

**THE QUEEN'S BENCH
WINNIPEG CENTRE**

BETWEEN:

DAVID WEREMY

Plaintiff,

- and -

THE GOVERNMENT OF MANITOBA

Defendant.

Proceeding under
The Class Proceedings Act, C.C.S.M. c. C.130

STATEMENT OF DEFENCE OF THE GOVERNMENT OF MANITOBA

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STATEMENT OF DEFENCE OF THE GOVERNMENT OF MANITOBA

1. The defendant, The Government of Manitoba ("Manitoba"), admits the allegations contained in paragraphs 6 and 8 of the amended statement of claim.
2. Manitoba denies all other allegations in the amended statement of claim except as is hereinafter expressly admitted, and denies that the plaintiff is entitled to the relief claimed in paragraph 1 of the amended statement of claim.

History of MDC

3. Manitoba admits that, at all material times, it owned, operated and managed a residential facility in Portage la Prairie, Manitoba, for individuals with developmental disabilities known as the Manitoba Developmental Centre ("MDC"). MDC is a developmental centre as defined under *The Vulnerable Persons Living with a Mental Disability Act*, C.C.S.M. c. V90, and has been designated as such under s. 7(a) of *The Vulnerable Persons Living with a Mental Disability Regulation*, Man. Reg. 208/96. Prior to the enactment of *The Vulnerable Persons Living with a Mental Disability Act* in 1996, MDC was operated pursuant to *The Mental Health Act*, C.C.S.M. c. M110 and *The Mental Deficiency Act*, R.S.M. c. 160.

4. MDC was known as the Home for Incurables from its inception until about 1933, then as the Manitoba School for Mentally Defective Persons until about 1963, then as the Manitoba School for Retardates until about 1967, then as the Manitoba School until about 1985, and thereafter as MDC.

5. MDC operated on a medical model of care from its inception until about 1994. At that time, it began to develop a client-focused psycho-social model of care, in which services were more closely aligned with residents' needs and aspirations, and more opportunities were provided for decision-making by residents.

6. From its inception until about 1930, MDC served persons currently described as persons with intellectual disabilities, as well as the sick, the elderly, soldiers returning from World War I, and outpatients. After 1930, MDC operated exclusively as an institution for the care of persons currently described as persons with intellectual disabilities. Residents have also suffered from mental illness, physical disabilities, and other medical and social problems. Many residents of MDC have, once admitted, resided there for the remainder of their lives.

7. MDC is currently comprised of a number of buildings. Current residents of MDC live and sleep in either dorm-style accommodations with shared bathrooms or private bedrooms with individualized living spaces and private bathrooms.

8. Since the passage of *The Vulnerable Persons Living with a Mental Disability Act* in 1996, MDC had only admitted residents for short-term placements or pursuant to an order of the court under *The Vulnerable Persons Living with a Mental Disability Act*.

9. In 1987, MDC became accredited through the Council on Accreditation, and has since maintained that accreditation. The Council on Accreditation is a non-profit organization which accredits human services agencies for their implementation of nationally-accepted standards of practice.

10. MDC provides services to its residents appropriate to their diagnosis and needs, including medical, dental, psychiatric and psychological care, speech language therapy, audiology services, occupational therapy, pharmacy services, employment services, therapeutic recreation and outreach network supports.

11. The number of residents of MDC has varied greatly since its inception. The number of residents peaked at approximately 1,200 in 1969, and has continuously decreased since then. MDC currently has approximately 160 residents, and continuously works to transition residents to the community.

12. With respect to the Clarkson Report referred to at paragraphs 15 and 16 of the amended statement of claim, Manitoba reviewed its findings and recommendations, and responded in an appropriate manner in accordance with the standards of care for a facility such as MDC that were applicable at any given time, while having regard for the financial circumstances and obligations of Manitoba at that time.

13. With respect to the Ombudsman Report referred to at paragraphs 17 and 18 of the amended statement of claim, Manitoba reviewed its findings and recommendations, and responded in an appropriate manner in accordance with the standards of care for a facility such as MDC that were applicable at any given time, while having regard for the financial circumstances and obligations of Manitoba at that time.

The Plaintiff's Experiences at MDC

14. In response to paragraph 24 of the amended statement of claim, Weremy was first admitted to MDC on or about November 24, 1958. Subsequently:

- a) between November 1958 and July 1970, Weremy was periodically placed on a leave of absence to the care of his mother, father and/or brother on 11 different occasions for approximately one to two weeks at a time;

- b) On July 2, 1970, Weremy was discharged from MDC to Oakhaven Residence, a group foster home in Morden, Manitoba;
- c) On July 2, 1971, Weremy was re-admitted to MDC;
- d) On January 17, 1972, Weremy was placed on a leave of absence to a care provider in Virden, Manitoba for a 6-month period before returning to MDC;
- e) from December 17, 1974 to April 21, 1975, Weremy was placed on a leave of absence from MDC to the care of his mother;
- f) on April 21, 1975, Weremy was discharged from MDC to a foster home in Portage la Prairie, Manitoba;
- g) on August 25, 1977, Weremy was re-admitted to MDC;
- h) on September 24, 1977, Weremy was placed on a leave of absence from MDC to the care of his mother;
- i) on September 30, 1977, Weremy was discharged from MDC.

15. Manitoba denies the allegations in paragraphs 25 to 29 of the amended statement of claim, and puts Weremy to the strict proof thereof.

16. In response to paragraph 30 of the amended statement of claim, Manitoba denies Weremy was constantly underfed, and puts Weremy to the strict proof thereof.

17. In further response to paragraph 30 of the amended statement of claim, some residents of MDC suffered from eating disorders such as pica, which is an eating disorder in which a person ingests non-nutritive substances. In instances where such behaviour occurred, staff at MDC would intervene and address the behaviour in an appropriate fashion.

18. In response to paragraph 31 of the amended statement of claim, Manitoba has no knowledge of any occasions in which Weremy “tried to escape” from MDC. Manitoba acknowledges that he was placed on a leave of absence or discharged into the community from time to time as described at paragraph 14 above. Manitoba denies that Weremy was placed in “solitary confinement” and forced to sleep naked on the floor without a mattress because he “tried to escape,” and puts Weremy to the strict proof thereof.

19. In further response to paragraph 31 of the amended statement of claim, Manitoba admits that, in certain instances, mechanical restraints or pharmacological interventions may have been utilized as part of the behaviour support plan of a resident for the purposes of ensuring the safety of the resident and/or other persons at MDC. Manitoba further admits that, in certain instances, a resident may have been placed into a segregated unit to ensure the safety of the resident and other persons at MDC. Manitoba denies that residents were placed into a segregated unit as a form of punishment or for any improper purpose, and puts Weremy to the strict proof thereof.

Response to Allegations Concerning Knowledge of the Crown

20. In response to paragraph 32 of the amended statement of claim, Manitoba considered and acted upon all information and recommendations provided to it, whether in commissioned reports or otherwise, and responded in an appropriate manner in accordance with the standards of care for a facility such as MDC that were applicable at any given time, while having regard for the financial circumstances and obligations of Manitoba at that time.

21. In response to paragraph 33 of the amended statement of claim, Manitoba denies that the care and conditions at MDC were poor, that the staff hired were unskilled or unsuitable, or that the conditions of the facility were not suitable or appropriate, as alleged or at all, and puts Weremy to the strict proof thereof. Manitoba states that the care provided and the conditions of the facility were in accordance with the standards of care for a facility such as MDC that were applicable at any given time while having regard for the financial circumstances and obligations of Manitoba at that time.

22. Manitoba further states that the qualifications, training and supervision of staff at MDC were in accordance with the standards of care for a facility such as MDC that were applicable at any given time, while having regard for the financial circumstances and obligations of Manitoba at that time.

Response to Allegations of Mistreatment of Residents and Conditions of the Institution

23. In response to paragraph 34 of the amended statement of claim, Manitoba states that until approximately 1990, MDC admitted both adults and youth. Since then, only adults have been admitted to MDC. Presently, the residents of MDC range in age from 18 to 86. Manitoba states that the admission and residency of all residents of MDC at all material times was lawful.

24. In response to paragraph 35 of the amended statement of claim, Manitoba denies that improper conduct occurred at MDC, as alleged or at all, and puts Weremy to the strict proof thereof. Manitoba states that the operation of MDC has at all times been reasonable and appropriate, and in accordance with the standards of care for a facility such as MDC that were applicable at any given time, while having regard for the financial circumstances and obligations of Manitoba at that time.

Response to Allegations of Duties Owed by the Crown to the Class (Duty of Care)

25. In response to paragraphs 36 to 40 of the amended statement of claim, Manitoba denies that it breached any duty of care owed to Weremy or any proposed members of the Class, as alleged or at all, and puts Weremy to the strict proof there. Manitoba states that the operation of MDC has at all times been reasonable and appropriate and in accordance with the standards of care for a facility such as MDC that were applicable at any given time, while having regard to the financial circumstances and obligations of Manitoba at that time.

26. Manitoba further states that all decisions related to the provision of funding for the operation of MDC constituted policy decisions, such that Manitoba does not owe any private law duty of care to Weremy or the proposed members of the Class arising out of the consequences of any such funding decisions.

27. In response to paragraph 41 of the amended statement of claim, Manitoba denies that it is vicariously liable for any assaults perpetrated by residents on other residents, as alleged or at all, and puts Weremy to the strict proof thereof.

Reply to Allegations of Fiduciary Relationship between the Crown and the Class

28. In response to paragraphs 43 to 51 of the amended statement of claim, Manitoba denies that it owed the fiduciary duties as alleged to Weremy or any proposed members of the Class. In the alternative, Manitoba denies that it breached any fiduciary or other duty owed to Weremy or any proposed members of the Class, as alleged or at all, and puts Weremy to the strict proof thereof. Manitoba states that the operation of MDC has at all times been reasonable and appropriate and in accordance with the standards of care for a facility such as MDC that were applicable at any given time, while having regard to the financial circumstances and obligations of Manitoba at that time.

29. Manitoba further states that at no time did it prefer its interests to those of the residents of MDC, conduct itself in a disloyal way, or abuse any trust-like relationship with the residents of MDC.

30. In response to paragraph 52 of the amended statement of claim, Manitoba denies that it is vicariously liable for any assaults perpetrated by residents on other residents, as alleged or at all, and puts Weremy to the strict proof thereof.

Response to Allegations of Vicarious Liability

31. In response to paragraphs 53 to 59 of the amended statement of claim, Manitoba acknowledges that it may be vicariously liable for tortious actions of its employees which may have been committed against residents of MDC, depending upon the circumstances in which any particular tortious action was committed.

32. In response to paragraph 60 of the amended statement of claim, Manitoba denies that it is vicariously liable for any assaults perpetrated by residents on other residents, as alleged or at all, and puts Weremy to the strict proof thereof.

Response to Allegations of Damages Suffered by the Class

33. In response to paragraphs 61 to 65 of the amended statement of claim, Manitoba denies that Weremy or the proposed members of the Class suffered loss or damage, as alleged or at all, and put Weremy to the strict proof thereof.

34. In the alternative, any such loss or damage suffered by Weremy or members of the proposed Class resulted from pre-existing physical, emotional and/or psychological problems which were not caused or contributed to by Manitoba.

Response to Claim for Punitive Damages

35. In response to paragraphs 66 to 68 of the amended statement of claim, Manitoba denies that Weremy or the proposed members of the Class are entitled to aggravated or punitive damages, as alleged or at all. Manitoba's operation of MDC has at all times been reasonable and appropriate, and in accordance with the standards of care for a facility such as MDC that were applicable at any given time while having regard to the financial circumstances and obligations of Manitoba at that time.

Response to the Statement of Claim as a Whole

36. Manitoba states that all the claims advanced by Weremy are statute-barred by s. 2(1) of *The Limitations of Actions Act* and section 21(1) of *The Public Officers Act*.

37. Manitoba pleads and relies on the limitation of liability provisions as set out in section 162(2) of *The Vulnerable Persons Living with a Mental Disability Act*, C.C.S.M. c. V90, section 94 of *The Mental Health Act*, C.C.S.M. c. M110, and sections 34 and 35 of *The Mental Deficiency Act*, R.S.M. c. 160.

38. In the alternative, Manitoba states that Weremy is estopped from bringing this action by virtue of the doctrine of laches. The lengthy passage of time since the alleged misconduct is said to have occurred has resulted in the spoliation of evidence, including adversely affecting the availability and recollection of witnesses, all of which causes severe prejudice to Manitoba in its ability to defend this action because of insufficient information to confirm or deny the allegations.

39. Manitoba pleads and relies on the provisions of *The Proceedings Against the Crown Act*, C.C.S.M. c. P140, and specifically sections 2 and 4, *The Vulnerable Persons Living with a Mental Disability Act*, C.C.S.M. c. V90, *The Vulnerable Persons Living with a Mental Disability Regulation*, Man. Reg. 208/96, *The Mental Health Act*, C.C.S.M. c. M110, *The Mental Deficiency Act*, R.S.M. c. 160, *The Limitation of Actions Act*, C.C.S.M. c. L150, and *The Public Officers Act*, C.C.S.M. c. P230.

40. Manitoba therefore submits that the claim should be dismissed, with costs.

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