

SJC-200-2019

IN THE COURT OF QUEEN'S BENCH
OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

B E T W E E N :

COUR DU BANC DE LA REINE DE
NOUVEAU-BRUNSWICK

DIVISION DE PREMIERE INSTANCE

CIRCONSCRIPTION JUDICIAIRE DE
SAINT JOHN

COURT OF QUEEN'S BENCH
CLERK / SAINT JOHN

E N T R E :

RECD REC'D MAY 24 2019 FILED FILE'D

COUR DU BANC DE LA REINE
GREFFIERE / SAINT-JEAN

**DARRELL TIDD AS LITIGATION GUARDIAN OF DEVAN TIDD
and REID SMITH AS LITIGATION GUARDIAN OF AARON
SMITH**

PLAINTIFFS
(DEMANDEUR)

-and-

**PROVINCE OF NEW BRUNSWICK and REGIONAL HEALTH
AUTHORITY A C/O VITALITÉ HEALTH NETWORK**

DEFENDANTS
(DEFENDEURS)

NOTICE OF ACTION WITH
STATEMENT OF CLAIM ATTACHED
(Form 16A)

To: **PROVINCE OF NEW
BRUNSWICK and VITALITÉ
HEALTH NETWORK**

The Defendants

LEGAL PROCEEDINGS HAVE BEEN
COMMENCED AGAINST YOU BY FILING
THIS NOTICE OF ACTION

If you wish to defend these proceedings, either you or a New Brunswick lawyer acting on your behalf shall prepare your Statement of Defence in the form prescribed by the Rules of Court and serve it on the Plaintiff or its lawyer at the address shown below and, with proof of such service, file it in this Court Office, together with the filing fee of \$50,

(a) if you are served in New Brunswick,
WITHIN 20 DAYS after service on you of this
Notice of Action With Statement of Claim
Attached, or

(b) if you are served elsewhere in Canada or in
the United States of America, WITHIN 40
DAYS after such service on you, or

(c) if you are served anywhere else, WITHIN 60
DAYS after such service.

If you fail to do so, you may be deemed to have admitted any claim made against you, and without further notice to you, JUDGMENT
MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE.

You are advised that:

AVIS DE POURSUITE ACCOMPAGNÉ
D'UN EXPOSÉ DE LA DEMANDE
(Formule 16B)

Destinataire:

PAR LE DEPOT DU PRESENT AVIS DE
POURSUITE, UNE POURSUITE
JUDICIAIRE A ETE ENGAGEE CONTRE
VOUS.

Si vous désirez présenter une défense dans cette instance, vous-même ou un avocat du Nouveau-Brunswick chargé de vous représenter devrez rédiger un exposé de votre défense en la forme prescrite par les Règles de procédure, le signifier au demandeur ou à son avocat à l'adresse indiquée ci-dessous et la déposer au greffe de cette Cour avec un droit de dépôt de \$50 et une preuve de sa signification:

(a) DANS LES 20 JOURS de la signification
qui vous sera faite du présent avis de poursuite
accompagné d'un exposé de la demande, si elle
vous est faite au Nouveau-Brunswick ou

(b) DANS LES 40 JOURS de la signification, si
elle vous est faite dans une autre région du
Canada ou dans les États-Unis d'Amérique ou

(c) DANS LES 60 JOURS de la signification, si
elle vous est faite ailleurs..

Si vous omettez de le faire, vous pourrez être réputé avoir admis toute demande formulée contre vous et, sans autre avis, JUGEMENT POURRA ÊTRE RENDU CONTRE VOUS EN VOTRE ABSENCE.

Sachez que:

- (a) you are entitled to issue documents and present evidence in the proceeding in English or French or both;
- (b) the Plaintiff intends to proceed in the English language; and
- (c) your Statement of Defence must indicate the language in which you intend to proceed.

If you pay to the Plaintiff or its lawyer the amount of its claim, together with the sum of \$100.00 for its costs, within the time you are required to serve and file your Statement of Defence, further proceedings will be stayed or you may apply to the Court to have the action dismissed.

THIS NOTICE is signed and sealed for the Court of Queen's Bench by Amanda J. Evans, QC, Clerk of the Court at Saint John, New Brunswick, on the 24th day of May, 2019.

(Sqd.) Amanda J. Evans, QC

Clerk of the Court
Judicial District of Saint John

- (a) vous avez le droit dans la présente instance, d'émettre des documents et de présenter votre preuve en français, en anglais ou dans les deux langues;
- (b) le demandeur a l'intention d'utiliser la langue anglais; et
- (c) votre exposé de la défense doit indiquer la langue que vous avez l'intention d'utiliser.

Si la demande a pour objet la perception d'une somme déterminée ou le recouvrement d'une créance avec ou sans intérêts, ajouter le paragraphe suivant :

Si, dans le délai accordé pour la signification et le dépôt de l'exposé de votre défense, vous payez au demandeur ou à son avocat le montant qu'il réclame, plus \$100.00 pour couvrir ses frais, il y aura suspension de l'instance ou vous pourrez demander à la cour de rejeter l'action.

CET AVIS est signé et scellé au nom de la Cour du Banc _____ de la Reine par _____, greffier de la Cour à Nouveau Brunswick, ce _____

STATEMENT OF CLAIM

1. The Plaintiffs claim on their own behalf and on behalf of the Class Members:
 - (a) an order pursuant to the *Class Proceedings Act*, 2011, c. 125 ("CPA") certifying this action as a class proceeding and appointing the Plaintiffs as representative Plaintiffs of the Class (as defined below);
 - (b) a declaration that the Defendants breached their fiduciary, statutory, and common law duties to the Plaintiffs and the Class through the establishment, funding, operation, management, administration, supervision and control of the Restigouche Hospital Centre, The Provincial Hospital and the Provincial Hospital Campbellton ("RHC") at Campbellton, New Brunswick.
 - (c) a declaration that the Defendants were negligent in the establishment, funding, operation, management, administration, supervision and control of RHC;
 - (d) a declaration that the Defendants are liable to the Plaintiffs and the Class for the damages caused by its breach of fiduciary, statutory and common law duties and for its negligence in relation to the establishment, funding, operation, management, administration, supervision and control of RHC;
 - (e) a declaration that the Defendants and their agents systemically violated, and continue to violate, section 15 of the *Charter* in a way that is not demonstrably justified in a free and democratic society pursuant to section 1 of the *Charter*;
 - (f) a declaration that Canada is liable to the plaintiff and Class Members for damages under section 24(1) of the *Charter* for breach of section 15 of the *Charter* in relation to the actions of RCMP Officers;

- (g) damages for negligence, breach of fiduciary duty, and breach of the *Charter* in the amount of \$400 million, or such other sum as this Honourable Court may find appropriate;
- (h) punitive damages of \$100 million, or such other sum as this Honourable Court may find appropriate;
- (i) interest pursuant to the *Judicature Act*, R.S.N.B. 1973, C. J-2 R.S.O. 1995, c. J-2, as amended;
- (j) costs of the action on a substantial indemnity basis or in an amount that provides full indemnity;
- (k) pursuant to section 26 of the CPA the costs of notice and of administering the plan of distribution of the recovery in this action, plus applicable taxes; and
- (l) such further and other relief as to this Honourable Court may seem just and appropriate in all the circumstances.

A. THE PARTIES

2. The Plaintiff, Devan Tidd ("Devan"), is an individual residing in the City of Campbellton, in the Province of New Brunswick. Devan was born on April 26, 1993. He was admitted to RHC in 2013 at the age of 20. Devan continues to reside at RHC.

3. The litigation guardian of Devan, Darrell Tidd, is an individual residing in the Local Service District of Bonny River, in the Province of New Brunswick. Darell Tidd is Devan's biological father.

4. The Plaintiff, Aaron Smith ("Aaron"), is an individual residing in the City of Campbellton, in the Province of New Brunswick. Aaron was born on April 16, 1984. He was admitted to RHC in 2009 at the age of 25. Aaron continues to reside at RHC.

5. The litigation guardian of Aaron, Reid Smith, is an individual residing in the City of Moncton, in the Province of New Brunswick. Reid Smith is Aaron's biological father

and has been appointed as power of attorney for property and power of attorney for personal care for Aaron.

6. The Defendant, the Province of New Brunswick (the "Crown") is named in these proceedings pursuant to the provisions of the *Proceedings Against the Crown Act*, R.S.N.B. 1973, c. P-18, and the amendments thereto. Pursuant to the *Mental Health Act* R.S.N.B. 1973, c. M-10, the Crown and the Defendant, Regional Health Authority A, are responsible for administering, operating, overseeing and providing care at RHC.

7. RHC is currently designated as a psychiatric facility pursuant to *General Regulation*, N.B. Reg. 94-33 to the *Mental Health Act*, R.S.N.B. 973, c. M-10 or predecessor Acts and regulations and is funded by the Crown.

8. The Defendant, Regional Health Authority A, currently operating as Vitalité Health Network, ("Vitalité") was created and appointed by the Crown to help serve as a regional health authority pursuant to the *Regional Health Authorities Act*, R.S.N.B. 2011, C. 217. Vitalité is a body corporate pursuant to the *Regional Health Authorities Act*.

9. Vitalité and the Crown serve as administrators for RHC as defined in section 1.1 of the *Mental Health Act*, R.S.N.B. 1973, c. M-10 and its regulations.

10. At all material times, the Defendants, through and with their agents, servants and employees, owned and was responsible for the operation, funding and supervision of RHC as a residential facility for the care and control of persons with mental illnesses and other persons in need of psychiatric care.

11. RHC is located in Campbellton, New Brunswick. It operates under the jurisdiction and control of the Defendants. The Defendants retained and authorized servants, agents, representatives and employees to operate RHC and gave instructions to such servants, agents, representatives and employees as to the manner in which the facility was to function and operate.

B. THE CLASS

12. The Plaintiffs bring this action pursuant to the CPA on his own behalf and on behalf of all other persons who resided at RHC.

13. The proposed members of the "Class" are:

All persons, who were resided at RHC between January 1, 1954 and the present, and who were alive as of May 24, 2017.

C. HISTORY OF RHC

14. RHC originally opened in 1954 as the "Provincial Hospital" and was often referred to as the "Provincial Hospital Campbellton". In June of 2015, RHC reopened under its current name and operates under that name to the present.

15. Since its inception in 1954, RHC has been a residential psychiatric facility that is managed by the Defendants. RHC is the province's chief provider of in-patient mental health services.

16. RHC's stated mission is to treat persons with mental illness and help them reintegrate back into society. The Class, as people who are with mental illnesses, are a uniquely vulnerable population.

17. From 1954-1967, the New Brunswick Minister of Health and Services oversaw and was directly responsible for RHC. From 1967- 1970, the New Brunswick Minister of Health oversaw and was directly responsible for RHC. From 1970 – 1986, the New Brunswick Minister of Health and Welfare oversaw and was directly responsible for RHC. From 1986-2000, the New Brunswick Minister of Health and Community services oversaw and was directly responsible for RHC. From 2000-2006, the New Brunswick Minister of Health and Wellness oversaw and was directly responsible for RHC. From 2006 to the present the New Brunswick Minister of Health., has been overseen and has been directly responsible for the RHC.

18. From May 20, 1992 – April 1, 2002, the Regional 5 Hospital Corporation, established by the Crown Defendant, under the *Hospital Act*, S.N.B. 1992, c. H-61,

delivered health services at RHC. From April 1, 2002 – September 1, 2008 Regional Health Authority 5, established under the *Regional Health Authorities Act*, S.N.B. 2002, c. R-5.05, delivered health services at RHC. From September 1, 2008 onwards, and pursuant to *An Act to Amend the Regional Health Authorities Act*, S.N.B. 2008, c.7, Regional Health Authority A, operating as Vitalité, has delivered health services at RHC.

19. Individuals are placed at RHC by reason of a court order or by an admission process. RHC has housed thousands of children and adults who have suffered from mental illness.

20. When RHC opened in 1954, it had a total capacity of 225 beds. Starting in the 1960s, RHC housed between 600-800 patients a year. As of today, RHC has total capacity of 140 beds and houses both youth and adult residents.

21. All material aspects of RHC residents' lives were dictated, controlled and provided for by the Defendants. Many patients at RHC had and continue to have no control over any material aspect of their lives. The opportunities to make choices or provide any input into their daily lives are and were extremely limited or non-existent for many residents. The vulnerability of these individuals as a result of their placement in the institution is and was further compounded by virtue of their mental illnesses and power imbalance of the patient-doctor relationship.

22. In 1968 a public report was published by M.D.T. Associates, and was sponsored by the New Brunswick Department of Health and Welfare, entitled "Mental Health Division Operational Policy: Phase 1, Part II: a starting point: Provincial Hospital-Campbellton" (the "**M.D.T Report**").

23. The M.D.T. report made the following criticisms and findings of RHC:

- (a) RHC only presents an "appealing picture" as an institution for treating patients, however, the reality is much worse;
- (b) RHC is a "dumping ground" for the abnormalities and rejects of society and its operative principle is "out of sight, out of mind";

- (c) there are repeated violations of civil rights and related abuses;
- (d) RHC suffers from serious overcrowding;
- (e) the overcrowding at RHC has caused an overpowering odor;
- (f) a significant proportion of admissions to RHC are carried out in violation of patients' civil rights;
- (g) RHC is understaffed;
- (h) children are placed in bare isolation rooms and only let out for feeding or bathing;
- (i) most of the psychiatrists lack professional qualifications; and,
- (j) there is a lack of concern for the standards of patient care at the most senior of levels at RHC.

24. The Defendants took no steps to respond to the criticisms found in the M.D.T. Report and these systemic failures persisted throughout the Class Period.

25. In 2019, Charles Murray, the Ombud of New Brunswick, published a special report regarding RHC, which was titled "Failure to Protect" (the "**Ombud Report**").

26. The Ombud Report focuses solely on RHC and made the following criticisms and findings:

- (a) RHC is not able to discharge the mandate of a modern mental health treatment facility;
- (b) contrary to RHC's mandate, the majority of have patients have no individualized care plan and receive very little patient-focused care;
- (c) RHC is unable to meet the minimum standards of care for a mental health institution;

- (d) patients at RHC experience sub-standard care which has contributed to the premature death of patients;
- (e) the patients at RHC face ongoing safety risks;
- (f) RHC urgently needs to take corrective measures to address safety risks;
- (g) the patients at RHC have faced serious incidents of physical and emotional mistreatment;
- (h) patients at RHC have been victims of negligence, abuse, and unacceptable physical and emotional treatment;
- (i) RHC suffers from a lack of proper incident reporting;
- (j) RHC suffers from chronic understaffing;
- (k) RHC has consistently failed to change its culture and improve its patient services;
- (l) RHC's staffing shortages have curtailed management's capacity to discipline or correct staff and deterred management from investigating staff;
- (m) patients at RHC are injured in physical intervention situation at a rate twice that of any other mental health institutions;
- (n) there is a culture of silence and fear at RHC;
- (o) patients who would otherwise be released are remaining institutionalized at RHC;
- (p) patients at RHC experience unacceptable delays in receiving psychiatric assessments;

- (q) RHC has an inability to recruit and detain sufficient personnel;
- (r) a new psychiatric facility for youths that is under construction should be halted as it will be plagued by the same problems as RHC;
- (s) RHC's shortcomings are a symptom of its systemic failure as an institution; and,
- (t) RHC is in crisis.

27. The Ombud Report provides a series of recommendations with respect to the RHC, but noted that the problems at RHC are too acute to risk any further delay. The Defendants have taken no steps to respond to the Ombud Report.

28. Through numerous publications and decisions, information regarding the operation, control, and management of RHC became well-known to the Crown. For example:

- (a) 1956: A Report of the Superintendent of the Provincial Hospital Campbellton N.B., notes that RHC has 275 patients and only 225 beds;
- (b) 1959: A Report of the Superintendent of the Provincial Hospital Campbellton N.B., notes that RHC has a serious shortage of staff;
- (c) 1962: A Report of the Superintendent of the Provincial Hospital Campbellton N.B., that RHC is in urgent need of more staff;
- (d) 1988: RHC's annual report notes that RHC has a shortage of doctors;
- (e) 1992: An employee at RHC is terminated after a resident complained of being sexually assaulted by the employee;
- (f) 2007-2008: 32 complaints are made about the RHC to the Office of the Ombudsman;

- (g) 2008-2009: 45 complaints were made about the RHC to the Office of the Ombudsman; and,
- (h) 2009-2010: 32 complaints are made about the RHC to the Office of the Ombudsman

D. THE PLAINTIFFS' EXPERIENCE AT RHC

29. Both Devan and Aaron were repeatedly and continuously physically abused and punished by being physically restrained without justification. This took place numerous times. Both Devan and Aaron were repeatedly prescribed medications they did not need, which had the effect of restraining or sedating them.

30. Since arriving at RHC, Devan has been inappropriately forcibly restrained 25 times with no justification and has regularly been left restrained for hours at a time. During these incidents Devan was left unattended and with no medical supervision.

31. In one instance Devan was restrained for so long he urinated while restrained.

32. Devan has also repeatedly been placed in seclusion rooms for lengthy periods of time without justification. These seclusion rooms contain only a bed with restraints for arms and legs. Individuals in seclusion are denied communication privileges.

33. Devan regularly witnessed staff assaulting residents at RHC.

34. Devan has been threatened by other residents at RHC and reported his concerns to the staff at RHC. Only after Devan contacted outside police did the RHC take action to address these threats.

35. Aaron has been repeatedly inappropriately forcibly restrained without justification at RHC. Aaron has been repeatedly placed into seclusion rooms for unnecessarily prolonged periods of time. While in the seclusion rooms Aaron could not be contacted or contact family members.

36. Aaron has been prescribed medications that were inappropriate for his condition numerous times and in amounts that were harmful at RHC.

In July of 2017 Aaron received an independent psychiatric assessment, in which it was determined that RHC had prescribed dangerously high doses of medications. When Aaron reduced his dosage, he suffered from severe withdrawal symptoms.

E. KNOWLEDGE OF THE DEFENDANTS

37. The Defendants had knowledge of their systemic failure to provide reasonable resident care in all respects, described herein, throughout the Class Period. This knowledge was derived from reports from management, third-party reports, reports of residents, family members of residents, and its own staff. In addition, the Defendants had knowledge of the systemic abuse occurring at RHC, and the conditions that led to such abuse, yet failed to take any reasonable action to prevent it from continuing or occurring.

38. The operational policies and practises of the Defendants, as well the funding provided by the Crown, were inadequate to meet the needs of Class Members. As a result, the care provided to the Class members and the conditions at RHC were drastically below standard and were not suitable or appropriate for residential patient care.

F. DUTIES OWED BY THE CROWN TO THE CLASS

39. The Defendants owed a duty of care and fiduciary duties to the Class members through their establishment, funding, oversight, operation, management supervision, control, maintenance and support of RHC.

40. The Defendants breached their duty of care and fiduciary obligations, operating RHC in a manner that allowed Class Members to be systemically subjected to abuse, mistreatment and poor living conditions, amongst other things.

41. As a result of their establishment, funding, oversight, operation, management supervision, control, maintenance and support of RHC during the Class Period, the Defendants owed duties to the Plaintiffs and to members of the proposed Class which include, but are not limited to:

- (a) adequately, properly and effectively supervising the environment of RHC and the conduct of their employees and agents to ensure patients, including the Plaintiffs and the putative Class members, would not suffer harm;
- (b) providing adequate, proper, and effective care for patients of RHC;
- (c) ensuring that physical, emotional and sexual abuse would not occur at RHC;
- (d) protecting residents of RHC from any person or thing which would endanger or be injurious to the health and well-being of any resident;
- (e) using reasonable care to ensure the safety, well-being and protection of residents of RHC;
- (f) providing a safe environment and in particular, one free from physical, sexual and psychological assault or harm;
- (g) setting or implementing standards of conduct for their employees and agents, and residents of RHC, to ensure that no employee or resident would endanger the health or well-being of any other resident or person;
- (h) providing residents a program and system through which abuse would be recognized and reported;
- (i) educating residents and employees in the use of a system through which abuse would be recognized and reported;
- (j) pursuing and investigating complaints of physical, sexual or psychological abuse with due diligence;
- (k) taking any and all reasonable steps to prevent and end physical, sexual or psychological abuse upon learning of a complaint;

- (l) taking any and all reasonable steps to ensure that individuals coming into direct contact with patients of RHC were not in danger of abuse from other patients or employees;
- (m) establishing, implementing and enforcing appropriate policies and procedures to ensure that Class members would not be unnecessarily or inappropriately confined, isolated or restrained during their time as patients in RHC;
- (n) ensuring that RHC staff members, who were agents of the Defendants were adequately educated, licensed and trained in order to fulfill their employment obligations in a manner that would not cause physical, emotional or psychological harm to Patient Class members;
- (o) properly collecting and maintaining medical and administrative records;
- (p) reporting conduct which is contrary to the *Criminal Code of Canada* to the appropriate law enforcement agencies upon learning the particulars of such conduct; and,
- (q) providing proper and reasonable treatment for patients after learning that a patient was abused.

42. At all material times, the Defendants were in breach of the aforementioned duties.

43. The Defendants knew or ought to have known that, as a consequence of such failures, the Plaintiffs and the residents of RHC would suffer immediate and long-term damages.

44. The Defendants' breach of the duties outlined above condoned, facilitated and/or encouraged the physical, sexual and psychological assaults perpetrated by residents on other residents. Given the duty of care owed and the dependence of the Class on the Defendants, the Defendants condoning, facilitating and/or encouraging the physical, sexual and psychological assaults perpetrated by residents on other residents, and the

Defendants' failure to act to stop such assaults from occurring, the Defendants are liable for such assaults as if perpetrated by the Defendants themselves.

45. These damages were not too remote as they were a direct consequence of the Defendants' failures.

G. FIDUCIARY RELATIONSHIP BETWEEN THE CROWN AND THE CLASS

46. The Defendants had a fiduciary relationship with the patients of RHC. The Defendants created, planned, established, set up, initiated, operated, financed, supervised, controlled and regulated RHC during the Class Period. The Defendants owed the patients of RHC, as individuals in their sole care and control, fiduciary duties. In the context of the operation, management, and control of a hospital such as RHC, such fiduciary duties include a duty to care for and protect the patients and act in their best interests at all material times

47. All individuals who resided at RHC by equal virtue of their mental illness were inherently vulnerable and were under the complete care and control of the Defendants. The Defendants owed the highest, non-delegable, fiduciary, moral, statutory, and common law duties, which included, but was not limited to, the duty to ensure that reasonable care was taken for the patients of RHC; the duty to protect patients while at RHC; the duty to protect the Class from intentional torts perpetrated on them while at RHC; liability if these non-delegable and fiduciary duties were performed negligently or tortuously; and, the special responsibility to ensure the safety of the Class while at RHC.

48. Amongst other things, the Defendants were responsible:

- (a) for the administration of the various government departments of the operation of RHC over time;
- (b) for providing, adequate, proper, and effective medical care to its patients;

- (c) to ensure that medical and other staff members working at RHC were properly trained and had appropriate certification to provide health care services to patients at RHC;
- (d) for the promotion of the health, safety and well-being of Class Members during the Class period;
- (e) for the construction, operation, maintenance, ownership, financing, administration, supervision, inspection and auditing of RHC during the class period;
- (f) for the care and supervision of all members of the Class while they resided at RHC during the Class Period and for the supply of all the necessities of life to Class Members during the class period;

49. At all material times, the Class Members who were patients at RHC were entirely and exclusively within the power and control of the Defendants and were subject to the unilateral exercise of the Defendant's power or discretion. By virtue of the relationship between the mentally ill Class Members and the Defendants, being one of trust, reliance and dependence, the Defendants owed a fiduciary obligation to ensure that the residents of RHC were treated respectfully, fairly, safely and in all ways consistent with the obligations of a party standing as a fiduciary to an individual under his or her care or control.

50. At all material times, the Defendants owed a fiduciary duty to the patients at RHC to act in the best interests of those individuals and to protect them from any abuse, including but not limited to, mental, emotional, physical, sexual or otherwise.

51. The individuals who were patients at RHC were entitled to rely and did rely upon the Defendants to their detriment to fulfill their fiduciary obligations, the particulars of which include, but are not limited to:

- (a) the Defendants failed to report injuries and the causes thereof sustained by patients of RHC;

- (b) the Defendants failed to report allegations of sexual abuse;
- (c) the Defendants failed to properly screen applicants for positions at RHC;
- (d) the Defendants hired medical professionals, staff, and others to work at RHC who were not qualified to meet the needs of the individuals under their care and supervision;
- (e) the Defendants failed to provide an adequate number of medical staff members;
- (f) the Defendants failed to provide timely, adequate, effective, and proper medical care and treatment to their patients;
- (g) the Defendants failed to adequately maintain and record patients' medical records
- (h) the Defendants failed to ensure that patients were not grossly overmedicated or inappropriately restrained for lengthy periods;
- (i) the Defendants failed to ensure that patients at RHC would be receive medical treatment at a standard commensurate with other hospitals in New Brunswick or elsewhere;
- (j) the Defendants failed to properly supervise the administration and activities of RHC;
- (k) the Defendants failed to provide adequate support to properly maintain RHC or to care and provide for its patients;
- (l) the Defendants failed to respond adequately, or at all, to complaints or recommendations which were made concerning RHC, both with respect to its condition and the treatment of patients;
- (m) the Defendants created, permitted and fostered an atmosphere of fear and intimidation;

- (n) the Defendants failed to safeguard the physical and emotional needs of the Class Members;
- (o) the Defendants permitted unhealthy and inappropriate punishments to be perpetrated against the Class Members; and
- (p) the Defendants permitted an atmosphere that threatened the Class Members with severe physical punishments, including violence.

52. The patients of RHC, had a reasonable expectation that the Defendants would act in their best interests with respect to their care by virtue of the following:

- (a) the historic duties of the Defendants to individuals deemed mentally incompetent or ill;
- (b) the well-established expectations of an individual receiving medical care in a Canadian hospital;
- (c) the long standing dependence of RHC patients on the Defendants;
- (d) the unilateral assumption of responsibility for the care of the Class Members and similarly situated persons by the Defendants at RHC;
- (e) the involvement of the Defendants in the initial establishment of RHC;
- (f) the nature and severity of the mental illnesses experienced by RHC patients;
- (g) the fact that the RHC environment was itself further harming to these individuals, physically, emotionally and psychologically;
- (h) the vulnerability of RHC patients as a result of their illnesses; and,
- (i) the sometimes involuntary nature of the relationship between RHC residents and the Defendants.

53. The Defendants knew, or ought to have known, that as a consequence of their operation, care and control of RHC, patients of RHC would suffer both immediate and long-term mental, emotional, psychological and physical harm.

54. In addition, the Defendants' failure to fulfill its fiduciary duties outlined above condoned, facilitated and/or encouraged the physical, sexual and psychological assaults perpetrated by patients on other patients. Given the fiduciary duty owed and the dependence of the Class on the Defendants, the Defendants condoning, facilitating and/or encouraging the physical, sexual and psychological assaults perpetrated by patients on other patients, and the Defendants' failure to act to stop such assaults from occurring, the Defendants are liable for such assaults as if perpetrated by the Defendants themselves.

H. BREACH OF SECTION 15 OF THE *CHARTER*

55. Section 15(1) of the *Charter* guarantees that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability, or other related recognizable grounds.

56. As government actors, the Defendants owed, and continues to owe, duties under the *Charter* to the Class Members.

57. The Defendants treated discriminated against the Class Members based on mental and/or physical disability throughout the Class Period, through their conduct particularized above. This treatment constitutes negative treatment on enumerated grounds.

58. Class Members have been discriminated against based on, *inter alia*, their mental illness, disabilities, and competency. The Defendants' conduct is discriminatory on its face, in its effect, and in its application. In particular, such actions included but are not limited to:

- (a) The Defendants allowed their agents, including, but not limited to medical professionals and other staff at RHC, to provide a sub-standard level of care for the patients at RHC;
- (b) The Defendants allowed their agents, including, but not limited to medical professionals and other staff at RHC, to use excessive force while Class Members were patients at RHC; and,
- (c) The Defendants were careless, reckless, wilfully blind, or deliberately accepting of, or actively promoted, a policy of discrimination against the patients of RHC

59. There is no justification in a free and democratic society for said discrimination under section 1 of the *Charter*.

I. VICARIOUS LIABILITY

60. The Defendants are vicariously liable for the physical, sexual and psychological abuse committed by its servants, employees, agents and representatives on patients of RHC.

61. The relationship between the Defendants and their servants, employees, agents and representatives was close and direct. The Defendants exercised or ought to have exercised control over their employees, agents and representatives including the power of assignment and supervision, the power to remove and the power to discipline them.

62. The Defendants' servants, employees, agents and representatives, as medical providers in a hospital setting, were afforded the opportunity to abuse their power over and to physically, sexually, and psychologically abuse patients of RHC by virtue of their relationship with the Defendants:

- (a) they were constantly placed in direct contact with residents of RHC;

- (b) they were provided with opportunities to physically, sexually, and psychologically abuse residents of RHC by virtue of their employment or representation with the Defendants;
- (c) the physical, sexual, and psychological abuse committed by the Defendants' employees, agents and representatives took place while the patients of RHC were participating in programs or activities required by the Defendants;
- (d) they were permitted to be alone with the patients of RHC;
- (e) by virtue of their roles with the Defendants, their servants, employees, agents and representatives were conferred with power over patients of RHC, including power to organize, discipline, and train them; and,
- (f) by virtue of their power and authority as servants, employees, agents and representatives of the Defendants, they were allowed and encouraged to exercise a degree of control over the patients of RHC that was parental in nature.

63. The Defendants' servants, employees, agents and representatives' physical, sexual, and psychological abuse was directly related to the friction, confrontation and psychological intimacy inherent in their roles:

- (a) the Defendants were responsible for disciplining the patients of RHC;
- (b) the Defendants were charged with caring for and treating for patients at RHC; and,
- (c) the Defendants encouraged physical and psychological intimacy between its servants, employees, agents and representatives and the patients of RHC;

64. The Defendants conferred significant power on their servants, employees, agents and representatives relative to the patients of RHC who were vulnerable to the wrongful exercise of their power, in part because:

- (a) the patients at RHC are mentally ill;
- (b) the power imbalance between in the doctor-patient relationship;
- (c) the length of the patients stay at RHC can be beyond their control; and,
- (d) the Defendants required the exercise of power and authority for their own successful operation, and they required and encouraged their servants, employees, agents and representatives to stand in a position of respect, which was required for the successful operation of RHC.

65. The relationship between the Defendants' servants, employees, agents and representatives and the Defendants was close and direct. The connection between the Defendants' servants, employees, agents and representatives and the Defendants created and enhanced the risk of physical, sexual and psychological abuse.

J. DAMAGES SUFFERED BY THE CLASS

66. The Defendants knew, or ought to have known, that as a consequence of their negligent operation of RHC and mistreatment of the Class, that they would suffer significant mental, emotional, psychological and spiritual harm.

67. Members of the Class were physically, mentally, and emotionally traumatized by their experiences arising from their residence at RHC. As a result of the negligence, breach of fiduciary duty, and breach of section 15 of the *Charter* by the Defendants and their failure to provide proper and adequate care or supervision, the Class members suffered and continue to suffer damages which include, but are not limited to the following:

- (a) emotional, physical, sexual and psychological abuse;

- (b) exacerbation of mental disability and deprivation of healing opportunities;
- (c) impairment of mental and emotional health and well-being;
- (d) an impaired ability to trust other persons;
- (e) a further impaired ability to participate in normal family affairs and relationships;
- (f) depression, anxiety, emotional distress and mental anguish;
- (g) pain and suffering;
- (h) a loss of self-esteem and feelings of humiliation and degradation;
- (i) an impaired ability to obtain and sustain employment, resulting either in lost or reduced income and ongoing loss of income;
- (j) an impaired ability to deal with persons in positions of authority;
- (k) an impaired ability to trust other individuals or to sustain relationships;
- (l) a sense of isolation and separateness from their community;
- (m) a requirement for medical or psychological treatment and counselling;
- (n) an impaired ability to enjoy and participate in recreational, social and employment activities;
- (o) loss of friendship and companionship;
- (p) sexual disorientation; and
- (q) the loss of general enjoyment of life.

68. At all material times, the Defendants knew, or ought to have known, that failing to rectify the institutional failures would continue to aggravate and contribute to the Class members' injuries and damages.

69. As a result of the aforementioned injuries, Class members have required and will continue to require further medical treatment, rehabilitation, counselling and other care. The Plaintiffs and other Class Members, or many of them, will require future medical care and/or rehabilitative treatment, or have already required such services, as a result of the Defendant's conduct for which they claim complete indemnity, compensation and payment from the Defendants.

70. The Defendants are strictly liable in tort for the damages set out above as the Defendants were aware that patients of RHC were being physically, emotionally and psychologically abused but permitted the abuse to occur. Further, the Defendants are strictly liable in tort for the damages enumerated herein as the Defendants were aware that its operation, management and control of RHC was in breach of all mental health industry standards and in breach of the duties it owed to the Class Members.

71. In the circumstances, the plaintiff and the Class are also entitled to monetary damages pursuant to section 24(1) of the *Charter* for violation of the Class Members' constitutional rights and freedoms in order to:

- (a) compensate them for their suffering and loss of dignity;
- (b) vindicate their fundamental rights; and,
- (c) deter systemic violations of a similar nature.

72. There are no countervailing considerations rendering damages in this case inappropriate or unjust.

K. PUNITIVE DAMAGES

73. The high handed and callous conduct of the Defendants warrants the condemnation of this Honourable Court. The Defendants conducted their affairs with wanton and callous disregard for the Class members' interests, safety and well-being. In all the circumstances, the Defendants breached, and continue to breach, their fiduciary duty and duty of good faith owed to the patients at RHC.

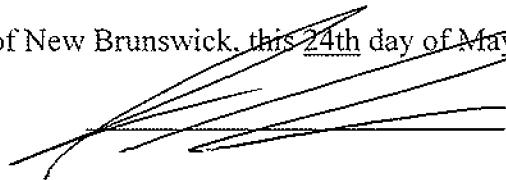
74. Over a long period of time, the Plaintiffs and the Class Members were treated in a manner that could only result in aggravated and increased mental stress and anxiety for vulnerable persons already suffering from a mental disability or illness. The anxiety, depression and sub-standard conditions to which the Plaintiffs and Class Members were exposed to has grossly violated their rights and severely altered the paths of their lives.

75. In these circumstances, the Plaintiffs and the Class Members request aggravated and punitive damages to demonstrate to other institutions that such wilfully irresponsible and tortious behaviour will not be tolerated. Such damages will act as a deterrent to other institutions in Canada that provide care to vulnerable populations of persons with mental illnesses. These individuals, by virtue of both illness and of social and institutional structures, are among the most vulnerable in Canadian society.

76. This action is commenced pursuant to the CPA.

77. The trial of the action should take place in the city of St John, in the Province of New Brunswick.

DATED at St. John, in the, Province of New Brunswick, this 24th day of May, 2019.



KOSKIE MINSKY LLP
20 Queen Street West
Suite 900
Box 52
Toronto ON M5H 3R3

Kirk Baert LSO#: 30942O
Tel: 416-595-2092
Fax: 416-204-2889

James Sayce LSO#: 58730M
Tel: 416-542-6298
Fax: 416-204-2809

Robert Alfieri LSO#75336J

Tel: 416-595-2117

Fax: 416-204-4928