

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

CANADIAN CIVIL LIBERTIES ASSOCIATION,

Plaintiff,

- and -

THE PROVINCE OF NEW BRUNSWICK,

Defendant.



**STATEMENT OF DEFENCE
FORM 27A**

On behalf of The Province of New Brunswick

1. The Defendant, the Province of New Brunswick (“the Province”), admits the allegations set forth in paragraphs 13, 18, 19 and 67 of the Statement of Claim.
2. The Province denies the allegations set forth in paragraphs 4, 8, 9, 20, 22, 23, 27, 28, 30, 31, 32, 34, 38, 39, 42, 45, 46, 47, 50-57, 59-66, 68, 69 and 70 of the Statement of Claim and puts the Plaintiff, Canadian Civil Liberties Association (“the Plaintiff”) to the strict proof thereof.
3. The Province has no knowledge as to the allegations set forth in paragraphs 2, 11, 12, 14, 15, 24, 25, 26, 33 and 35 of the Statement of Claim and puts the Plaintiff to the strict proof thereof.
4. As to the whole of the Statement of Claim, the Province says that the *Medical Services Payment Act* RSNB 1973 c. M-7 (“*MSPA*”) gives the Minister of Health the responsibility for establishing a medical services plan (i.e. Medicare).
5. The *MSPA* defines “entitled services” as being all services rendered by medical practitioners that are medically required, apart from those which are expressly excluded under the *MSPA* or Regulations.
6. The *MSPA* specifically excludes from payment by Medicare entitled services furnished in a private hospital facility in the province.

7. *New Brunswick Regulation 84-20* under the *MSPA O.C. 84-64* (“*Regulation 84-20*”) specifically provides that the services listed at Schedule 2 are deemed not to be entitled services under Medicare. These terms and conditions apply uniformly to all beneficiaries in the Province.
8. *Regulation 84-20*, at paragraph (a.1) of Schedule 2, provides that abortions are deemed not to be entitled services unless they are performed in a hospital facility approved by the jurisdiction in which the hospital facility is located.
9. *Regulation 84-20*, at Schedule 2, also provides a list of over 30 other services which are deemed not to be entitled services.
10. The *Hospital Services Act* RSNB 1973 c. H-9 (“*HSA*”) gives the Minister of Health the authority to approve hospitals, the establishment of new hospital facilities and additions to existing hospital facilities, in accordance with regulations.
11. The *HSA* provides regulation-making authority to ensure that adequate standards are maintained in hospital facilities, which are established, operated and maintained by regional health authorities. The health care delivery system in New Brunswick is subject to management strategies aimed to ensure standards of medical care, physician resources and service delivery throughout the Province are met.
12. As to paragraph 7 of the Statement of Claim, three hospital facilities provide abortion services in New Brunswick: Dr. Georges-L.-Dumont University Hospital and The Moncton Hospital, both located in Moncton, and the Chaleur Regional Hospital, located in Bathurst. Abortions performed in these three hospitals are considered entitled services and are covered by Medicare. The Province denies the other allegations found at paragraph 7 of the Statement of Claim and puts the Plaintiff to the strict proof thereof.
13. On or about June 28, 2017, the Province launched its Medical Abortion Program, wherein it provides the drug Mifegymiso free-of-charge to all New Brunswick residents with a valid Medicare card. New Brunswick was the first Canadian jurisdiction to provide Mifegymiso free-of-charge to its residents.
14. As to paragraph 40 of the Statement of Claim, the Province admits Mifegymiso can only be used at the early stages of pregnancy. The Province denies the remaining allegations found at paragraph 40 (a) through (e) and puts the Plaintiff to the strict proof thereof.
15. The Province denies that *Regulation 84-20* is inconsistent with or in violation of the *Canada Health Act* RSC 1985 c. C-6 (“*CHA*”) and puts the Plaintiff to the strict proof thereof.

16. Specifically, and as to paragraphs 10, 15, 16, 17 and 43 of the Statement of Claim, the Province acknowledges the requirements of the *CHA* that Canadians have reasonable access to health care, but the Province denies it has failed to comply with such requirements. The Province denies that the *CHA* is the federal legislation governing Medicare and puts the Plaintiff to the strict proof thereof. The Province has no knowledge of the remainder of the allegations found at paragraphs 15, 16, 17, 43 of the Statement of Claim and puts the Plaintiff to the strict proof thereof. The Province denies any and all remaining allegations found at paragraph 10 of the Statement of Claim and puts the Plaintiff to the strict proof thereof.
17. Further, the Province denies that alleged non-compliance with the *CHA* can found a cause of action against it and the Province further denies that this would be a justiciable issue. In any event, the Province denies this Court has any jurisdiction to deal with this claim and asks that it be struck.
18. Alternatively, the Province says it has the legislative authority to determine which services will be considered insured services, and this authority is not impeded by any provision of the *CHA*, but rather stems from the Province's sole exclusive legislative authority over health care.
19. The Province denies that abortion is a constitutionally protected right. The Province puts the Plaintiff to the strict proof of this allegation.
20. The Province denies that the *Canadian Charter of Rights and Freedoms*, The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11 ("*Charter*") imposes a positive constitutional obligation on government to provide Medicare funding for abortion services, where those services are not provided in hospital facilities.
21. Alternatively, if the Province has a constitutional or statutory obligation to provide Medicare funding for abortion services, the provision of Medicare funding for abortions provided for in hospitals in New Brunswick meets all statutory and constitutional requirements.
22. The Province denies that *Regulation 84-20* infringes on the life, liberty and security of a person's interests, as guaranteed in s. 7 of the *Charter*, and puts the Plaintiff to the strict proof thereof. Alternatively, if such deprivation is demonstrated, it would be in accordance with principles of fundamental justice.
23. In the further alternative, the Province says that economic rights such as the right to payment out of public funds for an abortion provided outside a hospital facility does not engage s. 7 of the *Charter*, and the Plaintiff is not entitled to such relief as claimed.

24. Additionally, the Province denies that *Regulation 84-20* discriminates on the basis of sex, or any other enumerated or analogous ground, as contemplated in s. 15 of the *Charter* and puts the Plaintiff to the strict proof thereof.
25. In the further alternative, any limit on constitutionally protected rights, which might be found to have occurred, is a reasonable limit that is demonstrably justified in a free and democratic society, in accordance with s. 1 of the *Charter*.
26. As to paragraphs 3 and 21 of the Statement of Claim, the Province acknowledges the Supreme Court of Canada has struck down the criminal prohibition on abortion. However, the Province denies the Plaintiff's allegation at paragraph 3 that abortion is inaccessible in New Brunswick and that *Regulation 84-20* is criminal law and puts the Plaintiff to the strict proof thereof. The Province has no knowledge of the remaining allegations found at paragraph 21 of the Statement of Claim and puts the Plaintiff to the strict proof thereof.
27. Further, and as to paragraph 3 of the Statement of Claim, the Province denies that *Regulation 84-20* is, in pith and substance, criminal law and puts the Plaintiff to the strict proof thereof.
28. As to the whole of the Statement of Claim, the Province relies on its exclusive legislative and constitutional authority to establish, maintain and manage the health care system in the province in accordance with s. 92(7) of the *Constitution Act, 1867*, The Constitution Act, 1867, 30 & 31 Vict, c 3, and in particular to determine which services are entitled services as defined, and which are not.
29. Further and as to the whole of the Statement of Claim, the Province says that the establishment, maintenance, operation and management of the health care system and allocation of the health care budget are policy decisions and, as such, are not actionable, nor justiciable.
30. The Province denies that it is not providing access to abortion services and puts the Plaintiff to the strict proof thereof.
31. Alternatively, the Province denies that access to abortion services would be materially enhanced by extending funding to abortions provided elsewhere than in a hospital facility. Specifically, the Province's objective of maintaining a provincial health care system accessible to all residents of New Brunswick would be compromised if government was to fund services provided in private clinics. Such funding would create a burden on the public system, because health care service providers would not be available to provide services within both systems at the same time. This is due to a shortage of nurses and other health care personnel in this province.

32. The Province further denies there is a positive constitutional obligation to provide funding for abortion services elsewhere than in a hospital facility and puts the Plaintiff to the strict proof thereof.
33. The Province specifically pleads and relies upon the aforementioned legislation which provides the legislative authority for funding of abortions in hospital facilities. The Province denies it is preventing access to abortions and puts the Plaintiff to the strict proof thereof.
34. As to paragraphs 5 and 6 of the Statement of Claim, the Province relies on the *MSPA* and the *HSA* which legislate entitled services pursuant to Medicare. The Province denies the remainder of the allegations found at paragraph 5 of the Statement of Claim and puts the Plaintiff to the strict proof thereof.
35. As to paragraph 29 of the Statement of Claim, the Province has no knowledge of the Plaintiff's claim that abortion is one of the most commonly performed surgical procedures in the country and puts the Plaintiff to the strict proof thereof. The Province admits the rest of paragraph 29.
36. As to paragraph 36 of the Statement of Claim, the Province has no knowledge of how Clinic 554 operated and obtained payment for services and puts the Plaintiff to the strict proof thereof. The Province admits that abortions provided by Clinic 554 are not covered pursuant to legislation.
37. As to paragraph 37 of the Statement of Claim, the Province denies that Clinic 554 is a necessary option and puts the Plaintiff to the strict proof thereof. The Province has no knowledge of the remainder of the allegations found at paragraph 37 and puts the Plaintiff to the strict proof thereof.
38. As to paragraph 41 of the Statement of Claim, the Province denies it is not providing real access to abortions. The Province further says the rights provided pursuant to its legislation promote access to adequate and reasonable health care for all New Brunswickers, while balancing resources. The Province denies the remaining allegations found at paragraph 41 of the Statement of Claim and puts the Plaintiff to the strict proof thereof.
39. As to paragraph 43 of the Statement of Claim, the Province has no knowledge of what conclusions were drawn by the federal government and what the Minister of Health told other provinces in writing and puts the Plaintiff to the strict proof thereof. The Province admits the remaining allegations as found at paragraph 43 of the Statement of Claim.
40. As to paragraph 44 of the Statement of Claim, the Province admits that the federal government withheld money from health transfer payments. The Province denies any remaining allegations found at paragraph 44 of the Statement of Claim and puts the Plaintiff to the strict proof thereof.

41. As to paragraphs 48 and 58 of the Statement of Claim, the Province admits that the wording of s.7 and s. 15 of the *Charter* appears accurate. The Province denies any remaining allegations found at paragraphs 48 and 58 of the Statement of Claim and puts the Plaintiff to the strict proof thereof.
42. As to paragraph 49 of the Statement of Claim, the Province acknowledges that patient autonomy in medical decision-making is important and that individuals have the right to make decisions concerning their health and health care, however the Defendant denies any state interference and puts the Plaintiff to the strict proof thereof.
43. The Province further says that when making health care allocation decisions, it balances competing considerations of access and resource management to apply uniformly to all beneficiaries in the Province. In so doing, the Province denies discriminating against any citizen of New Brunswick and puts the Plaintiff to the strict proof thereof.
44. The Province denies that the Plaintiff is entitled to the relief claimed at paragraphs 1(a) through 1(f), or any other relief, and puts the Plaintiff to the strict proof thereof.
45. Except as expressly admitted herein, all other allegations contained in the Statement of Claim are denied and the Province puts the Plaintiff to the strict proof thereof.
46. The Province requests that this action be dismissed with costs.
47. The Province intends to proceed in the English language.

DATED at Fredericton, New Brunswick this 2 day of July 2021.



OFFICE OF THE ATTORNEY GENERAL FOR
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