



No. S-255986
New West Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

PETER CAPE

PETITIONER

AND:

FRASER HEALTH AUTHORITY operating as Burnaby General

RESPONDENT

RESPONSE TO PETITION

Filed by: FRASER HEALTH AUTHORITY, MATTHEW WU and WALID CHAHINE (the
“petition respondents”)

THIS IS A RESPONSE to the Petition of Peter Christopher Cape filed November 21, 2024.

The petition respondents estimate that the hearing of the petition will take two hours.

Part 1: ORDERS CONSENTED TO

The petition respondents consent to the granting of the orders set out in the following paragraphs of part 1 of the petition: NIL.

Part 2: ORDERS OPPOSED

The petition respondents oppose the granting of the orders set out in paragraph 1 of Part 1 the Petition.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The petition respondents take no position on the granting of the orders set out in paragraphs 2 and 3 of Part 1 of the Petition.

Part 4: FACTUAL BASIS

1. Fraser Health Authority operates Burnaby Hospital (“BH”) pursuant to the *Health Authorities Act*, RSBC 1996, c 180.
2. On July 11, 2024, the petitioner attended the BH Neurology Department seeking a CT scan. He did not have an appointment. He was seen by Dr. De La Sablonniere.

Exhibit C at pages 35-37, Affidavit of Matthew Wu

3. During his discussion with Dr. De La Sablonniere, the petitioner reported having visual and auditory hallucinations.

Exhibit C at page 35, Affidavit of Matthew Wu

4. When asked if he had suicidal ideations, the petitioner responded, "I'm not going to answer that."

Exhibit C at page 35, Affidavit of Matthew Wu

5. Dr. De La Sablonniere, worried about the petitioner's safety, convinced him to go to the BGH Emergency Department for a head CT. The petitioner arrived in the Emergency Department at 13:22 and was discharged at 16:55 (the "**Admission**").

Exhibit C at page 36, Affidavit of Matthew Wu

6. After arriving at the BH Emergency Department the petitioner was initially assessed by a BH emergency physician, Dr. McGowan. He became increasingly paranoid, erratic and combative. The petitioner continued to seek a CT scan.

Exhibit B at page 18, Affidavit of Matthew Wu

7. At 14:03, another BH emergency physician, Dr. Garvida, completed a s. 22, Form 4.1, medical certificate pursuant to the *Mental Health Act*, RSBC 1996, c 288 (the "**MHA**") certifying the petitioner as an involuntary patient under the *MHA* (the "**Form 4.1**").

Exhibit A, Affidavit of Matthew Wu

8. Dr. Garvida wrote in the Form 4.1 certificate that the petitioner was a "vague historian" and had "depression with ?suicidality" which was a disorder of the mind that required treatment and seriously impairs his ability to react appropriately to the environment or associate with others.

Exhibit A, Affidavit of Matthew Wu

9. Dr. Garvida indicated that she formed the opinion that Mr. Cape required treatment in a designated facility, due to "safety concerns" and the need to access specialists.

Exhibit A, Affidavit of Matthew Wu

10. Further, Dr. Garvida wrote that the petitioner required care, supervision and control in a designated facility to "prevent death by suicide."

Exhibit A, Affidavit of Matthew Wu

11. Dr. Garvida indicated that she formed the opinion that the petitioner could not be suitably admitted as a voluntary patient because Mr. Cape declined voluntary admission.

Exhibit A, Affidavit of Matthew Wu

12. Dr. Garvida made orders on the Emergency/Ambulatory Care Clinical Record for the patient to be administered medication of Haldol and Midazolam as necessary for agitation, and to be placed in soft restraints or “pinnels” as necessary.

Exhibit B at page 18, Affidavit of Matthew Wu

13. After Dr. Garvida certified Mr. Cape he attempted to leave and was prevented from doing so.

Exhibit B at page 12, Affidavit of Matthew Wu

14. In accordance with the orders of Dr. Garvida , the petitioner was administered Midazolam and Haldol to treat his psychiatric symptoms.

Exhibit B at page 12, Affidavit of Matthew Wu

15. After reviewing Dr. Garvida’s notes on the Form 4.1, Matthew Wu signed the Form 4.1 at 14:43 as a person authorized by a director to carry out a duty of the Director under the *Mental Health Act*.

Paragraph 20, Affidavit of Matthew Wu

16. When making the decision to sign the Form 4.1 certificate, Matthew Wu relied upon Dr. Garvida’s notes.

Paragraphs 15-17, Affidavit of Matthew Wu

17. Matthew Wu was authorized by the *MHA* Director of BH and had the authority under the *MHA* to sign the Form 4.1 certificate.

Paragraph 14, Affidavit of Matthew Wu

18. At all material times, Matthew Wu was acting as delegate Director under section 1 of the *MHA*.

Paragraph 14, Affidavit of Matthew Wu

19. At all material times, Matthew Wu was employed as a registered nurse at BH and was the Patient Care Coordinator of the BH emergency department.

Paragraph 13, Affidavit of Matthew Wu

20. At all material times, Patient Care Coordinators in the emergency department were authorized by the *MHA* Director of BH and had the authority to sign Form 4.1 Medical Certificates (Involuntary Admission).

Paragraph 4c, Affidavit of Ken McDonald

21. At the time of July 11, 2024 Burnaby Hospital was a designated facility under the *MHA* in accordance with Ministerial Order M393/2016.

Exhibit A, Paragraphs 2, 3 and 4d, Affidavit of Ken McDonald

22. At the time of July 11, 2024, Dr. John Wu was the Director of Mental Health for BH and was appointed by the Fraser Health Authority as the Director of Burnaby Hospital Mental Health Facility.

Paragraph 4b, Affidavit of Ken McDonald

23. A memorandum from October 18, 2023 established the authorities under the *MHA* and the delegation of authority under the *MHA* (the “**Memorandum**”).

Exhibit B, Paragraph 5, Affidavit of Ken McDonald

24. The Memorandum was current at all material times.

Exhibit B, Paragraph 5, Affidavit of Ken McDonald

25. Following the administration of the Haldol and Midazolam, and during the Admission, Dr. Javaheri, a psychiatrist, completed a second psychiatric assessment as mandated by the *MHA* of the petitioner. Based off the petitioner’s presentation at the time of Dr. Javaheri’s assessment, Dr. Javaheri changed the petitioner’s status to voluntary admission and asked the petitioner to stay for one hour for observation. Mr. Cape agreed to do so.

Exhibit B at page 19, Affidavit of Matthew Wu

26. The petitioner was cooperative and was subsequently discharged with approval at 16:55.

Exhibit B at page 31, Affidavit of Matthew Wu

27. In addition to this Petition, Mr. Cape has filed a Notice of Civil Claim arising from the same set of events: *P.C. v FRASER HEALTH AUTHORITY, operating as a public hospital under the name Burnaby General Hospital, DR. ZOE MCGOWAN, MATTHEW WU, MICHAEL MCCORMICK, WALID CHAHINE*, No. 255756, New Westminster Registry (the “**NOCC**”).

28. The NOCC was filed on October 8, 2024.

29. The NOCC alleges that, on July 11, 2024 at BH, the Fraser Health Authority, Dr. Zoe McGowan, Matthew Wu and Walid Chahine (the “**NOCC Defendants**”) failed to properly treat the petitioner, forced the petition to remain in hospital against his will and failed to keep the petitioner free from harm.

The NOCC, Statement of Facts, para 17

30. In the NOCC, Mr. Cape claims the following damages:

- (a) General damages;
- (b) Special damages;
- (c) Past and future cost of health care services pursuant to the *Health Care Costs Recovery Act*, SBC 2008, c 27;
- (d) Punitive damages;
- (e) Costs;

- (f) An order that the NOCC Defendants pay damages or such other remedy as the Court may consider just and appropriate pursuant to s. 24 of the *Canadian Charter of Rights and Freedoms*;
- (g) Interest pursuant to the *Court Order Interest Act*, RSBC 1996, c 79 and amendments thereto; and
- (h) Such further and other relief as this honorable court may deem just.

31. The trial date for the NOCC proceeding is December 8-12, 2025.

Part 5: LEGAL BASIS

1. The petitioner was briefly detained as an involuntary patient under the *MHA* from 1403 to approximately 1600. At 1600 he was no longer involuntarily detained as a result of the decision of Dr. Javaheri, and was discharged at 1655. Accordingly there is no current legal issue for this court to consider in this petition. The issue of the legality of the detention of the petitioner on July 11, 2024, at BH is moot and does not affect the rights of the parties. Therefore, it should not be the subject of judicial review.

2. The Supreme Court of Canada has stated:

The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. [...]

Borowski v Canada (Attorney General), 1989 CarswellSask 241, [1989] 1 SCR 435 (SCC) at para 15

3. In *Kozoubenko v Gosk*, 2023 ONCA 802 (“*Kozoubenko*”), the ONCA declined to judicially review a decision to involuntarily detain a patient under Ontario mental health legislation on the basis that the patient was no longer detained and therefore the appeal was moot and would have no practical effect on the rights of the parties.

4. Capacity to consent to treatment

must be determined afresh each time a new treatment is proposed. Whether or not the appeal is successful, any future treatment that is proposed would require the health practitioner to consider whether [the patient] is capable of consenting to that treatment at that time. In each case a new capacity assessment would have to be performed. [...]

Kozoubenko, para 26

5. In *Adsett v Labelle*, 2024 ONCA 366 (“*Adsett*”), the ONCA cited *Kozoubenko* with approval and went on to hold that:

We are not persuaded that the appellant's history, and perceived mistreatment amounts to special circumstances that would permit us to exercise our discretion to hear the appeal despite it being moot.

Paragraph 8

6. As in *Kozoubenko* and *Adsett*, the petitioner is no longer detained. Any judicial decision about the legality of the July 11, 2024, detention would have no influence any future interaction between these parties.
7. Further, the petitioner is pursuing a remedy and damages, for the alleged tortious behavior relating to the identical issues, in another proceeding, the NOCC.
8. The petitioner should not be permitted to pursue two remedies in separate proceedings arising from the same events.
9. In the alternative, if it is held that the judicial review should be heard, the decision that can be reviewed is limited to the decision of Matthew Wu as delegate of the Director, to sign the Form 4.1.
10. As per the *Judicial Review Procedures Act*, RSBC 1994, c 241 (“*JRPA*”) s. 1 “statutory power of decision” means
 - a power or right conferred by an enactment to make a decision deciding or prescribing
 - (a) the legal rights, powers, privileges, immunities, duties or liabilities of a person [...]
11. Section 1 of the *MHA* defines “director” as a
 - person appointed under the regulations to be in charge of a designated facility and includes a person authorized by a director to exercise a power or carry out a duty conferred or imposed on the director under [the *MHA*].
12. Under the *MHA* Regulation BC Reg 257/2023 section 3 the Health Authority responsible for the operation of a designated facility must appoint a person as a director of the facility.
13. Section 22(1) of the *MHA* gives the “director” the “statutory power of decision” to make a decision deciding the legal rights of a person to leave the hospital on receiving one medical certificate respecting the person completed by a doctor. The factors regarding certification under section 22 have been recently considered in *A.A. v. Lions Gate Hospital (Director)* 2024 BCSC 464.
14. There is a presumption of reasonableness when a statutory power of decision is exercised. If the issue is Constitutional, the applicable standard is correctness, as required by rule of law.

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 5
15. Matthew Wu, a nurse and PCC of the BH emergency department was the authorized delegate of the Director of Mental Health for BH. He was responsible for approving involuntary certification and treatments authorized by the physicians.

16. His responsibility was to confirm that he reviewed section 1 of the Form 4.1 and that it set out the information required by section 22(3) of the *Mental Health Act* to involuntarily admit the person who was examined at the Burnaby Hospital designated facility.
17. In making that decision he was informed by Dr. Garvida that the petitioner was a “vague historian” and had “depression with ?suicidality” which was a disorder of the mind that requires treatment and seriously impairs his ability to react appropriately to the environment or associate with others. Dr. Garvida indicated that she formed the opinion that Mr. Cape required treatment in a designated facility, due to safety concerns and the need to be able to access specialists. Dr. Garvida indicated that Mr. Cape required care, supervision and control through a designated facility to prevent his substantial mental or physical deterioration or the protection of others because of the need for access to specialist care and to “prevent death by suicide”. Dr. Garvida indicated that she formed the opinion that he could not be suitably admitted as a voluntary patient because Mr. Cape had declined voluntary admission.
18. Having regard to this information there is no basis for this court to overturn the decision of Matthew Wu. Not only was Matthew Wu’s decision to sign the Form 4.1 reasonable and correct, but it was also the only reasonable and correct decision.
19. Had Matthew Wu not signed the Form 4.1, the petitioner may have been released. Matthew Wu had been told that the petitioner would be a risk to himself and may attempt suicide should that occur.
20. The respondents seek costs of this proceeding.

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit of Matthew Wu, dated January 24, 2025
2. Affidavit of Ken McDonald, dated January 24, 2025
3. Pleadings in Supreme Court of British Columbia New Westminster Registry action no. 255756

Date: January 24, 2025

Per:



Eric Stanger
Lawyer for the petition respondents

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