This column profiles a famous Canadian case from the past that holds considerable public and human interest and explains what became of the parties and why it matters today.

Eugenics and Leilani Muir

Peter Bowal and Kelsey Pecson

Introduction

Well into the 1950s, western industrial societies feared that mentally disabled persons would both exhibit little sexual restraint and give birth to (many) mentally disabled offspring. Many jurisdictions enacted legislation for state-imposed sexual sterilization of some of these people. Alberta and British Columbia were two such jurisdictions to do so, in 1928 and 1933 respectively, in a context of moral and civic duty. The United States Supreme Court had written in 1927, in response to a constitutional challenge to similar American legislation, "it is better for all the world if, instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."

The Alberta legislation was amended in 1937 to enlarge the category of characteristics for which sterilization was appropriate and consent unnecessary. A further amendment in 1942 added diagnoses of syphilis, epilepsy and, though not expressly stipulated in the Act, other conditions believed to be genetically inheritable such as alcoholism, prostitution and sexual promiscuity.

In the 44 years of its existence, 4,785 Albertans were seen and approved for sterilization by the Eugenics Board. By the time the Act was repealed in 1972, the Board sterilized 2,822 individuals. One of these was Leilani Muir. She was sterilized in 1959 at the age of 14 after producing an IQ score of 64. This was six years after her mother committed her to the Provincial Training School for Mental Defectives in Red Deer. She did not learn about the sterilization until around 1980.

She sued the Government of Alberta in 1995, well after the individuals directly involved in her sterilization, including her mother, were dead. Despite the legislation and procedure enjoying massive

public support in 1959, the Alberta government conceded the limitations issue and liability and allowed the compensation issue to be decided by a female judge of similar age to Muir *[Muir* v. *Alberta,* 1996 CanLII 7287 (QB)].

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The Judicial Decision and its Effect

Eight years before Muir came to court, D.L.W. sued Alberta on the same grounds that she had been sexually sterilized under the authority of the same Act and Eugenics Board when she was a ward of the Department of Child Welfare. D.L.W. was born with cerebral palsy and was in the care of foster parents when she was brought to the same Red Deer institution for the sterilization in 1964.

Although D.L.W. waited only 23 years in comparison to Muir's 36 years, the Alberta government asked the court to dismiss the action because it was brought too late. A procedural motion in 1992 failed to resolve the case in the public domain. D.L.W. either settled her claim with the government or abandoned it.

The decision by the Government of Alberta to waive the limitations defence rendered the *Muir* case extraordinary in that it was decided 36 years later, in a values context and with notions of defendant culpability far outside that which existed at the time the event took place. The *Charter of Rights and Freedoms* had been enacted in 1982. The terms "moron" and "mental defective" in clinical use in 1959 were outdated by 1995, and pain and suffering damage caps had become law. The very idea of state-sponsored sexual sterilization was unimaginably repugnant in 1995.

Justice Veit of the Alberta Court of Queen's Bench in Edmonton reviewed the law at the time of the sterilization and as it was in 1996 when she rendered her decision, to answer both *how* Muir would be compensated and *what* she would be compensated for. The Judge said, "The circumstances of Ms Muir's sterilization were so high-handed and so contemptuous of the statutory authority to effect sterilization, and were undertaken in an atmosphere that so little respected Ms Muir's human dignity that the community's, and the court's sense of decency is offended."

Muir claimed for pain and suffering, aggravated damages and punitive damages relating to the confinement and the sterilization. Justice Veit granted a 1996 present value, with interest, of $740,780 in total. Neither side launched an appeal for higher court review, a reality which set the *Muir* case up as a strong precedent for other sterilization victims who were still alive.

By March 1998, some 958 people brought claims against the Alberta government for their sterilization and confinement under the Act. On March 10, 1998, Premier Klein introduced Bill 26, the *Institutional Confinement and Sexual Sterilization Compensation Act* which was aimed at invoking section 33 of the *Charter*, the notwithstanding clause, to preclude large and indeterminate public liability for this historical event. Should today's taxpayers have to pay for what government did 40 years ago? Everyone personally involved in the *Muir* case had died before she sued. However, public protest led to the abandonment of this bill soon after it was introduced and the Alberta government negotiated with other claimants.

Six hundred and thirty-five claimants each received approximately $100,000 by the end of 1998, and in 1999, the Alberta government created a settlement panel and appointed a judge to arbitrate individual claims and settlements. By November of 1999, 248 other sterilization victims reached a settlement totaling $82 million.

What are some other effects of the *Muir* decision?

While *Muir* has been cited in about a dozen other judicial decisions across Canada, it is such an unusual case that most of its value as a precedent has been in relation to determining pain and suffering damages. In a nearly identical case, *D.E.* v. *BC* (2005 BCCA 134), by a two-to-one decision, the British Columbia Court of Appeal found that nine sterilized plaintiffs were not barred by time to bring their action against three successive hospital superintendents. The Plaintiffs sued the superintendents for abusing their public offices under similar legislation because they recommended these plaintiffs for surgery. There is no public record of whether a trial later took place or whether the case was settled or abandoned.

Forced sexual sterilization of incapacitated persons continues today but only under extreme restrictions. In a similar case from British Columbia, parents applied to have a hysterectomy on their ten-year-old severely mentally disabled girl, to alleviate a physical condition. The Court of Appeal found the girl could not "appreciate the loss of her uterus or the menstrual function" and the procedure was approved as being in her best physical health interests (*K. v. Be*, 1985 BCSC 691). It was not a contraception case as such, although sterilization was an outcome of the medical intervention.

One year later, in the *Eve* case, Justice LaForest said, "It is difficult to imagine a case in which non-therapeutic sterilization could possibly be of benefit to the person on behalf of whom a Court purports to act, let alone one in which that procedure is necessary in his or her best interest." ([1986] 2 S.C.R. 388). Eve, in her 20s, was extremely mentally delayed and unable to communicate. Yet she was an affectionate person who could be attracted by and to men. She became close to a mentally disabled man and her mother feared it would lead to unintentional pregnancy, in which case she would inevitably have to raise the child since neither of the two would be emotionally or financially capable of doing so. Eve's mother was a widow almost 60-years-old. She applied to court in Prince Edward Island for authority for Eve to be sterilized under the *Mental Health Act*. The Supreme Court of Canada observed that Eve's sterilization was not to improve her health or a medical condition but for the convenience of her mother, and it unanimously denied authority for the sterilization.

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Given the strides in human rights and legal recognition of human dignity, general programs of involuntary sterilization

of mentally disabled persons in Canada ended in the early 1970s. Social engineering of this kind and on this scale has been condemned. Eugenics is seen as a flawed science. Improper assessments and diagnoses made during this program suggest that many of those sterilized were not "defective" in modern understanding. The desire to produce high quality children is not greater than individual rights and interests.

Many articles, books and graduate theses have been developed out of this history, in part to ensure that it is not repeated. Today sterilizations can still be authorized in individual cases but only after intense judicial scrutiny and under specific provisions of guardianship, child welfare, public trustee, mental health and dependent adult legislation.

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Leilani Muir Now

When she started her lawsuit against the Alberta government, Muir was 50 years old and employed as a restaurant server in Victoria, B.C. Shortly after her trial, she participated in a documentary entitled *The Sexual Sterilization of Leilani Muir.* The film detailed her life, the eugenics movement and the Alberta *Sexual Sterilization Act.* Today at 66, Muir speaks publicly of this history from her home in southern Alberta and is working on a book about her case.

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