention and Deemed Consent Provisions is to provide psychiatric treatment to persons suffering from mental disorders who satisfy the criteria for involuntary detention. The *Act* does not provide for detention for the exclusive purpose of isolation or segregation.

26. The Deemed Consent Provision allows involuntary patients with mental disorders, whose conditions prevent them from recognizing the need for treatment or who lack the ability to remain on a treatment regime voluntarily, or both, to receive the treatment they require. Treatment allows patients to manage or recover from their illnesses so that they can be discharged from hospital or placed in the community. Without treatment, many involuntary patients would remain detained in a designated facility for extended periods. The inability to provide treatment would prolong the suffering that is caused by mental disorders and extend the duration of time where patients' liberty is restricted.

27. The Involuntary Detention and Deemed Consent Provisions also have an important protective purpose and effect. By facilitating necessary treatment, these provisions prevent patients with serious mental disorders from causing harm to themselves, their families, health care providers, and the broader public.

Division 3 – Additional Facts

Treatment of Mental Disorders

28. Early identification, diagnosis, and treatment of mental disorders results in improved short and long-term prognoses for most patients with mental disorders.

29. In many cases, treatment of serious mental disorders requires, as part of a comprehensive treatment plan, the use of psychotropic medication. Psychotropic medications include anti-psychotic medications, mood-stabilizers, antidepressants, and anti-anxiety medications.

30. Psychotropic medications are a highly effective form of treatment for mental disorders. For most involuntarily detained patients, psychotropic medications reduce or eliminate

symptoms, such as psychosis, hallucinations, or mania. Following treatment with psychotropic medications, many involuntarily detained patients are released or discharged from designated mental health facilities.

31. In contrast, involuntarily detained patients generally do not improve without treatment with psychotropic medications. In many cases, involuntary detention without treatment exacerbates psychotic, manic, or delusional symptoms, prolonging the need for detention.

32. Early treatment of psychosis generally results in better short and long term prognoses. Patients suffering from severe psychosis typically respond, as part of a comprehensive treatment plan, to anti-psychotic psychotropic medications within 24 to 48 hours of treatment. Symptoms generally continue to improve over the following weeks and months if treatment is maintained. There is no scientifically proven, effective alternative treatment for psychosis.

33. All medications, including psychotropic medications, can cause side effects. However, due to recent advances in pharmaceutical science, modern psychotropic medications, and in particular anti-psychotic medications, are both safer and more effective than medications prescribed in the past.

34. Most side effects from modern psychotropic medications are minor, and cease when the dosage is adjusted or the treatment regime is discontinued. Serious side effects such as neuroleptic malignant syndrome and tardive dyskinesia are very rare, and are typically associated with high doses of medication. Serious side effects normally cease if the treatment regime is discontinued or the dosage is adjusted.

35. Electroconvulsive therapy ("ECT") is an effective and safe treatment for major depression, mania, and in some cases, schizophrenia. Pursuant to the Electroconvulsive Therapy Guidelines for Health Authorities in British Columbia, ECT is usually reserved for situations where medications have not been effective.

36. Patients receiving ECT are placed under general anaesthetic, and given a brief, controlled pulse of electrical current through their brain. ECT causes positive changes to brain chemistry that reverse symptoms caused by mental disorders.

37. Misconceptions and stigma surrounding ECT are largely the product of early techniques and methods that have been discontinued. Modern ECT is considered a safe and effective treatment option within the mainstream medical profession. Although memory loss may be a side-effect of ECT, memory loss associated with modern ECT is generally transient and may be decreased by slight changes in the procedure.

38. Failure to treat involuntarily detained patients with serious mental disorders exposes them to serious risks of harm. These include increased risks of suicide, self-harm, deterioration, and social withdrawal. Other negative effects resulting from untreated mental disorders of involuntarily detained patients include increased need for restraints and seclusion, longer stays in hospital, and poorer prognosis.

39. Failure to treat involuntarily detained patients also has a negative impact on the broader community. For example, leaving involuntarily detained patients with mental disorders untreated increases the frequency of assaults upon nurses, other health care providers, and other patients. It also has a negative impact on family members, friends, and other patients.

40. Physicians caring for involuntarily detained patients must carefully balance the therapeutic benefits of treatment with any potential risks. In most cases, the risks associated with treatment are far less serious than the risks associated with untreated mental disorders.

Leave from a designated facility

41. As set out in paragraph 20 above, an involuntarily detained patient may be released on leave from a designated facility where the director of that facility considers that leave would have therapeutic benefit for the patient and appropriate support exists in the community to satisfy the conditions of leave.

42. The term "extended leave" refers to leave, authorized under s. 37 of the *Act*, for a period longer than 14 days. In most cases of extended leave, the director of the designated facility in which the patient is detained assigns his or her powers and obligations under the *Act* with respect to the patient to health care providers in the community.

43. Extended leave is a client-centred therapeutic intervention. The purpose of extended leave is to ensure that an involuntarily detained patient is released from a designated facility as early as possible, and to facilitate the patient's potential for living in the community by providing support for treatment compliance in the community.

44. Pursuant to the Guide to the Mental Health Act, extended leave should only be considered where an involuntarily detained patient: can be actively monitored for compliance with treatment in the community; will be provided appropriate services in the community; will be permitted reasonable choice as to geographic location of residence; and is capable of being informed of the meaning of extended leave and the conditions of leave.

Part 2: RESPONSE TO RELIEF SOUGHT

45. The AGBC consents to the granting of the relief sought in the following paragraphs of Part 2 of the notice of civil claim: **N/A**.

46. The AGBC opposes the granting of the relief sought in the following paragraphs of Part 2 of the notice of civil claim: **1(a)-(c).**

47. The AGBC takes no position on the granting of relief sought in the following paragraphs of Part 2 of the notice of civil claim: **N/A**.

Part 3: LEGAL BASIS

Section 7 of the *Charter*

48. The AGBC denies that the Impugned Provisions engage the right to life protected by s. 7 of the *Charter*. In the alternative, any deprivation of the right to life effected by the Impugned Provisions, or any of them, is in accordance with the principles of fundamental justice.

49. The AGBC concedes that a person's entitlement to consent to medical treatment engages the right to liberty and security of the person as protected by s. 7 of the *Charter*. However, the AGBC says that any deprivation of an individual's right to liberty or security of the person in relation to the Deemed Consent Provision in s. 31(1) of the *Act* is in accordance with principles of fundamental justice.

50. More specifically, the *Act* contains a number of important procedural safeguards that ensure that any deprivation of life, liberty or security of the person relating to treatment is in accordance with principles of fundamental justice. As set out in paragraphs 4 - 24 above, patients may be detained for over 48 hours only when two physicians have determined that the certification criteria have been satisfied; continued detention is permissible only after comprehensive review and re-assessment of the patient at appropriate time intervals; treatment for which consent is deemed must be authorized by a director and provided only after a physician has conducted an assessment of the patient's capacity to consent to treatment; involuntary patients or someone on their behalf can request a hearing by a review panel to determine whether the detention should continue; involuntary patients or someone on their behalf can request a second medical opinion regarding the appropriateness of treatment authorized by the director; and, lastly, involuntary patients may apply to the courts to have the appropriateness of their certification reviewed.

51. In response to paragraphs 3 and 7 of Part 3 of the Notice of Civil Claim, the AGBC says that the use of a substitute decision maker to decide whether or not to consent to psychiatric treatment would not ensure that patients receive necessary treatment, in fulfillment of the statutory objective.

52. In further response to paragraph 7 of Part 3 of the Notice of Civil Claim, as set out in paragraphs 8-12 above, treatment is not provided without an assessment of a patient's capability. Assessment of a patient's capability to provide consent is required by Form 5 before treatment can be provided to an involuntary patient.

53. The AGBC denies that the Impugned Provisions are arbitrary, overbroad, or grossly disproportionate in relation to their objective.

Section 15 of the *Charter*

54. The AGBC denies that any of the Impugned Provisions infringe s. 15 of the *Charter*.

55. The AGBC specifically denies that s. 31(1) of the *Act* creates a distinction based on mental disability. The Deemed Consent Provision, viewed within its proper statutory context, makes a distinction between individuals who are involuntarily detained under the *Act* and

those who are not. Patients are detained under the *Act* because they require treatment in or through a designated care facility, and also require care, supervision and control in or through a designated facility to prevent the patient's substantial mental or physical deterioration, or for the protection of the patient or others.

56. The AGBC denies that the plaintiffs have been denied a protection or benefit of the law as plead, or at all.

57. In addition, the AGBC denies that s. 31(1) of the *Act* creates a disadvantage by perpetuating discrimination, prejudice, or stereotypes.

58. In the alternative, if the Impugned Provisions distinguish between the plaintiffs and others on the basis of mental disability, or any enumerated or analogous ground, then the distinction is saved by s.15(2) of the *Charter.* The Impugned Provisions are an ameliorative program directed an improving the lives of certain people with mental disabilities by ensuring that people who lack the capacity to consent to treatment receive necessary treatment. There is a clear correlation between the Impugned Provisions, the objective of the *Act* as a whole, and the disadvantage suffered by people with mental disorders who lack the capacity to consent to treatment.

The United Nations Convention on the Rights of Persons with Disabilities

59. The AGBC denies that the Impugned Provisions are inconsistent with the United Nations Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 (the "CRPD"). In any event, the CRPD does not set a constitutional standard, and even if the Impugned Provisions were inconsistent with the CRPD, which is specifically denied, such inconsistency does not amount to a breach of s. 7 or 15 of the *Charter.*

Section 1 of the *Charter*

60. In the alternative, if any of the Impugned Provisions constitute an infringement of ss. 7 or section 15 of the *Charter,* any such breach is a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society.

61. The Impugned Provisions were enacted in furtherance of the objective of ensuring that people suffering from mental disorders who satisfy the involuntary detention criteria receive the treatment they require.

62. The Impugned Provisions are rationally connected to their objective, and impair the rights protected by ss. 7 and 15 of the *Charter* no more than necessary to achieve that objective. The impugned provisions do not have a disproportionately severe effect on the persons to whom they apply.

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Place of trial:	Vancouver, BC
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Date:	November 10, 2016

for Leah Greathead
Counsel for Attorney General of British Columbia

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 prove 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.