

AUG 12 2016



Form 66 (Rule 16-1 (2))

S-167329

No.

Vancouver Registry

In the Supreme Court of British Columbia

Between

Z.B.

Petitioner(s)

and

Her Majesty the Queen in Right of the Province of British Columbia

Respondent(s)

PETITION TO THE COURT

[Rule 22-3 of the Supreme Court Civil Rules applies to all forms.]

ON NOTICE TO:

Her Majesty the Queen in the Right of the Province of British Columbia
Deputy Attorney General
Ministry of Justice
PO Box 9280 Stn Prov Govt
Victoria BC V8W 9J7

Legal Services Society
400 - 510 Burrard Street
Vancouver, BC V6C 3A8

Community Legal Assistance Society
1140 W Pender St.
Vancouver, BC V6E 4G1

This proceeding is brought for the relief set out in Part 1 below, by

[Check whichever one of the following boxes is correct and complete any required information.]

☒ [X] the person(s) named as petitioner(s) in the style of proceedings above

[][name(s)]..... (the petitioner(s))

If you intend to respond to this petition, you or your lawyer must

(a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and

(b) serve on the petitioner(s)

(i) 2 copies of the filed response to petition, and

(ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner(s),

(a) if you were served with the petition anywhere in Canada, within 21 days after that service,

(b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,

(c) if you were served with the petition anywhere else, within 49 days after that service, or

(d) if the time for response has been set by order of the court, within that time.

(1) The address of the registry is: 800 Smithe Street, Vancouver, British Columbia

(2) The ADDRESS FOR SERVICE of the petitioner(s) is:

Mark Underhill

Underhill Gage Litigation

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Vancouver, BC V6B 5A1

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Kate Feeney

BC Public Interest Advocacy Centre

	208 – 1090 West Pender Street Vancouver, BC V6E 2N7 Fax number address for service (if any) of the petitioner(s): 604-682-7896 E-mail address for service (if any) of the petitioner(s): kfeeney@bcpiac.com
(3)	The name and office address of the petitioners' lawyer is: Mark Underhill Underhill Gage Litigation 401 W Georgia St Vancouver, BC V6B 5A1 Kate Feeney BC Public Interest Advocacy Centre 208- 1090 W Pender St. Vancouver, BC V6E 2N7

Claim of the Petitioner

Part 1: ORDER(S) SOUGHT

1. An interlocutory order that the Respondent provide the Petitioner with state-funded counsel for her Mental Health Review Board review panel ("Review Panel") hearing on August 23, 2016.
2. A declaration under section 24 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) that, in the circumstances of the Petitioner's case, the Petitioner has a right under s. 7 and s. 15(1) of the *Charter* to state-funded counsel for her Mental Health Review Board Review Panel hearing ("Review Panel hearing") on August 23, 2016.
3. Costs in any event of the cause.
4. Such further and other relief as counsel may advise and this Honourable Court deems just.

Part 2: FACTUAL BASIS

A. PARTIES TO THIS PETITION AND OVERVIEW

1. The Petitioner is a 39 year old woman. She is presently detained as an involuntary patient under the *Mental Health Act*, RSBC 1996 c. 288 ("MHA").
2. The Respondent Her Majesty the Queen in Right of the Province of British Columbia (the "Province") is named pursuant to s.7 of the *Crown Proceeding Act*, R.S.B.C. 1996, c. 89.
3. The Petitioner has requested a review of her involuntary patient status by the Mental Health Review Board ("Review Board"), an administrative tribunal established under the MHA. The Review Board initially scheduled a Review Panel hearing on August 16, 2016. Upon the Petitioner's request, the Review Board has postponed the Petitioner's Review Panel hearing until August 23, 2016.
4. The Petitioner requires legal representation for her Review Panel hearing and cannot afford to privately retain a lawyer.
5. The Petitioner, who is eligible to receive legal aid representation for her Review Panel hearing, has been denied legal representation by the Community Legal Assistance Society ("CLAS"), the provider of mental health legal aid in British Columbia, solely because CLAS does not have a lawyer available for her hearing.

B. THE CIVIL COMMITTAL REGIME IN BRITISH COLUMBIA

6. The MHA establishes the civil committal regime in British Columbia. A person who is involuntarily admitted or detained under the MHA is described as an "involuntary patient."
7. A physician authorizes the involuntary admission of a person under the MHA by completing a Form 4 Medical Certificate in accordance with s. 22 of the MHA. The initial detention period is 48 hours.
8. Under the criteria set out in s. 22(3)(a)(ii) and (c) of the MHA, physicians completing a Form 4 Medical Certificate must confirm that, in their opinion, the person or patient:
 - a. is a person with a mental disorder (s. 22 (3)(a)(ii));
 - b. requires treatment in a designated facility (s. 22 (3)(c)(i));

- c. requires care, supervision and control in or through a designated facility to prevent the person's or patient's substantial mental or physical deterioration or for the protection of the person or patient or the protection of others (s. 22 (3)(c)(ii)); and
 - d. cannot be suitably admitted as a voluntary patient (s. 22 (3)(c)(iii)).
- 9. A "person with a mental disorder" is defined in s. 1 of the MHA as "a person who has a disorder of the mind that requires treatment and seriously impairs the person's ability (a) to react appropriately to the person's environment, or (b) to associate with others."
- 10. Section 22(3)(c) of the MHA was amended in 1999 to authorize the detainment of persons or patients in order to prevent their "substantial mental or physical deterioration." Before this amendment, civil commitment was only authorized in order to protect the individual or to protect others. While the previous standard was upheld as constitutional in *McCorkell v. Director of Riverview Hospital*, 1993 CanLII 1200 (BC SC), the new standard has not been subject to *Charter* scrutiny by the courts.
- 11. A completed Form 4 Medical Certificate authorizes anyone, including ambulance personnel, police, or, if the physician deems it safe, relatives or others, to take the person to a designated medical facility.
- 12. If, within the initial 48 hour detention period, a different physician completes a second Form 4 Medical Certificate in accordance with s. 22 of the MHA, an involuntary patient may be detained beyond the initial 48 hour detention period. If a second Form 4 Medical Certificate is not completed, the patient must be discharged from their involuntary patient status.
- 13. Under s. 23 of the MHA, once two Form 4 Medical Certificates have been completed in accordance with s. 22 of the MHA, the involuntary patient may be detained up to one month after the date of admission. The involuntary patient must then be discharged from their involuntary patient status unless their detention is renewed in accordance with s. 24 of the MHA.
- 14. In order to renew an involuntary patient's certification under s. 24 of the MHA, a physician must examine the involuntary patient and complete a Form 6: Medical Report on Examination of Involuntary Patient ("Renewal Certificate") confirming that the patient continues to meet the criteria set out in s. 22(3)(a)(ii) and (c) of the MHA.

If the physician concludes that these criteria are not met, the patient must be discharged from their involuntary patient status.

15. The prescribed renewal periods under s. 24 of the MHA are as follows: the first renewal period is for one month; the second renewal period is for three months; and any subsequent renewal periods are for six months.
16. Under s. 31 of the MHA, while a patient is an involuntary patient under the MHA, any treatment authorized by the director is deemed to be given with the consent of the patient. In other words, the patient's fundamental right to refuse medical treatment is eliminated.
17. Under ss. 38 and 39 of the MHA, an involuntary patient may be released in the community on extended leave where the "appropriate support exists in the community to meet the conditions of the leave." However, the involuntary patient status continues despite a leave and an involuntary patient may be recalled from extended leave if the conditions of the leave are not met.
18. An involuntary patient has three mechanisms by which to challenge their involuntary patient status: requesting a Review Panel hearing; applying to court for a statutory discharge under s. 33 of the MHA; and applying to court for a writ of *habeas corpus*. All of these mechanisms are patient-initiated processes—they are not automatic and no court or tribunal order is necessary for continued detention.
19. Upon their initial admission and each renewal of their involuntary status, an involuntary patient is entitled under s. 34 of the MHA to written and oral notice of their rights, including their right to request a Review Panel hearing and their rights under section 10 of the *Charter*.

The Review Board and Review Panel hearings

20. The Review Board is an independent tribunal established under the MHA to conduct Review Panel hearings. Pursuant to s. 24.1 (3) of the MHA, a Review Panel consists of three members and must include a medical practitioner, a member in good standing of the Law Society or a person with equivalent training, and a third person who is neither a doctor nor a lawyer.
21. The Review Board has jurisdiction to conduct hearings to determine whether an involuntary patient's involuntary status should continue because the patient continues to meet the criteria set out in subsections 22(3)(a)(ii) and (c). If those

criteria are not met, the Review Panel must discharge the patient from their involuntary status. The Review Board does not have jurisdiction to review other issues concerning the involuntary patient's detention, such as treatment decisions or the conditions of extended leave.

22. In most circumstances, an involuntary patient is entitled to request a Review Panel hearing after the completion of a second Form 4 Medical Certificate and after each renewal of their certificate.

23. An involuntary patient may request a Review Panel hearing by completing a Form 7: Application for Review Panel Hearing. The Mental Health Review Board must then schedule Review Panel hearings within the time periods prescribed under the MHA. However, if an involuntary patient requests a postponement of a scheduled Review Panel hearing, the Review Board is not required to reschedule the hearing within the prescribed timelines. The prescribed time periods are set out in the table below:

Certificate	Detention period	Review Panel hearing must be scheduled within...
1 st Form 4	48 hours	N/A
2 nd Form 4	1 month	14 days of request
1 st Renewal	1 month	14 days of request
2 nd Renewal	3 months	28 days of request
3 rd Renewal and any subsequent Renewals	6 months	28 days of request + 90 days since the previous hearing

24. Upon the Review Board scheduling a Review Panel hearing, it sends the patient written confirmation of the hearing and a "Patient's Right to Legal Representation" form. The involuntary patient must complete this form, which includes an option to request legal representation from CLAS' Mental Health Law Program ("MHLP"). If the involuntary patient requests legal representation from the MHLP, the Review Board will notify the MHLP of this request. Under this system, the involuntary patient does not receive legal advice and representation until after a Review Panel hearing has been scheduled.

25. The three-person Review Panel presides over an inquisitorial process. This process tends to be complex in nature. It involves expert medical evidence and terminology, as well as difficult evidentiary issues and legal questions. Hearings usually last half a day or longer.
26. A Case Presenter appointed by the involuntary patient's medical facility presents the case in favour of continued detention to the Review Panel. The Case Presenter is usually a physician and ordinarily the involuntary patient's treating physician.
27. Normally, Review Panels only consider evidence presented at the hearing. They do not review the patient's medical records before or after a Review Panel hearing. This means that the onus is on the involuntary patient to ensure that the Review Panel considers all relevant information, and not just evidence presented by the Case Presenter.
28. The Case Presenters often rely on hearsay and uncorroborated evidence in support of the involuntary patient's continued detention. This type of evidence would mostly be inadmissible in criminal proceedings.
29. Preparing and presenting a case for decertification requires involuntary patients, or their representatives, to access and review medical records, organize documentary evidence, arrange for witnesses to attend the hearing, conduct direct examination of witnesses for the involuntary patient, cross-examine the Case Presenter, and prepare and present opening and closing statements.
30. Involuntarily detained patients face numerous barriers to preparing and presenting their case on their own, including:
 - a. Involuntary patients may be unable to request, review, or understand their medical records, which are often hundreds of pages long. Some involuntary patients are denied access to their own medical records.
 - b. Involuntary patients who are detained in hospital have limited access to a communal and publically-located patient phone. Often, they are not allowed to use their cell phones.
 - c. Involuntary patients may be intimidated and overwhelmed by the review process. They are often dealing with mental health issues or are perceived

to be dealing with mental health issues. They are often taking psychotropic medications, which have significant side effects.

- d. Involuntary patients do not have legal training and do not understand the MHA, making it difficult for them to speak to the legal test and respond to the case being made against them. From a procedural perspective, they generally have no idea how to challenge hearsay and uncorroborated evidence or make arguments about its weight. They are also not familiar with constitutional law, and in particular the Charter, which applies to the powers of the Review Panel.
- e. Involuntary patients may find it difficult to cross-examine their treating physicians, who have significant power over their patients.
- f. Involuntary patients may be unaware of community supports which could enable them to be a voluntary patient.

C. MENTAL HEALTH LEGAL AID FOR INVOLUNTARY PATIENTS

- 31. Prior to 2002, the *Legal Services Society Act* mandated the Legal Services Society to provide lawyers to persons subject to civil commitment proceedings. In 2002, the provincial government substantially amended the *Legal Services Society Act*, and since then legal aid coverage has been negotiated through a Memorandum of Understanding between the Attorney General and the Legal Services Society.
- 32. The current Memorandum of Understanding ("MOU") between the Attorney General and the Legal Services Society is operational from April 1, 2014 to March 31, 2017. Paragraph 9 of the MOU sets out the services to be provided by the Legal Services Society, including:
 - d. **Service:** Representation of Eligible Individuals who have a legal problem the disposition of which could affect their liberty or where representation is required to ensure a fair hearing. Such services may include, but are not limited to:
 - i. Representation in proceedings under the *Mental Health Act* in which an individual is detained.
- 33. Since about 1992, the LSS has contracted out to CLAS its services of providing representation to eligible individuals who are subject to Mental Health Review Board hearings under the *MHA*, as well as eligible individuals who are subject to BC Review Board hearings under the *Criminal Code*. The LSS' current "Intake Policies

and Procedures" Manual, dated May 4, 2016, confirms that it does not issue any contracts for BC Review Panel hearings.

34. CLAS administers its contract with the LSS through its MHLP. The MHLP provides legal representation at Review Panel hearings by advocates who are supervised by a lawyer within the Lower Mainland and by tariff lawyers outside of the Lower Mainland.
35. Since about 2009, CLAS' funding under its contract with the LSS has not been sufficient to meet the demand for its services. Consequently, it has had to deny hundreds of requests for legal representation from involuntary patients each year.
36. The Province has long been aware of CLAS' funding issues and the systemic failure to provide legal representation to involuntary patients before Review Panels. For example, CLAS and the Mental Health Review Board have written to the Attorney General, as well as provided submissions to the 2011 Public Commission on Legal Aid in British Columbia. The Public Commission on Legal Aid reported on and strongly condemned these circumstances.
37. In July, 2014, Access Pro Bono ("APB") launched its Mental Health Program to provide pro bono legal representation to involuntary patients who are denied legal representation by the MHLP.
38. APB started its Mental Health Program upon the express request of the current Chair of the Mental Health Review Board, Margaret Ostrowski. Ms. Ostrowski made this request in a presentation to APB's Board of Directors on February 26, 2014, during which she expressed her frustration with the large number of individuals in need of legal representation for their Review Panel hearings and the lack of financial and human resources available to meet their legal needs.
39. APB's Mental Health Program and the MHLP operate in cooperation with each other and have developed an effective referral system under which the MHLP refers involuntary patients to the Mental Health Program. However, the Mental Health Program is not able to match all of the referrals for reasons including limitations on the volunteer roster's geographic reach and the timing of the referral. The Program Manager, Marie-Noel Campbell, has asked the MHLP to not refer involuntary patients whose Review Panel hearings are scheduled less than 10 calendar days from the date of the referral.

PETITIONER'S CIRCUMSTANCES

40. The Petitioner, Z.B., is a 39 year old woman. She is single and does not have children.
41. Z.B. is unemployed and currently homeless. She receives CPP-D in the approximate amount of \$500 per month. She used to receive a top-up from the provincial government's "Person With Disabilities" ("PWD") program. However, she ceased receiving this top-up in or around December 2015. She wants help to get it started again.
42. Z.B. has a high school degree and was admitted to university. She has tried postsecondary studies on three different occasions—however, she has only completed one year of jazz studies.
43. Z.B. has only had sporadic employment since high school.
44. In her early twenties, Z.B. was diagnosed with bipolar disorder, depression, and anxiety.
45. Over the years, Z.B. has tried different mental health treatments, including psychotropic medications and more holistic treatments. It is important to her to make her own decisions about her medical treatments.
46. Z.B. has been hospitalized on a voluntary basis in the past to treat her mental health. She does not have a history of detention under any mental health legislation.
47. Z.B. believes that in the months before her involuntary admission in or about July, 2016, she was experiencing symptoms of depression. She was isolated and therefore did not have a support system to help her.
48. One night in or about July, 2016, Z.B. was sitting inside a Tim Horton's in Nanaimo and started having suicidal ideation. At that point, she decided that she needed help and asked a staff member at Tim Horton's to call the RCMP. She was then taken to the Emergency Room at a hospital in Nanaimo. She does not recall the name of the hospital.
49. Z.B. spent a couple of nights in psychiatric emergency ward. During her initial assessments, she was open about her thoughts and feelings. She does not recall

the doctors discussing with her the possibility of an involuntary admission. She was expecting to get help as a voluntary patient.

50. Later, Z.B. was surprised and upset when nurses told her that she had been involuntarily admitted. She does not agree with her involuntary admission because she went to the hospital to get help and she was not hurting anyone.
51. Z.B. is presently hospitalized at the Hospital in the City, British Columbia. She prefers this hospital to the hospital in Nanaimo and she has a better working relationship with her psychiatrist. However, she still disagrees with her involuntary patient status. In particular, she wants more control over her medications and her dosages. She also wants the choice of living in the community.
52. Z.B. requested a Review Panel hearing to challenge her involuntary patient status. The Mental Health Review Board scheduled her Review Panel hearing on August 16, 2016.
53. Z.B. requested legal representation for her Review Panel hearing from the Community Legal Assistance Society's ("CLAS") Mental Health Law Program ("MHLP").
54. On August 9, 2016, the MHLP called Z.B. and informed her that they were denying her request because the MHLP does not have the funding available to assign her a lawyer. The MHLP told her that they will not have funding available to assign her a lawyer until late October or November, 2016.
55. The MHLP also told Z.B. that in light of their denial, she has four options for her Review Panel hearing:
 - a. Hire a lawyer to represent her at my own expense;
 - b. Cancel the Review Panel hearing outright;
 - c. Postpone the Review Panel hearing until the MHLP has someone available to represent her; or
 - d. Represent herself at the Review Panel hearing.
56. Z.B. cannot afford to hire a lawyer because she only receives approximately \$500 per month in CPP-D payments and she has no savings or other assets. She is homeless and does not have a support system in place.

57.Z.B. does not want to cancel her Review Panel hearing or wait until October or November to have her Review Panel hearing, because she wants to be discharged from her involuntary patient status as soon as possible.

58.Z.B. does not want to represent herself because she does not think she will have a fair hearing if she represents herself.

59.Z.B. does not feel prepared to represent herself for reasons including:

- e. She is very emotional about her detainment and it is difficult for her to talk about it;
- f. She does not understand the law around civil detentions and how to succeed in a Review Panel hearing;
- g. She does not know how to access her medical records;
- h. She does not want to fight her doctor in the Review Panel hearing because she likes him and she wants them to continue to have a good working relationship; and
- i. The Review Panel hearing seems very overwhelming and she is already anxious about it.

EXPERIENCES OF OTHER INVOLUNTARY PATIENTS

60.V.H. is a 24 year old man who was, at the material time, detained under the MHA and on extended leave in Vancouver, British Columbia. He is a high school graduate and receives provincial disability assistance as a sole recipient. He has bipolar disorder and was involuntarily admitted to Vancouver General Hospital in February 2016 after he was in a head-on car collision during a manic episode. He may have sustained brain injuries from the car accident.

61.V.H. had a Review Panel hearing scheduled on June 17, 2016, but postponed it after CLAS denied his request for legal representation due to a lack of availability of advocates. He did not want to represent himself because: "I am not good at speaking and I still have symptoms and cognitive issues from my head injury. I would feel much more comfortable with someone representing me and speaking on my behalf." He has also stated that "I hate that I had to postpone my hearing again because I want to go back to having a normal life, on my own terms. I do not like that

someone else is controlling me and making decisions for me. It feels like I have no freedom and it feels wrong."

62. L.P. is a 35 year old man who was, at the material time, detained under the MHA and on extended leave in Vancouver, British Columbia. He became blind as an adult and relies on a cane at all times. He did not graduate from high school and does not read Braille. He receives provincial disability assistance as a sole recipient. L.P. has been an involuntary patient for approximately two years and has unsuccessfully challenged his involuntary patient status in several Review Panel hearings.
63. L.P. had a Review Panel hearing scheduled on January 5, 2016, but postponed it after CLAS denied his request for legal representation due to a lack of availability of advocates. He did not want to represent himself because "I am not that learned on these types of things and I was worried about messing up my case. I had found my previous Review Panel hearings to be overwhelming and confusing. I did not understand what people were talking about—I just knew it was about me." He also stated that "I also did not want to represent myself because being blind makes it hard to prepare my case. For example, I cannot read my medical records—I would need someone to read them to me."
64. J.B. is a 23 year old man who was, at the material time, detained under the MHA and on extended leave in Abbotsford, British Columbia. He has been diagnosed with Asperger's syndrome and learning disabilities, including ADHD. In high school, he required specialized supports in order to graduate. He also started using drugs in high school and attended residential addictions treatment. Since J.B. was about 16 years old, he has been involuntarily detained under the MHA several times. J.B. has been diagnosed with various mental health disabilities over the years, including drug-induced psychosis and later schizophrenia. However, he does not agree with these diagnoses.
65. J.B. had a Review Panel hearing scheduled on June 17, 2016, but postponed it after CLAS denied his request for legal representation due to a lack of availability of advocates. He did not want to represent himself because "I do not know how to convince the Review Panel to agree with me, and not my psychiatrists. My psychiatrists are very condescending and dismissive toward me. In the past, when I have told them that I disagree with their medical opinions, it has been a mess and it has gone nowhere." J.B.'s Review Panel hearing was rescheduled on July 18, 2016. He swore his affidavit during a break in the hearing and said "I am very happy to have legal support, as it would feel very one-sided to do the hearing on my own. The hearing is very stressful and I am not doing any of the talking."

66. R.W. is a 72 year old man who was, at the material time, detained under the MHA and living in Kelowna, British Columbia. He has been diagnosed with alcohol—aggravated dementia. While he agrees that he has some dementia, he does not agree that it is alcohol-aggravated. He was involuntarily admitted in July 2015 because the police found he was wandering around at night and a risk to himself. He has not worked in several years and lives on public assistance.

67. R.W. had a Review Panel hearing scheduled on January 12, 2016, but postponed it after CLAS denied his request for legal representation due to a lack of availability of lawyers. He did not want to represent himself because he does not know “the applicable law and procedure.” The Mental Health Review Board ultimately rescheduled his Review Panel hearing on March 2, 2016, when CLAS had a lawyer available to represent him. R.W. was not successful in challenging his involuntary patient status at the Review Panel hearing—however; he said “it was helpful to have counsel representing me, as I would have found it difficult to stay on top of the proceedings on my own.”

Part 3: LEGAL BASIS

1. The Petitioner relies on:

- a. *The Mental Health Act*, RSBC 1996 c. 288;
- b. Sections 1, 7, 15, and 24 of the *Canadian Charter of Rights and Freedoms*, being Schedule “B” to the *Constitution Act, 1982*;
- c. *The Supreme Court Civil Rules*, BC Reg. 168/2009, Rule 2-1;
- d. The inherent jurisdiction of this Honourable Court; and
- e. Such further and other materials as counsel may advise.

The Petitioner's Charter Rights will be breached

SECTION 7

2. Section 7 of the *Charter* states that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

3. In order to demonstrate a violation of s. 7, applicants must first show that the law interferes with, or deprives them of, their life, liberty or security of the person. Once they have established that s. 7 is engaged, they must then show that the deprivation in question is not in accordance with the principles of fundamental justice.

Deprivation of life, liberty and security of the person

4. The Petitioner's involuntary patient status under the *Mental Health Act* constitutes a deprivation of her rights to liberty and security of the person under Section 7 of the *Charter*.
5. It is well established that civil psychiatric committals constitute a deprivation of the involuntary patient's liberty. Civil psychiatric committals can also be understood as a deprivation of both the involuntary patient's liberty and security of the person, in particular where an involuntary patient is subject to non-consensual medical treatments.
6. The Petitioner's rights to liberty and security of the person are mutually supporting and intersecting in her case. They are both underscored by the Petitioner's rights to individual autonomy and dignity.

The principles of fundamental justice

7. Section 7 guarantees the Petitioner the right to a fair Review Panel in accordance with the principles of fundamental justice. In order to have a fair Review Panel hearing, the Petitioner's circumstances require representation by a lawyer. As she cannot afford to privately retain a lawyer, s. 7 guarantees that she be provided with state-funded counsel.
8. Where a decision-maker has a power of decision over life, liberty, or security of the person, such as in reviews of civil psychiatric detentions, the principles of fundamental justice include the right to a fair process.
9. The procedural fairness requirements mandated by section 7 are context-specific. The situation of civilly detained involuntary patients, like the situation of NCR persons who are detained under Part XX.1 of the *Criminal Code*, is in the category of "close or analogous to criminal proceedings," where greater judicial vigilance of procedural fairness is required.

10. The principle that NCR persons should be afforded the utmost liberty compatible with their situation has been affirmed in a series of Supreme Court of Canada cases addressing the constitutionality of Part XX.1 of the *Criminal Code*. This legal principle is equally applicable to civil psychiatric detentions.
11. In the criminal context, it is well established under ss. 7 and 11 (d) of the *Charter* that an accused's right to a fair hearing may require representation by state-funded counsel.
12. In the civil context, the Supreme Court of Canada held in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR 46 ("G.J.") that under s. 7 of the *Charter*, where the state seeks custody of a parent's children, there are circumstances in which the parent may require state-funded counsel to ensure a fair hearing.
13. The Supreme Court held in G.J. that the assessment of whether a parent requires state-funded counsel should consider the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the parent. With respect to the parent's capacities, the Supreme Court observed at para 83:

Competence is a necessary but not sufficient condition for determining whether an unrepresented parent will receive a fair custody hearing. Although competent, the parent must be able to participate meaningfully at the hearing, which goes beyond mere ability to understand the case and communicate.
14. It is widely recognized in British Columbia that most involuntary patients require legal representation in order to ensure a fair Review Panel hearing.
15. As set out above, the Attorney General and LSS provide legal aid representation to involuntary patients in Review Panel hearings on the basis that "representation is required to ensure a fair hearing."
16. 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.

17. Further, in written submissions to the Public Commission on Legal Aid, the Board made these observations:

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.

...

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.

...

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.

18. In "Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia" (the "Doust Report"), Leonard T. Doust, QC, condemned 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," and observed 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

19. There is a meaningful difference in outcomes between Review Panel hearings where the involuntary patients represents themselves and Review Panel hearings where the involuntary patients have legal representation. INSERT updated statistics.

SECTION 15(1)

20. Section 15(1) of the *Charter* provides: "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."

21. The Petitioner's rights under ss. 7 and 15(1) of the *Charter* are intersecting and should be considered together.
22. The Supreme Court of Canada has recognized that all *Charter* rights strengthen and support each other. In particular, the equality guarantee has an important influence on the other rights in the *Charter*.
23. There is a long history of discrimination against persons with mental disabilities and those perceived to have mental disabilities. In *R v Swain*, [1991] 1 SCR 933, the Supreme Court of Canada observed that "the mentally ill have historically been the subjects of abuse, neglect and discrimination in our society. The stigma of mental illness can be very damaging": page 973.
24. More specifically, there is a problematic history of state discrimination against persons with mental disabilities under the umbrella of the state's *parens patriae* jurisdiction.
25. Prejudice and stereotyping about persons with mental illness, combined with an overemphasis on the protective or therapeutic purposes of civil committal regimes, have resulted in an under-emphasis on the rights violations experienced by involuntary patients whose detentions are not subject to review in accordance with the principles of fundamental justice. This has in turn permitted the erosion of mental health legal aid representation in British Columbia, contrary to s. 15(1) of the *Charter*.
26. The denial of legal representation to the Petitioner perpetuates prejudice, stereotyping and discrimination, as it signals a lack of concern with the protection of the Petitioner's personal autonomy, self-determination and dignity.
27. The Petitioner's mental health disabilities give rise to additional barriers to accessing justice, resulting in a greater chance of an unfair Review Panel hearing, contrary to ss. 7 and 15(1) of the *Charter*. An unfair Review Panel hearing in turn compounds the gravity of the Petitioner's detention and the impact of detention on the Petitioner's mental health disabilities, contrary to ss. 7 and 15(1) of the *Charter*.

SECTION 1 OF THE CHARTER

28. Section 1 of the *Charter* reads: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable

limits prescribed by law as can be demonstrably justified in a free and democratic society.”

29. The infringements of s. 7 and s. 15 in this case cannot be justified under s. 1, the burden of proof of which lies with the Province.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of the Petitioner, made on August 10, 2016.
2. Affidavit #2 of the Petitioner, made on August 10, 2016.
3. Affidavit #1 of V.H., made on June 17, 2016.
4. Affidavit #1 of L.P., made on July 8, 2016.
5. Affidavit #1 of J.B., made on July 18, 2016.
6. Affidavit #1 of R.W., made on July 15, 2016.
7. Affidavit #1 of Marie-Noel Campbell, made on July 15, 2016.
8. Affidavit #1 of Mary Childs, made on July 27, 2016.
9. Affidavit #1 of Jamie McLaren, made on July 20, 2016.
10. Affidavit #1 of Sozan Savehilaghi, made on August 11, 2016.

The petitioner estimate that the hearing of the petition will take 2 days.

Date: August 12, 2016


Signature of Kate Feeney,
lawyer for applicant(s)

To be completed by the court only:

Order made

- ☐ in the terms requested in paragraphs of Part 1 of this petition
- ☐ with the following variations and additional terms:

.....

.....

.....

Date:[dd/mmm/yyyy]..... Signature of [] Judge [] Master
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Form 67 (Rule 16-1 (5))