



EMBARGOED: not for publication before press conference at 10am on Monday, Aug. 15, 2016
Please note, there is a court-ordered publication ban in place (see attached order)

MEDIA BACKGROUNDER

BC woman launches challenge for right to legal representation in Mental Health Act detentions

- Z.B. is a 39 year old woman who is currently detained and hospitalized as an involuntary patient under the Mental Health Act (MHA). The MHA governs the civil psychiatric committal system in British Columbia.
- A person detained under the MHA has the right upon their initial certification, as well as every renewal of their certificate, to challenge their detention in a Review Panel hearing by the Mental Health Review Board. The Mental Health Review Board is an administrative tribunal with the jurisdiction to decide whether or not a person's involuntary patient status should continue.
- Z.B. has a Review Panel hearing scheduled on August 23, 2016.
- Z.B. wants legal representation for her Review Panel hearing and cannot afford to hire a lawyer. She is eligible to receive legal aid from the Community Legal Assistance Society (CLAS), but CLAS denied her legal aid request solely because it does not have a lawyer available to represent her on the date of her hearing. Z.B. understands that CLAS will not be able to provide her with a lawyer until late October or November, 2016.
- Since the early 1990s, CLAS has contracted with the Legal Services Society ("LSS") to provide legal aid representation for Review Panel hearings.
- Since about 2009, CLAS has not received enough funding from the LSS to meet the demand for legal aid for Review Panel hearings. This has resulted in CLAS being forced to deny legal aid to hundreds of eligible individuals each year.
- In our view, it is the BC Government who must answer to the systemic failure to provide legal aid for Review Panel hearings. The BC Government controls legal aid funding in British Columbia and is responsible for ensuring the adequacy of legal aid funding.

- Over the years, CLAS, the Mental Health Review Board, and the Public Commission on Legal Aid, among others, have called on the BC Government to adequately fund legal aid for Review Panel hearings.
- CLAS and the Mental Health Review Board have also warned the BC Government that inadequate legal aid for Review Panel hearings may violate the *Charter* rights of people detained under the MHA. However, despite this, the Province has not taken meaningful action to remedy the problem.
- We say that our client’s *Charter* rights—specifically her right under s.7 to a fair and timely review of her detention and her right under s.15 to equality—give rise to a right to a state-funded lawyer for her Review Panel hearing.
- Our client is seeking two remedies in her case:
 1. First, given that our client has been denied legal aid representation for which she is eligible, she will be asking the court to grant an injunction requiring the Province to provide her with a free lawyer for her Review Panel hearing on August 23, 2016.
 2. Second, our client is seeking a *Charter* declaration that she has the right under sections 7 and 15(1) of the *Charter* to state-funded counsel for her Review Panel hearing.

The importance of legal representation in Review Panel hearings

- Many observers of the civil committal system in BC agree that *almost all* involuntary patients require legal representation in order to have a fair Review Panel hearing.
- In a letter to the Attorney General dated June 8, 2009, the then Chair of the Mental Health Review Board, Allen Tuokko, informed the Attorney General of a “serious, ongoing and systemic failure” to provide legal representation to involuntary patients who request it, and observed as follows:

The importance of legal support for those who request it will be self-evident. For all practical purposes, the Review Panel hearing is the patient’s only opportunity to have his or her detention reviewed by an external body (access to the Court is legally possible but extremely rare in

practice. A patient seeking to advance his or her case for release unassisted must be prepared to do so in the presence of a health care provider from the facility exercising full authority over the patient's detention and treatment, and before a panel consisting of a lawyer, a physician and a community member. The patient is required to do this in a process where the public is excluded and which relies on the parties to inform the Board regarding the information relevant to that particular review.

Many of us would find the prospect of a review panel hearing daunting even in the absence of mental health issues. But the problem is magnified where, as here, detained persons have a serious form of mental disorder. It is important to note that having a mental illness is by itself legally insufficient to justify involuntary admission or ongoing detention under the *Act*. The status depends on other legal and factual criteria also being satisfied. Yet the presence of a mental disorder can make it exceedingly difficult for a patient, by herself or himself, to address the legal and factual criteria relevant to detention, let alone plan a hearing, gather evidence, question her or his treatment team and prepare legal argument. Proceedings can be complex and involve expert medical evidence terminology, as well as difficult evidentiary issues and legal questions. When one superimposes on all of this the reality that the issues at stake involve continued detention and involuntary treatment, one can begin to appreciate the serious challenges patients face in proceeding with a review panel hearing when requested legal support is refused.

- The Mental Health Review Board's written submission to the 2011 Public Commission on Legal Aid in British Columbia observed:

With respect to cases where patients decided to proceed despite having been refused access to counsel or an advocate, review panel members have expressed serious concerns regarding their fundamental duty to ensure a fair hearing – the presence of an advocate can affect the outcome of the hearings as shown in the statistics from CLAS. Very few patients understand the statutory detention criteria to be applied and potential arguments that can be raised; for example, the unrepresented patient may not know that the panel can put weight on discharge plans in reaching its decision. Legal advocates can assist in preparing a discharge plan and may arrange for a letter or evidence given over the phone at the hearing. Also the unrepresented patient may not be able to assess

whether witnesses would be helpful or what evidence is most useful to the panel and may have difficulty assessing his/her medical records prior to the hearing. If evidence is needed from the community—for example, supportive family members or friends - a detained patient is hampered in his/her ability to gather and organize due to their confinement and medicated condition.

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The patients that appear before review panels often complain of side effects of their medications. A common side effect mentioned at the hearing is sedation/drowsiness...Also, patients who have been civilly committed are often members of the least advantaged groups in society and further difficulties exist when the patient cannot read or is not fluent in English.

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All these factors underscore the fact that it will be the very rare detained patient who will have the capacity to address the legal and factual criteria relevant to detention, plan a hearing, gather evidence, question his or her treatment team and prepare legal argument.

- In “Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia” (the “Doust Report”), Leonard T. Doust, QC, described the lack of ready legal advice and representation in Review Panel hearings as a “profound violation of the rights of one of the most vulnerable segments of our community,” citing the observation that:

“When these individuals are impacted by acute psychiatric states and co-morbid conditions, such as cognitive and intellectual disabilities and multiple psychiatric disorders, they are at a significant and inhumane disadvantage when trying to present their cases for de-certification versus powerful, educated and skilled professionals, usually their own psychiatrists and other health care professionals. The severely mentally ill, which includes those living in the community and psychiatric patients in British Columbia are almost entirely disempowered and often have very little access to justice anywhere”: Page 36