SUPREME COURT OF YUKON

Citation: *Bachli v Yukon Care and Consent Body/Board*, 2025 YKSC 70

Date: 20251023
S.C. No.25-AP002
Registry: Whitehorse

BETWEEN:

ERWIN BACHLI

APPELLANT

AND

YUKON CARE AND CONSENT BODY/BOARD

RESPONDENT

Before Chief Justice S.M. Duncan

Appearing on his own behalf	Erwin Bachli
Counsel for the Respondent	Donald Dear

REASONS FOR DECISION

OVERVIEW

[1] This is an appeal by the appellant Erwin Bachli under the *Care Consent Act* SY 2003, c 21, Sch B (the *Act*) of the decision of the Capability and Consent Board (improperly named as the Care and Consent Body/Board) to uphold the conclusions and recommendations of the last resort decision makers that the appellant did not have the capacity to determine his health needs and limitations and that residence in a long term care facility would best meet his needs.

[2] The appellant has set out various grounds of appeal in his written documents and at the oral hearing. They may be summarized as a failure of due process because the Capability and Consent Board (the Board) failed to provide documents to him, did not hold a hearing, only a 'top secret' paper review, provided no evidence they reviewed the opinions of the last resort decision-makers, one of whom was not properly qualified, did not assess his injuries or assess or investigate his medical equipment; and a lack of jurisdiction because the Board members were not properly appointed, and the statute relied on by the Board and included in the materials was not legal. The appellant asks that the decision of the Board be reversed: that is, he be removed from long term care. During the hearing, he also asked for a new assessment of his medical equipment, a new wheelchair, and an adherence by government to its procurement policy.

[3] The appellant raised a preliminary issue of a conflict of interest created by my membership on the Law Society of Yukon Executive Committee in 2017, at the same time as James Tucker was President of the Law Society. James Tucker is the Chair of the Board and authored the decision in this case. At the hearing I determined that I did not have a conflict of interest and would provide written reasons.

[4] The Board raised its own preliminary issue, requesting that the subpoenas issued by the appellant to James Tucker and Barbara Evans, the registrar of the Board, be quashed. I decided at the hearing to quash the subpoenas, with reasons to follow.

[5] The Board also argued in its written submissions that the appeal was out of time, although in oral argument indicated it would not pursue this because of the broad appellate scope set out in s. 52 of the *Act*. The ability of this Court among other things to substitute its decision for that of the Board, exercising in doing so all the powers of

the Board (s. 52(2)(b)) renders moot any time limits for commencing an appeal. I will not address this limitation argument in my reasons.

[6] I will first set out my reasons for my conclusions on both preliminary issues. After reviewing the background, I will briefly describe the relevant sections of the statutory scheme and the scope and standard of appellate review. I will then address the positions of the parties and my findings.

PRELIMINARY MATTERS

Conflict of Interest

[7] The appellant argues I should not be the judge hearing this application because I am in a conflict of interest based on my position on the Law Society of Yukon Executive as First Vice President (Discipline) in 2017 before my appointment as a judge. At that time, the President of the Law Society was James Tucker, who is the Chair of the Board. The appellant argued that I have a lack of neutrality because I worked with Mr. Tucker and I was "entwined" with the people on the Executive, including him. As evidence of my lack of neutrality, the appellant points to a statement he says I made to him during a case management conference on April 8, 2025 "you cannot continue to provide evidence".

[8] Justice Wenckebach, in *Bachli v Yukon Human Rights Commission*, 2025 YKSC 39 at para 6 summarized the law on reasonable apprehension of bias set out in *Taylor Ventures (Trustee of) v Taylor*, 2005 BCCA 350 at para. 7. She wrote:

> "The legal principles are:
>
> (i) a judge's impartiality is presumed;

> (ii) a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified;
>
> (iii) the criterion of disqualification is the reasonable apprehension of bias;
>
> (iv) the question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude:
>
> (v) the test for disqualification is not satisfied unless it is proved that the informed, reasonable and right-minded person would think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly;
>
> (vi) the test requires demonstration of serious grounds on which to base the apprehension;
>
> (vii) each case must be examined contextually and the inquiry is fact-specific [emphasis in original] citing *Wewaykum Indian Band v Canada*, [2003] 2 SCR 29)."

I adopt this statement of the law.

[9] The argument raised by the appellant here is similar to the argument he raised in the case decided by Justice Wenckebach - that is, my working relationship as a member of the Law Society of Yukon Executive with other lawyers in the community, specifically Mr. Tucker, while I was a lawyer, in 2017, means there is a likelihood that I will have a reasonable apprehension of bias in favour of Mr. Tucker and the Board and against the appellant.

[10] I do not agree that the appellant has met his burden to show that this circumstance meets the test for establishing conflict of interest. Informed, reasonable and right-minded persons, viewing this situation realistically and practically, would

understand that the nature of lawyers' work requires them to relate to one another in various contexts, including volunteering in legal organizations such as the Law Society Executive. Professional relationships such as this kind of committee membership, are not enough to cause a reasonable person to think it is probable that one of those lawyers, after appointment as a judge, would not decide a case fairly because a lawyer who was also a member of the committee was involved in the case. As pointed out by counsel for the Board, a lawyer may argue in Court before a judge who was their former law partner once a certain amount of time has passed since the judicial appointment, and the judge was not involved in that case while a lawyer, without a concern about conflict of interest. The professional relationship at issue here is more distant than that of a former legal partnership. The eight years that have passed since I was a member of the Law Society Executive is also significant, as that length of time increases the distance between any former professional relationship between me and Mr. Tucker, and decreases the likelihood of any reasonable apprehension of bias.

[11] The appellant's reliance on the statement at the April 8, 2025 case management conference that he "cannot continue to provide evidence" as evidence of my bias is also not evidence that is sufficient to meet the test. The case management conference on April 8 was conducted by Justice Wenckebach, not by me. This disposes entirely of the ability of the appellant to rely on the statement as evidence of my lack of neutrality.

[12] For these reasons, I dismiss the appellant's request that I recuse myself from hearing this appeal because of a conflict of interest.

Quashing Subpoenas of James Tucker and Barbara Evans

[13] The appellant issued subpoenas to James Tucker, Chair of the Board and Barbara Evans, registrar of the Board. During the hearing he explained he sought evidence from Mr. Tucker and Ms. Evans about the legal basis of their authority to exercise the powers of their respective positions under the *Act*, about documents that were before the Board, about the reliance on the unofficial consolidation of statutes, about the authority to conduct a paper review without a hearing involving the appellant, and about the lack of neutrality of Ms. Evans.

[14] Counsel for the Board, while stating that both potential witnesses were prepared to attend the appeal hearing if required, sought an order quashing the subpoenas on the basis that they were unnecessary, as contemplated by Rule 42(44) of the *Rules of Court* of the Supreme Court of Yukon. Rule 42(44) provides:

> A person who has been served with a subpoena may apply to the court for an order setting aside the subpoena on the grounds that compliance with it is unnecessary or that it would cause a hardship to the person, and the court may make any order, as to postponement of the trial or otherwise, as it thinks just.

[15] Counsel referenced the affidavit affirmed and filed by Mr. Tucker, which addressed the legal basis of his appointment, and the exhibits to that affidavit that included all the documents before the Board when they made their decision, in addition to correspondence from Board members in that process, and correspondence between the appellant's wife and Mr. Tucker and Ms. Evans after the decision was made. Counsel for the Board stated that the original outline and material filed, the Tucker affidavit and exhibits, and the supplementary outline serve to answer all of the appellant's questions, and Mr. Tucker and Ms. Evans could add nothing more.

[16] I agree with Board counsel that subpoenas to Mr. Tucker and Ms. Evans are unnecessary. The comprehensive and detailed materials provided by the Board and the legal backdrop and parameters in this case, answer most of the questions raised by the appellant. The questions are legal or procedural in nature, such as the legal authority of Mr. Tucker and Ms. Evans under the *Act*, authority to conduct a paper review, and the legal status of the unofficial consolidation of statutes. The necessary legal analysis to answer these questions does not come from witnesses. To have Mr. Tucker and Ms. Evans appear at the appeal to answer questions on the issues raised by the appellant would be inappropriate and unnecessary.

[17] Counsel for the Board's second argument in relation to the subpoena for Mr. Tucker is the principle of deliberative secrecy – that is, the principle that judges are not required to justify, defend or explain a judicial decision, in order that they can "reflect on the evidence without restriction, to draw conclusions untrammelled by any concern of subsequent disclosure of their thought processes, and, where they are so inclined, to change these conclusions on further reflection without fear of subsequent criticism or of the need for subsequent explanation" (*Apotex Inc. v Alberta*, (1996) 38 Alta L.R. (3d) 153 (QB) (*Apotex*) at para. 48).

[18] Given my finding on under Rule 42(44) that the subpoenas are not necessary in this case I do not need to address this second argument. I make the following few observations based on the limited case law provided by counsel for the Board, however, to demonstrate that this is a more complex legal issue that requires further analysis if this issue were to arise again in the future in another case.

[19] Deliberative secrecy for judges has always been seen as an essential element of judicial independence. “Immunity from having to justify one’s decisions is essential to the personal independence of judges, while immunity from having to account to the executive or the legislature for administrative matters connected with adjudication is part of the administrative or institutional independence of the judiciary” (*MacKeigan v Hickman,* (1989) 41 Admin LR 236 (SCC), cited in *Apotex* at para. 56). However, this principle has not been applied equally to administrative tribunals, such as the Board. While there appears to be an acceptance that there is immunity in the decision-making process of administrative decision-makers, the case law has recognized some exceptions to complete immunity as is in place for judges, such as where the person issuing the subpoena has concerns that the process followed did not comply with the rules of natural justice, where the decision-maker provided statements to the media, or where evidence is sought on matters not inextricably bound up with the decision. I also note in this case the Board chose to provide to the Court and the appellant the emails from the panel members that show in part their thought processes in arriving at the conclusions expressed in the Board decision. This disclosure adds to the complexity of the analysis. Since the issue of the application of deliberative secrecy in an administrative tribunal context is not so straightforward and requires further submissions, updated case law, and a contextual analysis, and because it is unnecessary given my finding on Rule 42(44), I will not address it further.

BACKGROUND

[20] Although the appellant submitted a significant amount of material related to his health care struggles on this appeal, I have limited my review of the background to the

material that was before the Board when it made its decision. I will refer to some of the additional material provided by both parties in my analysis of the appeal.

[21] The appellant was born on September 12, 1948. At the time of the Board decision, he was 76 years old. In 2010, as a result of a fall from the roof of his home, he suffered a traumatic brain injury and became paraplegic. He required hospitalization and significant treatments from various health care providers at Whitehorse General Hospital (the hospital). The appellant requires a wheelchair, a hospital bed, a transfer commode chair, and a specialized mattress. The appellant was able to remain at home for the most part, with help from home care provided by the Yukon Home Care Program until 2023. He became ineligible for Yukon Home Care services due to his ongoing pattern of communicating with the staff disrespectfully to the extent that they no longer considered his home a safe working environment. A letter to him from the Assistant Deputy Minister (ADM) dated July 18, 2023, confirmed this and recommended he investigate private health care or show a willingness to engage with home care staff respectfully.

[22] Over time, the appellant developed sacral wounds, also called pressure ulcers, on his buttocks and hips. From time to time, the wounds required him to be hospitalized. On July 16, 2023, the appellant was admitted to hospital due to a fever caused by a worsening sacral wound. A wound care plan was prepared and recommended by the hospital, but the appellant resisted the plan, which has compromised wound healing.

[23] He also refused a wheelchair seating assessment by Continuing Care occupational therapists, refused an inpatient rehabilitation bed at Glenrose Hospital in Edmonton, G.F. Strong Rehabilitation Centre in Vancouver and Holy Family

Rehabilitation Centre in Vancouver, and refused assistance from Access Occupational Therapy – an agency that provides services in the Yukon for complex wheelchair seating issues.

[24] The appellant's ongoing complaints about the wheelchair provided to him resulted in the ADM of Health and Social Services confirming they would pay for a wheelchair of his choice. As of the date of the Board decision, the appellant had made no attempts to purchase a wheelchair. He did contact the RCMP on July 10, 2023, to request a criminal investigation into his substandard wheelchair. The RCMP declined to investigate.

[25] The appellant also refused in his most recent hospital admission to accept a hospital bed with a specialized mattress designed for wound healing and considered critical to the management of his wounds. His continuing objection to it is that he has no proof the mattress is certified, and only the original print manual, not an online PDF copy, will satisfy him. He says the hospital staff's inability to produce the original manual is evidence that the mattress is illegal, not certified and not tested to standards of the "Equipment Safety Act".

[26] On or about January 14, 2024, the head of emergency services at the hospital applied to admit the appellant to long term care. Before this, the hospital had attempted to contact the appellant's wife for weeks to no avail. The physician at the hospital designated as the last resort substitute decision-maker, Dr. Brad Avery, also a hospitalist, was able to speak with her. She advised that she was unwilling to be a substitute decision-maker for the appellant as she believed he is capable. She also told the physician that she cannot manage him at home, saying "it's disrespectful, I'm not a

nurse." The hospital also attempted to contact the appellant's son on numerous occasions, leaving messages, but he did not return their calls. Another child is estranged from the family, and another has a medical condition making her unable to provide care or make substitute decisions.

[27] The hospital requested that Joy Vall, an occupational therapist who is a capacity assessor under the *Adult Protection and Decision-Making Act*, SY 2003, c 21 in the Yukon, assess the appellant to determine if he is capable of making decisions in the areas of i) wound care; ii) an application to a long term care residence; and iii) equipment needs. She saw the appellant on at least two occasions and wrote a report outlining her conclusion on his capacity and her reasons. Dr. Avery reviewed her report and, along with Dr. Adam Pankalla acted as a last resort substitute decision-maker under the *Act*. Dr. Avery assessed the appellant and attempted to discuss multiple times the issue of long term care or other alternatives with him. Dr. Avery completed the form prescribed under the *Act*, setting out his efforts to ascertain the appellant's wishes and his explanation for making the decision for an application for long term care on the appellant's behalf.

[28] The last resort decision-makers concluded that the appellant failed to appreciate the options for his care in a realistic manner; and did not appreciate his medical condition, its course, proposed treatment interventions, and risks and benefits with intervention or alternatives. This included decisions about wound care, living in a long term care facility, and equipment. He did not have the capacity to understand his present health care needs and limitations. He was unable to live at home because his family could not provide the necessary support, nor could Yukon Home Care Services,

and he declined alternative private home care. Although his wounds at that time did not require acute hospital care, he continued to require substantial personal care and ongoing wound care assistance that could be provided in a long term care facility.

[29] On or about February 1 or 2, 2024, the conclusions and decision of the last resort decision-makers were automatically reviewed as required by the Board, pursuant to s. 38(1)(b) of the *Act*. The Board conducted a paper review, communicated with each other and the Registrar by email, and approved the decision of the last resort decision-makers that the appellant requires long term care residence.

[30] The appellant was transferred from the hospital to Whistle Bend Place, a long term care facility, on May 7, 2024. He submitted an application for appeal to the Board on September 8, 2024, and materials were filed with this Court on January 31, 2025. The appeal was heard on August 29, 2025.

STATUTORY FRAMEWORK/LEGISLATIVE SCHEME

[31] Part 3 of the *Act* addresses the role, functions, and processes of the Board. Section 37 says the Board provides:

> … a forum for reviewing the decisions of care providers and substitute decision-makers, and for providing direction to substitute decision-makers to ensure that
>
> (a) the rights of care recipients are respected;
>
> (b) as required by other provisions of this Act, careful consideration is given to the wishes, beliefs and values, or best interests of care recipients; and
>
> (c) relatives and friends of the care recipient, and care providers, have an opportunity to be heard.

[32] S. 38(1)(b) provides that the Board shall, without holding a hearing, review the circumstances of substitute consent to admit a person to live in a care facility. S. 38(2) provides that a board may hold a hearing where it considers it necessary. S. 38(3) sets out what the Board must do in conducting a review as follows:

> (3) In conducting a review, the board
>
> (a) may request information from any person it considers appropriate; and
>
> (b) shall review the information to determine whether
>
> (i) the provisions of this Act have been complied with,
>
> (ii) persons making decisions in respect of the matter have not unreasonably refused or failed to consider information that reasonably could affect their decision, and
>
> (iii) persons making decisions in respect of the matter have not acted arbitrarily, capriciously, negligently, or out of an improper motive.

[33] The relevant provisions of the *Act* the Board must ensure were complied with are set out in s. 13 and ss. 18-20. Section 13 requires a last resort decision-maker to be a health care provider who does not have a conflict with the recipient that casts doubt upon their ability to comply with their duties under the *Act*, is not prevented from carrying out those duties by an order of a court, and is willing to comply with those duties.

[34] Sections 18-20 require any substitute decision-maker (of which the last resort decision-maker is one) to consult with the care recipient to the extent that is reasonable (s. 18), make a reasonable effort before making a decision to ascertain the care

recipient's wishes, beliefs or values if they do not know them, and consult any friend or relative of the care recipient who asks to assist (s.19). They may consult with any person who may be reasonably believed to have relevant information (s. 19).

A substitute decision-maker shall give or refuse consent in accordance with the wishes of the care recipient, or in accordance with their beliefs and values, unless the wishes were expressed before they were capable, compliance is impossible, or the substitute decision maker believes the care recipient would not still act on the wish because of unforeseen changes in knowledge, technology or practice in care provision. If wishes, beliefs or values remain unknown, consent shall be given or refused in accordance with the best interests of the care recipient (s. 20(1-5)). Finally, when deciding whether to give or refuse consent in the care recipient's best interests, the substitute decision-maker must consider:

> (a) the care recipient's current wishes;
>
> (b) whether the care recipient's condition or well-being is likely to be improved by the proposed care or will not deteriorate because of it;
>
> (c) whether the care recipient's condition or well-being is likely to improve without the proposed care or is not likely to deteriorate without it;
>
> (d) whether the benefit the care recipient is expected to obtain from the proposed care is greater than the risk of harm or other negative consequences; and
>
> (e) whether the benefit of a less restrictive or less intrusive form of available care is greater than the risk of harm or other negative consequences.
>
> (s. 20(6))

[35] Section 39 of the *Act* allows anyone with a substantial interest in the matter to request a Board decision on the compliance with ss. 18-20 of the *Act* in a substitute decision-maker's ability to give or refuse substitute consent for the person to live in a care facility.

[36] The membership of the Board is set out in ss. 53 and 54 of the *Act*. The Commissioner in Executive Council appoints:

> (a) Two regular members from the Yukon Medical Association, with three alternates;
>
> (b) Two regular members who are care providers, including nurse practitioners, registered nurses, psychologists, and OTs, with two alternates;
>
> (c) Three regular members from the Law Society of Yukon, with two alternates; and
>
> (d) Two additional regular members, with two alternates, described as a layperson.

[37] S. 53(3) also requires the Commissioner in Executive Council to attempt to give effect to principles reflecting the cultural, regional and gender diversity of the Yukon and include people with knowledge or experience of people with intellectual disabilities, mental illnesses, physical disabilities, people with brain injuries or diseases of aging or other degenerative illnesses that can lead to mental incapacity. Finally, s. 54 provides that the Commissioner in Executive Council appoints a chair and two vice chairs who are members of the Law Society of Yukon.

[38] Section 52 of the *Act* sets out who can appeal, on what basis, when, and the scope of the Supreme Court of Yukon’s review. Among others, the care recipient can appeal from a decision of the Board to the Supreme Court on a question of law or fact within 30 days of the date of the decision. The Supreme Court may:

> (a) confirm or rescind the decision of the Board;
>
> (b) substitute its decision for that of the Board, exercising in so doing all the powers of the Board; or
>
> (c) refer the matter to the Board for rehearing, in whole or in part, in accordance with such directions as the Court considers proper.

STANDARD OF REVIEW

[39] The broad scope of appellate review given to the Supreme Court of Yukon under s. 52, including the ability to substitute its decision for that of the Board and to exercise all powers of the Board, means that the standard of review is correctness.

THE BOARD DECISION

[40] The Board conducted an automatic review of the last resort decision-makers' decision to provide consent on the appellant's behalf to have him transfer to a long term care facility, as required by s. 38(1)(b) of the *Act*. The three Board members were James Tucker, Chair of the Board, a practising lawyer, and active member of the Law Society of Yukon; Dr. Ngozi Ikeji, an active member of the Yukon Medical Association and medical practitioner at the Aurora Medical, Surgical & Cosmetic Clinic; and Vicki Hancock, retired person, former Clerk of the Supreme Court of Yukon and former Deputy Minister of Justice, Government of Yukon.

[41] The Board received the following documents for the review: application by Dr. James Wilkie, dated January 14, 2024 (Form 6); substitute decision form (Form 5) completed by Dr. Avery dated January 29, 2024; written opinion of Joy Vall, occupational therapist, of the capacity of the appellant to make health and personal care decisions, undated but faxed to the Board on January 30, 2024; and an email dated February 1, 2024 from the Registrar of the Board, Barbara Evans, to the Board

members, requesting their approval or not of the admission of the appellant into long term care.

[42] In this case, the panel members did not consider it necessary to hold a hearing or to request further information.

[43] They also considered whether the requirements in s. 13 and ss. 18-20 of the *Act* had been met. Specifically, the Board found that based on the information before them, there was no suitable person (family member or close friend) to accept the role and responsibilities of a substitute decision-maker for the appellant (s. 13). The last resort decision-makers had made their decision taking into consideration the appellant's wishes. They found that he required ongoing care and did not have the capacity or supports to live at home. Further, his needs were better met in a long-term care facility rather than an acute care hospital, in part because long term care is a "less restrictive environment providing programs and social activities…" and would be better able to meet his ongoing and changing care needs. The Board found that the last resort decision-makers considered whether the appellant's condition was likely to improve without the care or was unlikely to deteriorate without the care, whether the benefit of the care was greater than the risk of harm, and whether the benefit of a less restrictive or intrusive form of care is greater than the risk of harm or other negative consequences (s. 20(6)). Finally, the Board was satisfied that the last resort decision-makers met the requirements in s. 38(3)(b)(ii) and (iii), namely they did not unreasonably refuse or fail to consider information that reasonably could affect their decision, and they did not act arbitrarily, capriciously, negligently or out of an improper motive.

ISSUES

i) Did the Board follow the appropriate process in arriving at their decision under s. 38(1)(b)?

ii) Should the Board have assessed the appellant's injuries and equipment in arriving at their decision?

iii) Did the Board review the decision-maker's opinion?

iv) Was Joy Vall properly qualified to provide her report?

v) Were the Board members properly appointed by the Commissioner in Executive Council and is the statute in the materials a legal document?

i) Was the appropriate process followed by the Board?

[44] The appellant asserts that before the review no documents were provided to him and the Board conducted only a paper review that was "top secret" and he had no ability to participate. The Board states that it followed the process mandated by the *Act* in s. 38.

[45] Although there were irregularities in the processes followed by the Board, they were not significant enough to require a rehearing or a reversal of the Board's decision.

[46] The Board followed the appropriate process in conducting the review under s. 38(1)(b) of the *Act*. This section mandates a paper review only, unless the Board in its discretion decides a hearing is necessary. In this case the Board members determined they had sufficient information, and a hearing was not necessary. While I understand that the appellant would have preferred to provide his input at that stage, the legislation does not generally contemplate the care recipient's participation then. His ability to participate is provided in s. 39, which allows him to request the Board for a

decision about whether certain sections of the *Act* have been complied with, such as ss. 13, 18-20; and through an appeal under s. 52. The appellant exercised both of these remedies. The review under s. 38 is a second look at the last resort decision-makers' decision by objective third parties who apply the statutory considerations.

[47] The following irregularities in the Board process in this case are not sufficient to change the Board's decision but require noting in the hope that such irregularities will not be repeated in future.

[48] First, the date on the written decision is incorrect, and the document suggests a hearing was held. The materials submitted by the hospital to the Board for its decision were sent by email to the panel members by the Registrar on February 1, 2024, requesting their response on whether a hearing was necessary, and if not, whether they approved the proposed transfer of the appellant to long term care. On February 1, 2024, two of the panel members responded by email that a hearing was not necessary and they approved the decision. The third panel member responded the same way on February 2, 2024. The Board's written decision reflects and is consistent with the email comments of all three panel members. However, the decision document shows the date of January 31, 2024, and a time of 4:30-5:30 pm. This suggests a hearing was held on that date and time, and that the decision was made before the material was sent out to the panel members or responded to. While I accept that this was an administrative or clerical error, it is one that contributed to diminishing the appellant's trust in the Board process.

[49] Second, there is no evidence that the written Board decision was sent to the appellant until August 28, 2024. It is not clear what prompted the Board to send the

decision at that time. The affidavit of James Tucker confirms that the decision was forwarded to the hospital and the last resort decision-makers. The appellant was transferred to Whistle Bend Place on May 7, 2024. While the *Act* is silent about the timing and process for sending the decision to the appellant, and it may have been communicated orally to him (although there is no evidence of that either), the apparent failure to forward the Board decision to the appellant in a timely way was not respectful and did not contribute to establishing the appellant's trust in the Board process.

[50] Third, while the affidavit of James Tucker states that neither the appellant nor his wife made an application under s. 39 of the *Act*, in fact Exhibit A to the affidavit sets out an application completed and signed by the appellant, and dated September 8, 2024, in Form 6 to the Board. The ground of the application is the appellant's disagreement with the assessment of his incapacity and need for a substitute decision-maker. In the attached handwritten notes, he makes some of the same arguments he made at the hearing before this Court – questioning the legitimacy of the appointment of the Board members and the panel members, complaining about his inability to be present at the review, or receive documents, objecting to the Board's failure to assess his equipment and to the hospital's failure to forward the copies of the original manuals and model numbers for the commode and wheelchair equipment, that he says would show the inadequacy of the equipment.

[51] The Board explained the process of an appeal in its decision, saying it is done "by forwarding an Application for Review to the Board (Form 6 CCA)." A blank Form 6 was sent to the appellant's wife by the Registrar on September 3, 2024, in response to her request to challenge the Board decision. Another detailed email from the Registrar

was sent to the appellant's wife on September 3, 2024, at the request of the Board, to clarify the Board process. It explained the request for a hearing after the decision is made under s. 39 of the *Act*, using Form 6, including the provision that the Chair shall order a hearing, to include the applicant, if informal discussions did not occur or were not successful.

[52] In this case, after receipt of the application in Form 6 from the appellant dated September 8, 2024, the Chair of the Board initiated an informal resolution discussion as provided for in s. 39, with the appellant, by visiting him at Whistle Bend Place on September 20, 2024. On September 27, 2024, the appellant's wife emailed the Chair to advise him about a possible lawsuit on the appellant's wound issue and expressed her appreciation of his in person visit to the appellant. No further evidence was provided on the results of those discussions or how the statutory requirement to hold a hearing was addressed. Section 42 sets out the bases on which the Chair can decline to take a s. 39 request to the Board, including that the request involves questions of law that should be dealt with only by a court, the request is frivolous, vexatious, or concerns a trivial matter, or the requestor has commenced proceedings in the Supreme Court for the resolution of the matter. It may be that the Chair made a decision under one of these provisions, but the evidence is not there.

[53] In the end, however, the processes complained about by the appellant – the review in the absence of a hearing in which he could participate and receive documents were not procedural errors, but were done in accordance with the statutory provisions. The acceptance and hearing of his appeal by the Supreme Court has served to uphold

and protect his rights, due in part to the broad remedies available to this Court, including substituting its decision for that of the Board

ii) Should the Board have assessed the appellant's injuries and equipment?

[54] The appellant's concern expressed repeatedly to his family doctor, Dr. Alton, the hospital staff, the last resort decision-makers, Joy Vall, and during the hearing, was the inadequacy of his wheelchair, commode, and mattress in the hospital. He blamed substandard equipment for his persistent wounds and says that these issues should have been addressed by the Board in its decision. The Board responded that its role was to review the last resort decision-makers' conclusions and reasons why a substitute decision-maker was necessary and in compliance with the *Act*, and whether the proposed decision to transfer the appellant to long term care was appropriate and in compliance with the *Act*. This decision did not require the Board to assess his injuries or his equipment, especially given the extensive background on both matters set out in the reports and forms provided to the Board.

[55] As noted above in the review of the *Act*, the Board's role is to assess the decision made by the last resort decision-makers, and to ensure they complied with the statutory provisions. In this case the decision to be assessed was the substitute consent to the appellant's long term care residency. The appellant's equipment and his wounds form important context to the decision: the equipment issue helped to determine the capacity of the appellant and the care he requires; and the nature and extent of his wounds determined the care he requires. However, the appropriateness of his equipment and the cause or treatment of his wounds were not the issues that either the last resort decision-makers or the Board had to decide. Instead, they had to decide, his

capacity and, whether the transfer of the appellant to a long term care residence was appropriate to meet his medical needs, and was in his best interests.

[56] More specifically, Dr. Avery wrote:

> patient continues with perseverant thoughts around government issued unsafe wheelchairs. He claims "only NASA could design it." He is very tangential with conversation and always comes back to the damage done by OT/physicians/government, who have given him unsafe equipment. He has no solution as to how or what equipment would be acceptable and help improve his independence [...] limited insight [...] Patient not willing or able to plan for future health care needs [...] Patient/family not able to recognize capability limitations or plan for safe/independent living moving ahead. Requires health support that can no longer be provided at home = safe transfers to wheelchair, in and out of bed, and wound prevention/management.

The observations of Dr. Avery provided a basis for the determination of his incapacity.

[57] Similarly, Joy Vall wrote in her report:

> On each visit, Mr. Bachli's argument became circular and not based on the facts of the situation. He would not answer direct questions. Instead he espoused at length on the "Equipment Safety Act" and that the equipment that he has received has been "illegal"... Mr. Bachli blames his equipment (wheelchair and commode), and uncertified staff not following the "Equipment Safety Act", for his wounds. Mr. Bachli would report that a wheelchair needs to be designed and constructed for the individual, but would later state that the Yukon's procurement strategy is wrong and that many wheelchairs should be procured at the same time, as people with spinal cord injuries would require similar chairs.

[58] Joy Vall noted that the appellant had been told he may purchase a wheelchair of his choice and have the invoice sent directly to the ADM for payment, but to date he has not done so. The letter from the ADM confirming this offer was included in the materials. Joy Vall further wrote that the appellant objected to the recommended bed mattress designed for wound healing because he had no proof the mattress is certified or tested

to the standards of the Equipment Safety Act, without the original print manual, which he said the staff were unable to produce. Joy Vall wrote "Please note that a transfer to an appropriate bed with a wound healing mattress is critical to the management of his wounds…" Joy Vall concluded that the appellant is

> … making decisions to the detriment of his health based on a belief system that is not based on the facts. There is [a] real possibly [as written] that Mr. Bachli's health care status could deteriorate and he is already facing a life-threatening infection of a pressure wound.
> ...
>
> Even when presented with logical and evidence-based options regarding his equipment, he continues to refuse due to a belief that the equipment has not passed the "Equipment Safety Act" [(a non-existent statute in Canada)] and therefore illegal... it is clear that he does not appreciate the potential consequences of his decisions.
> ...
>
> [H]is faulty belief system is impairing this ability to appreciate how his wounds have been exacerbated by not accepting a pressure relieving mattress or following a positioning protocol...
>
> He could not accept any explanation that equipment that is appropriate for institutions would be suitable for home.

[59] This belief contributed to Joy Vall's finding that the appellant

> … fails to appreciate the options for his care in a realistic manner. He was not able to be educated on his options due to a reliance on a fixed belief system that I believe is faulty and not grounded in reality. He was not able to weigh the pros and cons or communicate a rational choice in alignment with what choices are currently open to him. His thought form was tangential.

[60] At the hearing before the Court, the appellant re-emphasized his concerns about his equipment and the failure of the Board to address those concerns. This arose in his questioning of Dr. Alton, his family physician whom he subpoenaed. His questions to

her were focussed on her alleged failure to fulfill her “moral duty” to order an investigation for an audit of the mechanical soundness and safety of his medical equipment. Dr. Alton testified that her moral duty as his family physician was to advocate for the best care possible for him. She confirmed that she referred him in 2022 to a specialist with expertise in medical equipment assessment in the context of patients’ needs, a physiatrist. The appellant spent time during his submissions at the hearing complaining about the inadequacy of his equipment, the lack of assessment and testing for safety, and that this caused his wounds. This demonstrates the appellant’s pre-occupation with these issues.

[61] To conclude on this issue, the conclusions and recommendations of the last resort decision-makers and the decision of the Board were not inadequate for failure to assess the appellant’s equipment or wounds.

iii) Did the Board review the last resort decision-makers' opinion?

[62] The appellant states there is no evidence from the Board decision that the Board reviewed the last resort decision-makers’ opinion, especially given there was no hearing and he did not participate in the review process. In response, the Board provided additional evidence through the affidavit of James Tucker of the email exchanges between the Registrar and the panel members of the Board, confirming their receipt of the material and their views, to demonstrate their review of the last resort decision-makers’ opinions.

[63] The written Board decision and the emails from the panel members show they reviewed the form completed by Dr. Avery, and the report of Joy Vall. For example, the Board decision refers specifically to the material they received and reviewed and states

several times that their conclusions are based on the information provided. The decision repeats some of the findings in the report and the Form 5 completed by Dr. Avery, such as the appellant's requirement for ongoing care that cannot be met at home, and the conclusion that his needs would be better met in long term care than in an acute hospital setting. The email responses from one panel member included:

> Lengthily [as written] and detailed examples of the patient refusing to accept facts around the mobility equipment required to assist in his care on numerous occasions were identified, the fact that Home Care was not [as written] longer available to the patient was clearly set out...It is clear from the information that nature of the care E.B. requires would be better provided through the services of a long term care facility.

[64] Another panel member wrote in part: "I have reviewed this very lengthy and well detailed file of Erin [as written] B."

[65] And the third panel member wrote in part: "... it is also clear that the patient will benefit generally from the care he will receive in a long term care facility in a much better environment than the hospital, where the patient has been for a protracted period of time."

[66] The decision and supplementary materials confirm that the Board reviewed the opinions of the last resort decision makers.

iv) Was Joy Vall properly qualified?

[67] The appellant says that Joy Vall is not a medical professional and was not authorized to provide the medical opinion in this case.

[68] Joy Vall is an occupational therapist registered in the province of Alberta. Occupational therapists in the Yukon are not regulated. She is a capacity assessor under the Yukon *Adult Protection and Decision Making Act*, Schedule A of SY 2003, c

21 authorized to perform assessments of capacity for personal and health care decisions. S. 13(1)(d) of the regulations to the *Adult Protection and Decision Making Act* allows for occupational therapists to be assessors under that *Act*. S. 13(2) defines an occupational therapist as one who is licensed or registered in a province, like Joy Vall, who is registered in Alberta. Joy Vall in her own clinical practice conducts assessments of other forms of legal capacity for the purposes of legal proceedings or for the determination of the validity of decisions or actions taken by a person. Thus, she is qualified to perform capacity assessments such as the one she conducted in this case.

[69] Another irregularity in the material provided by the Board and its counsel is whether Joy Vall and Dr. Avery were the last resort decision makers, or Dr. Avery and Dr. Pakulla. Dr. Avery's Form 5 and the affidavit of James Tucker state that the two physicians were the last resort decision makers and they relied on the report of Joy Vall to assist them. There is no evidence of Dr. Pakulla's involvement in this case except the notation on the Form 5. The outline provided by Board counsel states that the last resort decision makers were Dr. Avery and Joy Vall.

[70] Section 13 of the *Act* says where there is no qualified person to give substitute consent, it may be done by the care provider and one other person who is a health care provider, or in the case of major health care, two other persons who are health care providers. Care provider is defined in the *Act* as a health care provider, which in turn is defined as a medical practitioner, dentist, nurse practitioner, registered nurse, and any other person designated by the regulations as a health care provider. Section 5 of the regulations designates among others occupational therapists as health care providers. Therefore, all of Dr. Avery, Dr. Pakulla, and Joy Vall were qualified and appropriate last

resort decision-makers. It would have been helpful to clarify who the last resort decision-makers were in the material before the Court, but the assessments of Dr. Avery and of Joy Vall fulfill the requirements under the *Act*.

[71] It is noted that the definition of care provider does not require that the health care provider be a treating physician of the patient whose decision-making capability is being determined. The appellant was concerned that the last resort decision makers were improperly selected because they had not previously treated or cared for him, but this condition is not required by the *Act.*

iii) Appointment of board members by the commissioner is invalid and the unofficial consolidation of statutes is illegal

[72] The appellant says the Commissioner is a federal appointment and has no authority to appoint Board members, because only the legislature can make law and thus valid appointments.

[73] Appointments to the Board are made by the Commissioner in Executive Council (s. 53 of the *Act*). The Commissioner in Executive Council is not the same as the Commissioner.

[74] The Commissioner of the Yukon is appointed by the Government of Canada, under the *Yukon Act,* SC 2002, c 7. The role of the Commissioner includes:

- ensuring that the Yukon has a Premier in the case of resignation or death or if the government resigns following a defeat in the legislature or in an election;
- ensuring continuity of government and maintaining democratic freedoms;
- swearing-in Members of the Yukon Legislative Assembly;

- delivering the Speech from the Throne at the opening of each legislative session;
- summoning, proroguing and dissolving the legislature;
- providing assent to bills passed by the Yukon Legislative Assembly, enabling them to become law;
- signing Orders-in-Council, Commissioner's warrants, statutory appointments and dispositions of Commissioner's lands on the advice of Cabinet; and
- representing the interests of the Yukon's people by attending official functions, community and social events and handing out honours and awards.

[75] By contrast, the Commissioner in Executive Council is defined in the *Interpretation Act,* RSY 2002, c 125 as the Commissioner acting by and with the advice and consent of the Executive Council. The Executive Council in the *Interpretation Act* has the same meaning as it does in the *Government Organization Act,* RSY 2002, c 105 which is "Executive Council continued under section 8 of the *Yukon Act* (Canada), the members of which are appointed under subsection 2(1)" (s. 1).

[76] The *Yukon Act*, passed in 2002, states in s. 8 that the Executive Council of Yukon established under the former Act is continued under the current *Yukon Act*. The Executive Council was established under the former Act by regulation (OIC 1982/184).

[77] The Executive Council in the Yukon is more commonly known as the Cabinet. It is made up of elected members of the Legislative Assembly, selected as members of the Executive Council by the Premier.

[78] The Executive Council, or Cabinet, is responsible for all appointment to Boards and Committees in the Yukon. The Government of Yukon General Administration Manual, Volume 1, Corporate Policy provides: Cabinet is responsible for: appointments to government boards and committees. Once selected, appointments are provided to the Commissioner for her signature on the Order in Council which makes the appointment legal.

[79] Thus, the Commissioner in Executive Council means that the Executive Council decides on the appointment and the Commissioner signs the appointment document. She does this on the advice and agreement of the Executive Council. The Commissioner does not select the person for the appointment; this is done by the Executive Council, who are made up of elected members of the Legislative Assembly.

[80] In this case, James Tucker and the other Board panel members were appointed in this way. Their appointments were properly and legally authorized.

[81] The appellant also expressed concern about the reliance of the Board and the Court on the copy of the statute in the materials with a notation “Unofficial Consolidation of the Statutes of the Yukon”. The appellant’s concern is that the use of the word ‘unofficial’ means it is not legal or reliable.

[82] Unofficial consolidation of statutes means it is a published version of the *Act* that includes all of the amendments and is updated continually for ease of reference. The official version of the *Act* contains a list of the dates of all the amendments, with different versions at different times to show when the amendments were made.

[83] In order to provide some peace of mind to the appellant, I have compared the sections of the *Act* referred to in this hearing in the unofficial consolidated version of the

statute, with the sections in the official up-to-date version found in the table of public statutes, and they are identical.

CONCLUSION

[84] There were two other problems in the way the Board responded to his appeal that did not affect this decision, but I note for the purpose of avoiding such problems in future. First, there was reference in the outline to a finding of incapacity after an assessment of the appellant in September 2023, but it was not able to be produced. Second, no one from the Board or counsel representing the Board filed an appearance or appeared in Court during the first two case management conferences for this appeal. No real explanation was provided for this, and it was a waste of the appellant's and Court's time.

[85] To conclude, I appreciate that the appellant is in a very difficult and unenviable situation that naturally causes intense feelings of frustration, helplessness, and even despair at time. He continues to fight hard for what he believes is right. Unfortunately, however, his beliefs do not accord with reality, and he is not able to make health care decisions in his best interests. Long term care is an appropriate place for him at this time for the reasons stated above. The decision of the Board according with the statutory requirements and was correct. If I were to put myself in the position of the Board, I would have decided the same way they did.

[86] There is no order for costs.

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DUNCAN C.J.