Court File Number 84114/13
Oshawa Registry

ONTARIO SUPERIOR COURT OF JUSTICE

BETWEEN

MARILYN NELSON

Appellant

- and -

DR. ROMAS STAS, DR. CARMAN PRICE and ROUGE VALLEY HEALTH SYSTEM, and ARTHUR HIPPE

Respondents

APPELLANT'S FACTUM

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PART I: THE CASE

The Appellant, Marilyn Nelson, ("Ms. Nelson") is the plaintiff in an application brought in the Consent and Capacity Board ("CCB") by the Respondents, Dr. Roman Stas ("Dr. Stas") and Dr. Carman Price ("Dr. Price) to determine whether or not the Appellant had complied, as substitute decision maker for Mr. Arthur Hippe ("AH"), with section 21 of the *Health Care Consent Act ("HCCA"* or the *"Act")*. The CCB panel chair, Lora Patton (senior lawyer member, sitting alone) in a decision issued June 4, 2013 and amended on June 6, 2013, held that the appellant (and substitute decision maker) had not complied with the principles for substitute decision making set out in the *HCCA*, and ordered Ms. Nelson to consent to the doctors' proposed

Treatment Plan within 14 days, failing which she would be deemed non-compliant with the *HCCA* and forfeit her legal authority as Substitute Decision Maker for AH. The appellant requests the decision be quashed on the grounds of fact and law.

PART II: OVERVIEW

1. The CCB Reasons for Decision concluded that that appellant "had not complied with the principles for substitute decision making set out in the *HCCA*," section 21(2) of the Ontario *Health Care Consent Act*, *("HCCA"* or the *"Act"*) because she had not taken Mr. Hippe's wishes and beliefs into account in making care consent decisions. The CCB Reasons also state that the appellant "either did not understand the condition and the reasons behind some of the care decisions or was imposing her own beliefs about medicine on AH."

Hearing process flawed

2. The appellant submits that the Consent and Capacity Board pre-hearing process and Hearing was not conducted in an appropriate or equitable manner.
3. The appellant was denied the opportunity to present evidence and to receive and review evidence, as she had requested.
4. Several witnesses who were informed they would be called to testify in support of the appellant's position were denied that opportunity. One of these witnesses is a medical expert in internal medicine and in pharmacology.
5. Only the respondents, Rouge Valley Health System ("hospital") and Dr. Stas and Dr. Price, were permitted to offer other medical opinions in testimony. No pharmacological expert testimony was provided at the Hearing to address one of

the Hearing's central issues, withholding of consent for certain antipsychotic drugs.

6. Serious, relevant incidents occurred while the CCB Hearing was underway that should have been disclosed at the Hearing or cited in the Reasons. In one of these incidents, the SDM was coerced by Dr. Stas, under duress, to sign a Treatment Plan with which she did not agree. The facts of these material incidents were known by counsel for all the parties, and should have been disclosed to the Hearing and reflected in the Reasons in the best interests of the patient, AH.
7. The "Most Responsible Physician" for AH, Dr. Carman Price declined to give any testimony, although he did attend parts of the Hearing. The only testimony given by doctors involved in treating AH was given by Dr. Romas Stas, who is, by his own testimony, an occasional substitute for Dr. Price in the treatment of the patient, AH.

Factual errors

8. Certain significant information given as fact in the Hearing testimony is wrong or false or otherwise unreliable. Some of the erroneous testimony is cited as fact in the Reasons, in support of the CCB Decision. There is compelling evidence to substantiate that these purported facts are wrong. Some of the substantiation is in the evidence, some is not.

New evidence

9. There is other relevant new evidence which confirms that important and material evidence, relied upon by the CCB member in reaching the Decision and cited in the Reasons, is either unsubstantiated, false, hearsay or otherwise unreliable. The

appellant requested that much of this evidence be made available, but was denied that opportunity. No reasons were given to the appellant why she was denied the opportunity to give or present this evidence. This Factum gives notice of an impending Motion to the Court for permission to present (adduce) new evidence in this appeal.

PART III – SUMMARY OF THE FACTS

10. The appellant is Mr. Hippe's spouse of 29 years, and is his appointed Power of Attorney for Personal Care **[EXHIBIT A *** - Power of Attorney for Personal Care, Arthur Hippe, May 12, 2009] and Substitute Decision Maker (SDM) **[Record of Appeal, page** 45 – CCB Order, March 20, 2013**]** Note: ***** denotes new evidence sought in impending Motion for adducing new evidence.
11. Arthur Hippe is a 69-year-old patient who has been hospitalized at Ajax Pickering Hospital, Rouge Valley Health System (the "hospital") since June 2010 as a result of a stroke. Mr. Hippe is paralyzed on his left side, and is unable to speak except for occasional words and phrases. He does not require artificial mechanisms such as a ventilator, feeding tube, catheter or any other device to maintain his life or bodily functions. As a result of being bed-ridden and not receiving any physiotherapy for the entire duration of his hospitalization, Mr. Hippe has acquired muscle contractures in both legs and right arm. **[EXHIBIT B *** Dr. Heather Gilley Report, 2013-02-28] Therefore he needs assistance with all personal care, and requires a wheelchair for mobility and a lift for transfer to/from bed to chair.

12. Mr. Hippe does not have any terminal illness but in June 2012 Dr. Stas and Dr. Price placed Mr. Hippe on a palliative care Treatment Plan asserting that "his prognosis for any recovery is nil and his condition is expected to deteriorate further", and that he was likely to die soon. **[EXHIBIT C * –** letter from Dr. Stas and Dr. Price, May 31, 2012] The Appellant does not agree that Mr. Hippe should be designated as "palliative", nor that he should be given the amount of antipsychotic drugs he is being administered under the Proposed Treatment Plan **[Record of Appeal, page 35]**
13. The hospital and doctors engaged in a series of tactics to pressure the SDM into agreeing to the hospital's and doctors' wishes from the outset, and these tactics continue to this day. Within a week of Mr. Hippe's hospitalization in June 2010, a doctor urged the appellant to consent to placing a Do Not Resuscitate (DNR) order on his chart. The appellant refused, in writing [**EXHIBIT D ***, Letter from Ms. Nelson to Dr. Nicholson, June 8, 2010], but the hospital doctors placed a DNR order on the chart regardless, without the appellant's (substitute decision maker's) consent and without her knowledge. This was confirmed by Dr. Stas in his testimony at the CCB Hearing. [**Transcript – page 77**].
14. The doctors ignored the appellant's SDM authority to make care consent decisions in other areas. The medical records show that between June 2, 2010 and September 2011, the doctors administered medications to Mr. Hippe without obtaining consent, nor did they get consent for any ongoing treatment plan during that entire period. [**EXHIBIT E *** – Medication Administration Records summary]

15. The doctors ignored the recommendations and warning from a neurologist from whom the appellant had sought a second opinion shortly after AH was hospitalized in June 2010. Ms. Nelson sought a second opinion after the attending doctor at the hospital urged her to "just let Arthur go," which the appellant found abhorrent. The appellant contacted Dr. Lila Georgevich, who conducted a thorough assessment of AH, including comprehensive testing. Dr. Georgevich's consultation report states that Mr. Hippe should not be given Haldol in the doses he was being prescribed, recommended that he be given the smallest dose if needed, and warned that Haldol should only be administered to Mr. Hippe for a short period of time. [**EXHIBIT F ***, Dr. L. Georgevich consultation report June 22, 2010] Dr. Georgevich told the appellant that AH "did not have to die", that while it was unlikely he would recover completely, he was a good candidate for considerable improvement with rehabilitation. The hospital's doctors never heeded Dr. Georgevich's warnings about Haldol and they never implemented her recommendations for physio and speech therapy. Since then, Mr. Hippe has been on Haldol for much of the last three years, often in conjunction with other antipsychotic or neuroleptic drugs.
16. The hospital and doctors have impeded, without cause and in extreme measure, Mr. Hippe's and the appellant's opportunity to enjoy each other's companionship, and to have privacy during visits. These restrictions have also impeded the SDM's ability to observe and gain information required for informed consent of health care treatments. Beginning in December 2011, the hospital imposed a 5-week ban on the appellant. The appellant immediately reported the banning and false

allegation to the Durham Regional Police who investigated and, one week later, determined that the hospital's allegation was without substance or merit. [**Record of Appeal, page 325** - Durham Regional Police incident report] Yet the ban on visiting continued for four (4) more weeks, despite Ms. Nelson have been cleared of any wrong doing by the Police. The appellant was subsequently permitted severely limited access to her husband, one hour per day, only under the constant presence of a guard. Visiting restrictions and the requirement to be accompanied by a guard are still being enforced today, despite the fact that the restrictions were based on a single unfounded allegation. The hospital has made other allegations and statements of innuendo to portray the appellant (wrongly) of being a danger to her husband, alleging she feed him foods that were not approved. The extreme measures imposed by the hospital on Ms. Nelson have a significant negative impact on Mr. Hippe's state of mental well being. The appellant is not only Mr. Hippe's spouse and POA for personal care, she is his only regular visitor in the hospital because most of Mr. Hippe's family lives in Western Canada.

PART IV – ISSUES AND ARGUMENTS

Hearing process flawed

17. The appellant submits that the Consent and Capacity Board pre-hearing process and Hearing was not conducted in an appropriate or equitable manner.
18. The appellant was denied the opportunity to present evidence, as she had requested.

a. The appellant requested that she be allowed to give testimony, and was advised that she would be testifying at the Hearing. [**EXHIBIT G *** – Email from Mark Handelman to counsel for respondents, April 14, 2013] However Ms. Nelson was ultimately denied that opportunity, without any explanation from counsel or from the CCB panel. As a result, the appellant was unable to provide evidence to counter the doctors' and staff allegations in testimony, which resulted in the panel member accepting the evidence from the opposing side, which the appellant knows to be incomplete, inaccurate or misleading, or all of the above, including but not limited to the following items noted in the Reasons for Decision [**Record of Appeal, page 28**]:

    i. Necessary Gall Bladder Investigation and Surgery, and

    ii. Food and Liquid Recommendations.

b. A medical specialist with particular expertise in pharmacology and internal medicine who had been advised he would be testifying in support of Ms. Nelson was denied the opportunity to testify. [**EXHIBIT H *** – Emails to/from Mark Handelman and Dr. J. Wright, Mar 27 and Apr 3, 2013]

c. The Reasons for Decision cite "lack of evidence" in numerous areas. "MN provided no information about AH's value or beliefs..." "She did not testify at the hearing,..." and "I was unable to obtain further clarification about AH's values and beliefs from MN." [**Record of Appeal, page 17**, Reasons for Decision]

i. This lack of evidence, not due to any failing or unwillingness on the part of the appellant, contributed to a flawed decision the appellant is asking be reversed.

d. The appellant was denied copies of information pertaining to the Hearing and evidence.

i. The appellant was impeded in her efforts to present evidence and to fully participate in the Hearing. The appellant had, on several occasions, asked to be given copies of all information relating to the CCB Hearing while it was ongoing, including copies of material referenced at the Hearing and evidence presented during the Hearing. The appellant was not given the information she requested. Her ability to inform her lawyer about inaccuracies and issues that would allow her to raise points for cross-examination was thereby impeded, and as a result, her defense was compromised. [**EXHIBIT I *** – emails from MN requesting records from counsel, Feb 15, 2013]

19. The CCB Reasons also state that the appellant "was imposing her own beliefs about medicine on AH." Dr. Stas testified that, because Mr. Hippe had agreed in the past to some forms of prescription drugs, that that alone must mean AH is or would be in favour of the drug regimen Dr. Stas and Dr. Price are administering and proposing. In support of Dr. Stas' opinion on this issue, the Reasons for Decision go on to cite the lack of evidence regarding Mr. Hippe's own beliefs and wishes, particularly about prescription drugs and natural health care treatments.

This assumption by Dr. Stas and the conclusion of the CCB panel member is vigorously disputed in the following affidavits.

a. Dee Nicholson, a colleague of the patient AH of some ten years, states in her affidavit that Mr. Hippe was an avid proponent of natural health regimes and actively engaged in supporting natural health initiatives and that he was wary of the risks of prescription drugs. [**EXHIBIT J *** – Affidavit of Dee Nicholson, August 30, 2013]

b. His sister Thelma Matheson attests to Mr. Hippe's preference for natural health treatments, stating her brother was "not much of a prescription drug person." She also speaks of Mr. Hippe encouraging her to participate with him in efforts to promote natural health care modalities. The Reasons for Decision dismiss Ms. Matheson's ability to know her brother's values and beliefs, based solely on Dr. Stas' factually wrong and unsubstantiated testimony that Ms. Matheson had had not seen her brother for 26 years, a point addressed later at para 27.a in this Factum. [**EXHIBIT K *** – Affidavit of Thelma Matheson, August 29, 2013]

20. The Reasons for Decision state that Ms. Nelson, "either did not understand the condition and the reasons behind some of the care decisions or was imposing her own beliefs about medicine on AH." [**Record of Appeal, page 29**]. The CCB panel member concluded in her Reasons that Ms. Nelson did not seem to understand that in order to fulfill her role as SDM, she had to seek and respect medical expertise in her decision making. The Reasons for Decision state, "It is

not the role of the SDM to put herself in the shoes of the person for whom treatment is proposed but to carefully consider the advice of medical practitioners who have expertise in the issues at hand." [**Record of Appeal, page 30**]

a. To the contrary, the Ms. Nelson did seek, understand and respect medical expertise in order to make informed decisions. One such example is that she sought a second medical opinion, from neurologist Dr. Lila Georgevich, [**EXHIBIT F**] just a few weeks after AH was hospitalized. The appellant, Ms. Nelson, agreed with Dr. Georgevich's recommendations, however the hospital and Drs. Stas and Price never implemented the neurologist's recommendations.

21. Witnesses who were informed they would be called to testify in support of the appellant's position were denied that opportunity.

a. These individuals included a medical expert specializing in internal medicine and pharmacology. There was no medical expert testimony by a specialist in the efficacy of prescription drugs provided to the Hearing even though antipsychotic medications was one of the primary issues addressed in the Hearing. Dr. Stas is a general practitioner with no specialist expertise, Dr. Price is a specialist in internal medicine and Dr. Gilley (the hospital's and doctors' witness) is a geriatrician; none have any specialist credentials or expertise in stroke treatment or in pharmacology, the two medical conditions at issue in this case.

22. The "Most Responsible Physician" for AH, Dr. Carman Price, attended parts of the Hearing but declined to give any testimony. The only testimony given by the treating doctors was given by Dr. Romas Stas, who (by his own admission in testimony) testified that he is only an occasional substitute for Dr. Price in the treatment of the patient, AH. [**Transcript, page 77**]
23. During Dr. Stas' testimony, which comprised the majority of testimony during the six days of Hearing proceedings, Dr. Stas either couldn't recall details and facts about medical decisions, treatment and care of Mr. Hippe, or wasn't aware of the facts, or wasn't party to the treatment actions, for example whether or not a Form G application to have the appellant declared incapable as an SDM had been filed in June 2011. [**Transcript, pp 77 - 80**] Dr. Stas testifies that the application by Dr. Fishman was done while AH was in acute care: "It wasn't done on, on 2-North, that I can recall." Medical records confirm that Mr. Hippe was transferred out of acute care to 2-North in October 2010. Therefore, the first CCB application submitted by the doctors was – contrary to Dr. Stas' testimony – "done" while AH was on 2-North (Complex Continuing Care). In other words, AH was a patient under the medical charge of Dr. Stas at the time. The testimony of Dr. Stas, who is RVHS's Associate Chief of Staff, and the Medical Director for Complex Continuing Care, is incomplete, misleading and unreliable. No testimony from any other treating doctor of AH was made available during the Hearing. This is an insubstantial basis for drawing conclusions, and should not be considered sufficiently robust evidence upon which to render a Decision.

24. The Reasons extensively cite the actions and recommendations of Dr. Steven Fishman, chief of psychiatry for Rouge Valley Health Systems, [**Record of Appeal, page 16** Reasons for Decision], including his clinical assessments and his pharmaceutical prescriptions and/or recommendations.

    a. Dr. Steven Fishman was found to have acted without legal authority in the care and treatment of AH, stemming from his actions on March 31, 2011 and relating to all of his subsequent involvement in the care and treatment of Mr. Hippe. This is confirmed in the CCB Order dated February 4, 2013. [**RECORD OF APPEAL, PAGE 50 –** CCB Order]

    b. Given that the Consent and Capacity Board had earlier found that Dr. Fishman had acted unlawfully with respect to AH, and had willfully and knowingly interfered with the appellant's legal authority, all of Dr. Fishman's evidence should be struck from the Reasons for Decision, and removed from consideration in the Decision.

25. Only the respondents, Rouge Valley Health System ("hospital") and Drs. Stas and Price, were permitted to offer other medical opinions in testimony. The Reasons confirm this, stating "There was no medical evidence contradicting the evidence of Drs. Stas and Price." [**RECORD OF APPEAL, Page 25 –** Reasons for Decision]

    a. The appellant was not permitted to have the same opportunity to provide medical evidence in defense of her position, which was readily available to the Hearing but not permitted to be given.

26. Serious, relevant incidents occurred while the CCB Hearing was underway that should have been disclosed and reflected in the Reasons. The facts of these material incidents were known by counsel for all the parties. These facts have a material bearing on the best interests of the patient, AH, which was the underlying, fundamental reason for the CCB Hearing. Indeed by not disclosing these serious incidents and/or not reporting them in the Reasons, AH's health and well being has been compromised.

    a. Immediately after the applications were submitted to the CCB, the doctors wrote to all parties to say that Mr. Hippe was no longer being administered Haldol. The doctors were warned by Mr. Hippe's appointed counsel, Alvin Schieck, that any administration of any antipsychotic or similar effecting drug would be considered battery. About six weeks later, it was discovered that the doctors and hospital had been secretly administering the antipsychotic drug Haldol (haloperdol). Dr. Stas and Dr. Price admitted to at least four administrations of Haldol, without consent and without notifying the SDM or counsel for Mr. Hippe or counsel for Ms Nelson. This matter of battery was raised and discussed at length, including, as the transcripts show, by the panel chair. [**Transcript, pp 416 – 426**] Included in this exchange of information is further false testimony by Dr. Stas. On page 422 of the transcript, Dr. Stas, in response to a question about whether Thelma Matheson had withdrawn consent to Haldol, states, "She (Thelma Matheson) was, she was not, in our eyes,

the SDM because she did not respond by e-mail." "She only responded with vague e-mails." That is false; Ms. Matheson communicated with doctors and hospital staff by telephone, by letter as well as by e-mail. The withdrawl of consent for Haldol dated January 17, 2013 is one such example [**Transcript, page 419**], as is a letter from Ms. Matheson to Dr. Stas in August 2012. [**EXHIBIT L *** – letter from Thelma Matheson to Dr. Stas, Aug 3, 2013] It is disturbing that the matter of administering Haldol without consent on multiple occasions and without informing the SDM was never mentioned in the Reasons for Decision. Battery is a serious (criminal) matter, yet it received no consideration in the Reasons that this had occurred. Section [**EXHIBIT M * –** emails exchanged between counsel for respondents, January/February, 2013 and March 2013]

b. Shortly after the Haldol battery incidents were exposed, Ms. Nelson was coerced by Dr. Stas through counsel, under duress, to sign a Treatment Plan with which she did not agree. This "interim" Treatment Plan gives Ms. Nelson's consent (given under duress) to Drs. Stas and Price to resume administering Haldol to AH, something she did and does not want to do. A further concern is that an additional section was inserted into this "interim Treatment Plan", a section entitled "Behaviour Plan". Most unusually, this Behaviour Plan does not address the patient's behaviour management but instead contains prejudicial innuendo about the appellant herself, most of which is

entirely unrelated to the patient's treatment and care. [**[EXHIBIT N * – Treatment Plan signed April 3, 2013]**

c. According to the *Health Care Consent Act,* s 11 (1), consent must be given voluntarily. The presentation and signing of this Treatment Plan occurred while the Hearing proceedings were underway, at the end of a long day of Hearing testimony. The Appellant did not want to sign the document but both her counsel and appointed counsel for AH urged her to do it at the behest of counsel for the hospital and Drs. Stas and Price because it was "getting late and everyone is tired". The appellant was not advised that signing the document could be or was prejudicial to her. The appellant believes she was pressured into this agreement in order to obscure the battery admitted by Drs. Stas and Price, and also to discredit her character with the addition to the Treatment Plan. This unorthodox section on behaviour management had never before been part of any Treatment Plan for AH, and is not in the Proposed Treatment Plan (**Record of Appeal, page 35,** Amended Decision, Schedule A). This "interim Treatment Plan" is still in force, even though it contains sections that are invalid, out-dated and which do not pertain to treatment of the patient, AH.

d. While the CCB pre-hearing process was in progress, the hospital made an offer that the appellant alleges was made in bad faith. The hospital made an offer, confirmed in writing, that the hospital would "pay for Mr. Hippe's care at home for the rest of his life."

i. The hospital suddenly withdrew their offer two weeks later, without any opportunity for discussion.

ii. This "offer" was never made known to the CCB Hearing, even after the offer had been rescinded.

[**EXHIBIT O *** – email communications between lawyers for the parties March 08, 2013]

Factual errors

27. Certain information given as fact in the Hearing testimony, some of which was then relied upon and noted in the Reasons for Decision as a basis for the Decision, is factually wrong. There is compelling evidence to substantiate these purported facts are wrong. For example:

    a. Dr. Stas testified during the CCB Hearing that Mr. Hippe's sister, Thelma Matheson could not have known what his wishes and beliefs were because "they have not been in contact for 26 years." [**Record of Appeal, page 13**] [**Transcript, page 422**] Ms. Matheson's affidavit confirms that the last time she visited with her brother Arthur Hippe was in September 2008, and that they otherwise were in regular telephone contact up until his hospitalization. The CCB Reasons for Decision agree with and cite as support for the Decision, Dr. Stas' erroneous and unsubstantiated testimony. [**EXHIBIT K *** – Affidavit of Thelma Matheson]

b. The CCB Reasons for Decision incorrectly cite the appellant as the person who had sent a letter that Haldol be stopped. The Reasons state incorrectly, "...was struck by how intense his behaviours had become over the last few months (when consent for regular Haldol was withdrawn by MN)." [**Record of Appeal, page 20** – Reasons for Decision] Ms. Nelson (MN) did not withdraw consent for Haldol at any time in those last few months, or anytime in 2013. The withdrawl of consent for Haldol had been made by Thelma Matheson in January 2013.

c. The Reasons for Decision erroneously state that Thelma Matheson was only a "potential SDM" at the time she sent a letter to "Dr. Stas and others." [**Record of Appeal, page 17** – Reasons for Decision] The "letter" referred to is actually an email from Ms. Matheson, following up on a telephone conference call she had had the previous day with Dr. Stas, Karl Wong, manager of the unit AH is in, and a hospital public relations person, Theresa Eyman. The telephone conference call was requested by the hospital and doctors in order that they could provide Ms. Matheson with information about the health of her brother and the treatment plan of the doctors. Following the conference call where she was given that information, Ms. Matheson confirmed with the hospital and doctors in attendance ("Dr. Stas and others") that she had accepted the responsibility to be AH's substitute decision maker. In the same correspondence, Ms. Matheson gave the hospital and

doctors instructions, among them, to remove the DNR and palliative care designations from his chart. This is the email to which the Reasons refers, and contrary to what the Reasons state, Ms. Matheson was the SDM at that time, not merely the "proposed SDM" as the panel member writes. [**EXHIBIT P *** – email from Thelma Matheson to Dr. Stas and others, July 9, 2012]

d. The Reasons for Decision incorrectly identify the appellant as the person who ordered that Haldol be stopped in the "spring of 2013" [**Record of Appeal, page 19**]. The instructions to stop Haldol were given by AH's sister and SDM at the time, Thelma Matheson – not by Ms. Nelson. The instructions were given in a letter dated January 17, 2013. [**EXHIBIT Q *** – letter from Thelma Matheson to Drs. Stas and Price, hospital, January 17, 2013]

e. In his testimony, Dr. Stas stated that AH "was not on Zyprexa for very long..." This is not true. As the medical records show, AH was administered Zyprexa (olanzapine) on a regularly scheduled basis for almost a year and a half, from at least January 2011 until May 9, 2012, often along with other antipsychotic drugs, such as Haldol. [**EXHIBIT E ***]

28. Given the number of substantial and fundamental errors of fact made in reaching the Decision and the evidence that was not permitted to be entered at the Hearing, it cannot be said with any reasonable amount of certainty that

"MN was not, on a balance of probabilities, making decisions in accordance with the *Act*." [**Record of Appeal, page 28**, Reasons for Decision]

New evidence

29. There is further relevant new evidence which confirms that evidence relied upon by the CCB member in reaching the Decision and cited in the Reasons for Decision, is either unsubstantiated, false, hearsay or otherwise unreliable. The appellant is hereby giving notice in this Factum that she will be submitting, imminently, a Motion to request that new evidence be adduced (permitted to be entered as evidence) for consideration in this appeal. The court documents will be filed in tandem with the filing of this appeal Factum document, as the appellant is unrepresented and unable to confirm the actual procedure and timing of the filing of the court documents required for this purpose.

    The new evidence includes, but is not limited to, the following [**EXHIBIT R *** – affidavit of Marilyn Nelson] and [**EXHIBIT S *** – Motion to request new evidence be adduced for appeal], and to Exhibits mentioned elsewhere in this document, identified with an asterisk, and the following:

    a. The panel chair writes in the Reasons, "... I found that MN was required to consider only AH's openness to traditional medical interventions as a value and belief held by AH." [**Record of Appeal, page 17**, Reasons for Decision] Evidence exists in the medical chart – some of which was authored by Dr. Stas himself – that confirms AH's doctor prior to his hospitalization in 2010 (Dr. Paul Jaconello) is a

medical doctor who also treats patients with natural or alternative health interventions. [**EXHIBIT T *** – Hospital and other records regarding Dr. Paul Jaconello, MD] Moreover, the conclusion reached by the panel chair ignores the almost 30-year relationship of MN and AH. To say that MN's knowledge of AH's values and beliefs should be superceded by a doctor who, by Dr. Stas' own admission in testimony, only occasionally acted as the Most Responsible Physician is an astounding conclusion to reach.

b. The Reasons state, "All of the evidence was that AH's condition was such that he will not recover from his 2010 stroke and will only deteriorate." The Reasons cite Dr. Stas' testimony that there was "no hope of further recovery." In fact, Mr. Hippe has had material, significant improvement in some aspects of his health in the last year, and even in the last several months.

    i. On July 9, 2012 just after AH's treatment plan was reduced to "palliative", Dr. Stas told Thelma Matheson, Mr. Hippe's sister, that AH weighed "maybe 100 pounds" at the time. Mr. Hippe weighed 190 pounds when he was hospitalized, so this was a serious concern to the appellant and to AH's family. However, by 2013 AH had gained about 30 pounds, substantially improving his health, and reversing the "wasting" that had occurred and which is associated with Haldol use.

ii. In May 2013, AH was witnessed having spoken his first complete and coherent sentence since his hospitalization. He looked down the hallway and said, “Look! Here comes the dog!” A volunteer comes in once a week to visit patients with his dog, a highlight of “normal” life on the outside for Mr. Hippe. Several weeks later, in June 2013, AH laughed heartily and fully over the antics of the same dog. This was captured on video [**EXHIBIT U * –** video recording] These are observable, measurable improvements in AH’s health. The conclusions are based in large part on Dr. Stas’ opinions. Dr. Stas’ belief that AH has no prospect of improvement were first documented in a letter on May 31, 2012 in which he recommended AH be put on palliative care. Dr. Stas’s opinions proved to be wrong then, and it’s quite likely his opinions could be or are wrong now. The conclusion stated in the Reasons, namely that AH “will only deteriorate” is simply incorrect. He has had material weight gain in the last year, and in speaking and regaining the ability to express joy through laughter in the last several months. [**[EXHIBIT R * –** affidavit of Marilyn Nelson]

30. Subsection 134(4)(b) of the *Courts of Justice Act,* R.S.O 1990, c. C.43 permits this Honourable Court to admit fresh evidence on an appeal. It provides:

134. (4) Unless otherwise provided, a court to which an appeal is taken may, in a proper case, ...

(b) receive further evidence by affidavit, ... or in such other manner as the court directs; ...

31. The four part test for admission of fresh evidence on appeal was set out by the Supreme Court of Canada in R. v. Palmer as follows:

    (i) The evidence should generally not be admitted if, by due diligence it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases;

    (ii) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

    (iii) The evidence must be credible in the sense that it is reasonably capable of belief, and,

    (iv) It must be such that if believed it could reasonably, when taken with the other evidence adduces at trial, be expected to have affected the result.

    R. v. Palmer, [1980] 1 S.C.R. 759 (S.C.C.) at pg. 13, Tab 18 of the Respondents' Book of Authorities; *Monteiro v. Toronto Dominion Bank,* [2005] O.J. No. 4749 (Ont. Sup. Ct.) at para 3, Tab 19 of the Respondents' Book of Authorities; *Visagie v. TVX Gold Inc.* [2000], 49 O.R. (3d) 198 (Ont. C.A.) at para. 53, Tab 20 of the Respondents' Book of Authorities; *Chiang (Trustee of) v. Chiang,* [2009] O.J. No. 41 (Ont. C.A.) at paras. 73-77, Tab 21 of the Respondents' Book of Authorities.

32. The Reasons for Decision cite the "professionalism and accountability of the doctors," a claim that does not withstand the facts as they exist and are presented in this document. [**Record of Appeal, page 23** – Reasons for Decision]

33. Where the evidence did not exist at the time of the original hearing, this Honourable Court will exercise its discretion to admit the fresh evidence where:

    i. The evidence is necessary to deal fairly with the issues on appeal; and

    ii. To decline to admit the evidence could lead to a substantial injustice in the result.

    Illidge (Trustee of) v. St. James Securities Inc. (2002), 60 O.R. (3d) 155 (Ont. C.A.) at para. 6, Tab 23 of the Respondents' Book of Authorities.

34. The fresh evidence sought includes evidence which was not in existence at the time the matter was originally heard, as articulated by McKinlay J.A. in *Sengmueller v. Sengmueller at paragraph 10:*

    [I]n a case where evidence is necessary to deal fairly with the issues on appeal, and where to decline to admit the evidence could lead to substantial injustice in result, it appears to me that the evidence must be admitted.

35. The fresh evidence sought to be filed by the appellant will assist this Honourable Court in assessing the merits of the Decision.

PART V – ORDERS REQUESTED

36. That the Court grant leave to have new evidence adduced (presented) for consideration in this appeal, as indicated in this Factum.
37. That the Court grant time for a Supplementary Notice of Appeal, as necessary.
38. That the Court grant leave for amendment of the Factum and ancillary materials.
39. That the Court reverse or quash the Consent and Capacity Board Order dated June 6, 2013 (issued June 4, 2013).

40. That the Court to compel the doctors to comply with the directions of the appellant (and substitute decision maker) to transfer AH to Ontario Shores or to another such care facility, as determined by a doctor of the appellant's choice, in consultation with the appellant.

41. That the Court award the appellant full costs of the appeal and of the CCB Hearing, and other costs as this Honourable Court sees fit.

CERTIFICATE

42. An Order for original record and exhibits is not necessary.

43. The appellant will require 2.0 hours to make oral arguments.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated September 10th, 2013 in the City of Pickering, Ontario.

Marilyn Nelson

Marilyn Nelson, Appellant acting in person

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SCHEDULE A

1. *Hillier v. Milojevic,* [2010] ONSC 4514 (CanLII)
2. *R. v. Palmer,* [1980] 1 S.C.R. 759 (S.C.C.)
3. *Visagie v. TVX Gold Inc.* (2000), 49 O.R. (3d) 198 (Ont. C.A.)
4. *Chiang (Trustee of) v. Chiang*, [2009] O.J. No. 41 (Ont. C.A.)
5. *Illidge (Trustee of) v. St. James Securities Inc.* (2002), 60 O.R. (3d) 155 (Ont. C.A.)
6. *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (Ont. C.A.)

SCHEDULE B

1. *Health Care Consent Act,* S.O 1996 c.2 Schedule A as amended.

   All sections.

2. *Courts of Justice Act,* R.S.O. 1990, CHAPTER C.43

   Powers on appeal

   134.(1) Unless otherwise provided, a court to which an appeal is taken may,

   (a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;

   (b) order a new trial;

   (c) make any other order or decision that is considered just.

   R.S.O. 1990, c. C.43 s. 134(1).

   Determination of fact

   (4) Unless otherwise provided, a court to which an appeal is taken, may, in a proper case,

   (a) draw inferences of fact from the evidence, except that no inference shall be drawn that is inconsistent with a finding that has not been set aside;

   (b) receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs; and

   (c) direct a reference or the trial of an issue,

   to enable the court to determine the appeal.