

CANADA / JUDGMENT

N.C. v. Fraser Health Authority

2024 BCSC 240

COURT

Supreme Court of British Columbia

DECIDED

13 February 2024

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2024 BCSC 240 N.C. v. Fraser Health Authority

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

N.C. v. Fraser Health Authority,

2024 BCSC 240

Date: 20240213

Docket: S234080

Registry: New Westminster

Between:

N.C.

Appellant

And

Fraser Health Authority

Respondent

Corrected Judgment: The front page of the judgment was corrected where changes were made on February 16, 2024. The text of the judgment was corrected at paragraph 49 where changes were made on February 16, 2024.

The judgment has been redacted to protect the privacy interests of the Appellant on September 16, 2024.

Before: The Honourable Justice Armstrong

Reasons for Judgment

Counsel for the Appellant:

K.A. Kirkpatrick

H. Cho

Counsel for the Respondent:

A.S. Boucher

R.R.N. Grant

Counsel for Attendee Community Legal Assistance Society:

J.G. Blair

Counsel for Disability Alliance BC Society and Canadian Lawyers for International Human Rights:

M. Iyengar

S.K. Pringle

Place and Dates of Hearing:

New Westminster, B.C.

June 12-14, 2023

Place and Date of Judgment:

New Westminster, B.C.

February 13, 2024

Introduction

- [1] The Adult Guardianship Act, R.S.B.C. 1996, c. 6 [AGA] is designed to ensure that adults who are abused or neglected and are incapable of deciding to seek support and assistance can be provided services, including "available health care, social, legal, accommodation or other services" (s. 47(3)(a)) without their consent. Under the AGA, the Provincial Court of British Columbia (the "Court" or "Provincial Court") may order that adults who are incapable of deciding to refuse services be bound to receive those services, including a requirement to reside in a specific residential facility.
- [2] This appeal concerns orders of the Provincial Court made under ss. 56 and 57 of the AGA, dated October 26, 2020 and December 11, 2020, that compel the appellant to receive support and assistance by means which have compromised and limited her choices and her liberty from October 29, 2020 to the present.

- [3] In particular, these court orders direct that a Support and Assistance Plan ("SAO") proposed by a designated agency, in this case Fraser Health Authority ("FHA"), bind the appellant to receive support and assistance, including residing where directed without her consent.
- [4] The appellant contends these orders were made without lawful authority because the court lacked jurisdiction and should be declared of no force and effect.
- [5] The importance of decisions binding persons to SAO orders under the AGA was referred to in *A.H. v. Fraser Health Authority*, 2019 BCSC 227 [A.H.] where Justice Warren said:
- [1] As expressed by then Chief Justice McLachlin in *United States of America v. Ferras*, 2006 SCC 33 at para. 19, it is "an ancient and venerable principle as old as the Magna Carta" that no person shall lose her liberty "without due process according to the law". This is among the most fundamental aspects of the rule of law, and one that must be protected and fostered, perhaps most keenly in the context of the non-punitive detention of vulnerable people who, because of some incapacitating condition, find themselves subject to well-meaning but non-consensual state interventions that deprive them of their autonomy.
- [6] The procedural steps mandated under Part 3 of the AGA can be summarized as follows:
- a) if a person reports to a designated agency that an adult is abused or neglected and is unable to seek support and assistance, the agency must determine whether the adult needs support and assistance (ss. 46 and 47);
 - b) if a designated agency determines that a person requires support and assistance, it conducts an investigation to determine whether the person has been abused or neglected and is unable, for reasons set out in the AGA, to seek support and assistance on their own (ss. 47-49);
 - c) after completing each investigation, if the designated agency determines that a person has been abused or neglected and that they are unable to accept support and assistance on their own, the designated agency prepares a support and assistance plan outlining the services needed by the person (s. 51(g));
 - d) the designated agency presents and explains the support and assistance plan and the proposed services to the person (ss. 53(1), 53(3));
 - e) if the person rejects the proposed support and assistance plan and the designated agency views the person as incapable of making that decision, then it may request the Public Guardian and Trustee ("PGT") assess the person's capacity to accept or reject the proposed support assistance (ss. 53(4), 53(5));
 - f) if the PGT assessor finds the person is incapable of making the decision to reject or accept support assistance, the designated agency may apply to the Provincial Court for an order that the services in the proposed plan be provided to the person without their consent (s. 54(3)(a)); and

- g) after obtaining such an order from the Provincial Court, the services contemplated in the plan maybe provided without the person's consent (ss. 56(1), 56(3)(a)) which can include limitations on the person's liberty.
- [7] Any order made under s. 56(3)(a) terminates one year after it is made or at an earlier time specified by the court (s. 56(7)), but may be renewed only once for up to one year if the court is satisfied the adult still needs the support and assistance provided under s. 56(3)(a) (ss. 57(4)(b) and (5)).

Background

- [8] The appellant is 51 years old. She is married and has two teenage children in the care of her former husband from whom she separated in 2002. The appellant suffers from a major neurocognitive disorder secondary to a traumatic brain injury compounded by alcohol misuse. She suffers a neurological disorder involving severe damage to cells in the area of her brainstem and she suffers from chronic alcoholism. She has limited short-term memory retention and a history of impulsive and self-destructive behaviour when left on her own.
- [9] In 2015, the PGT became guardian of the appellant's estate.
- [10] FHA is a regional health authority in British Columbia, created under the Health Authorities Act, R.S.B.C. 1996, c. 180. Its mandate is to develop and deliver healthcare services to people within the Fraser Health region.
- [11] FHA operates public hospitals and health facilities and works with private facilities to arrange residential care services for adults.
- [12] FHA is a "designated agency" within the meaning of Part 3 of the AGA. Pursuant to this Part, the Provincial Court may order FHA to provide support and assistance to adults without their consent if they are abused or neglected and are unable to seek support and assistance on their own for several reasons, including because of illness, disease, injury or another condition that affects the adult's ability to make decisions about their neglect or abuse.
- [13] A full and accurate description of the appellant's history is set out in Schedule A to FHA's factum; a copy of the schedule is attached to these reasons as Schedule A.
- [14] On October 29, 2018, the Provincial Court issued an order by consent for FHA to provide support and assistance to the Appellant under a plan (SAO) with her consent (the "Initial Order").
- [15] Between October 2018 and October 26, 2020, various orders approving changes to the Initial Order were made. In June 2019 another SAO order was made; on November 13, 2019, this June SAO was renewed. SAO orders were also made between January 24, 2020 and April 23, 2020. This last SAO order was changed, and on August 20, 2020, the Initial Order was renewed by consent to be effective until October 29, 2020.

- [16] In September 2020, faced with the impending termination of the Initial Order, FHA commenced a new investigation concerning the appellant's circumstances and prepared another SAO. The appellant did not consent to this new SAO. In September 2020, FHA requested a new PGT assessment of the appellant's capacity pursuant to the AGA.
- [17] On October 7, 2020, FHA commenced an application to extend the 2018 SAO order beyond the October 29, 2020 expiry of the 2018 SAO. That application was made on the basis that the impact of COVID-19 had delayed the capacity assessment to be undertaken by the PGT to support a new application for a new SAO order. There were difficulties with FHA's ability to compile the necessary evidence to support a timely application to the Provincial Court and to comply with the statutory requirements for service after receiving the PGT assessment.
- [18] On October 26, 2020 an extension order was granted extending the application of the Initial Order from October 29, 2020, until December 11, 2020 (the "CRMA Extension Order"). This extension was made under the authority of the Emergency Program Act, R.S.B.C. 1996, c. 111 (since replaced by the Emergency and Disaster Management Act, S.B.C. 2023, c. 37) and s. 3 of the Limitation Periods (COVID-19) Order No. 2, MO 98/2020 [Limitation Periods (COVID-19) Order No. 2], which is listed as Schedule 2 of the COVID-19 Related Measures Act, S.B.C. 2020, c. 8 [CRMA].
- [19] Judge Stark said that this extension was an "emergency provision" and was not for a long-term extension. She said the court had the statutory power of decision granted under the AGA and she was exercising a limited power that existed under the CRMA. Extend the Initial Order until the hearing of FHA's new application. At this time, FHA had not begun its application for a fresh order to provide support and assistance to the appellant without her consent. The CRMA Extension Order had the effect of extending the Initial Order by 43 days, notwithstanding the statutory termination of the Initial Order limiting renewals for periods of up to one year: ss. 57(3)(b) and 57(5) of the AGA.
- [20] An application for a new SAO order was filed November 25, 2020 based on the PGT's assessment of the appellant's capacity to accept or reject the proposed assistance and FHA's determination that she needed support and assistance.
- [21] Eventually, FHA scheduled the hearing for December 11, 2020 and the new order for support and assistance was made to provide services to the appellant without her consent (the "New Order") and compelling her to reside at a facility chosen by FHA. This appeal concerns the Extension Order and the New Order.
- [22] This New Order made December 11, 2020 expired and another SAO order was made November 10, 2022. No appeal was taken from this last order.
- [23] Critically, for the purposes of this appeal, a Provincial Court order to provide support and assistance without a person's consent terminates after one year (AGA, s. 56(7)) and can only be renewed for one further period of up to one year if the court is satisfied that the adult still requires support and assistance: AGA, s. 57(4)(b); AGA, s. 57(5).

- [24] The issues to be decided on the appeal are whether the Court exceeded its jurisdiction under the AGA by issuing the CRMA Extension Order and whether the December 11, 2020 Order was lawful insofar as it compelled the appellant to abide by the terms, which included limitations of her liberty.

The Provincial Court Decisions

- [25] Judge Stark decided to extend the initial SAO order beyond October 29, 2020 (the second anniversary date) until the eventual hearing date of a new application. Absent this order, the Initial Order would have terminated on October 29. The Court made this decision in reliance on the CRMA legislation granting decision makers the power to waive or extend mandatory time periods relating to the exercise of their powers.
- [26] At the December 11 hearing, Stark P.C.J. made findings that the appellant was "a person at risk of self neglect and at risk of abuse" because of her condition and was incapable of accepting or rejecting the support and assistance plan prepared and presented by the FHA: RFJ at para. 18.
- [27] After reviewing the appellant's history, the Court said that Adanac Park Lodge, at which the proposed SAO order would have required the appellant to reside, was the least restrictive and intrusive location for the appellant to be housed. The Court accepted that the SAO met the test of most effective and least restrictive and intrusive plan to meet the appellant's needs.
- [28] This December 11, 2020 order was made for one year with a review to be taken four months after December 11, 2020.

Statutory Framework

- [29] Section 8 of the Interpretation Act, R.S.B.C. 1996, c. 238 [Interpretation Act] requires that every enactment--including the AGA--is construed as remedial and receives such fair, large, and liberal construction and interpretation as best ensures the attainment of its objects.

- [30] The relevant sections of the AGA include the following:

"neglect" means any failure to provide necessary care, assistance, guidance or attention to an adult that causes, or is reasonably likely to cause within a short period of time, the adult serious physical, mental or emotional harm or substantial damage or loss in respect of the adult's financial affairs, and includes self-neglect;

"self-neglect" means any failure of an adult to take care of himself or herself that causes, or is reasonably likely to cause within a short period of time, serious physical or mental harm or substantial damage or loss in respect of the adult's financial affairs, and includes

- (a) living in grossly unsanitary conditions,
- (b) suffering from an untreated illness, disease or injury,

- (c) suffering from malnutrition to such an extent that, without intervention, the adult's physical or mental health is likely to be severely impaired,
 - (d) creating a hazardous situation that will likely cause serious physical harm to the adult or others or cause substantial damage to or loss of property, and
 - (e) suffering from an illness, disease or injury that results in the adult dealing with his or her financial affairs in a manner that is likely to cause substantial damage or loss in respect of those financial affairs;
2. This Act is to be administered and interpreted in accordance with the following principles:
- (a) all adults are entitled to live in the manner they wish and to accept or refuse support, assistance or protection as long as they do not harm others and they are capable of making decisions about those matters;
 - (b) all adults should receive the most effective, but the least restrictive and intrusive, form of support, assistance or protection when they are unable to care for themselves or their financial affairs;
 - (c) the court should not be asked to appoint, and should not appoint, guardians unless alternatives, such as the provision of support and assistance, have been tried or carefully considered.

3 (1) Until the contrary is demonstrated, every adult is presumed to be capable of making decisions about the adult's personal care, health care and financial affairs.

- (2) An adult's way of communicating with others is not grounds for deciding that he or she is incapable of making decisions about anything referred to in subsection (1).

44 The purpose of this Part is to provide for support and assistance for adults who are abused or neglected and who are unable to seek support and assistance because of

- (a) physical restraint,
- (b) a physical handicap that limits their ability to seek help, or
- (c) an illness, disease, injury or other condition that affects their ability to make decisions about the abuse or neglect.

44.1 In this Part, "guardian" includes a committee under the Patients Property Act.

45 (1) This Part applies whether an adult is abused or neglected in a public place, in the adult's home, a relative's home, a care facility or any other place except a correctional centre.

- (2) This Part does not
- (a) override the rights in section 4 of the Health Care (Consent) and Care Facility (Admission) Act, or

- (b) prevent an adult's representative or guardian from refusing health care for the adult in accordance with wishes the adult expressed while capable, even if the refusal will result in the adult's death.

46 (1) Anyone who has information indicating that an adult

- (a) is abused or neglected, and
 - (b) is unable, for any of the reasons mentioned in section 44, to seek support and assistance, may report the circumstances to a designated agency.
- (2) Despite the Freedom of Information and Protection of Privacy Act and the Personal Information Protection Act, a person must not disclose or be compelled to disclose the identity of a person who makes a report under this section.
- (3) No action for damages may be brought against a person for making a report under this section or for assisting in an investigation under this Part, unless the person made the report falsely and maliciously.
- (4) A person must not
- (a) refuse to employ or refuse to continue to employ a person,
 - (b) threaten dismissal or otherwise threaten a person,
 - (c) discriminate against a person with respect to employment or a term or condition of employment or membership in a profession or trade union, or
 - (d) intimidate, coerce, discipline or impose a pecuniary or other penalty on a person because the person makes a report or assists in an investigation under this Part.
- (5) In subsection (4), "discipline" includes
- (a) a refusal to issue or renew a licence or certificate to practise a profession or trade, and
 - (b) a denial or cancellation of permission to practise in a hospital or a refusal to renew that permission.

47 (1) A designated agency must determine whether an adult needs support and assistance if the agency

- (a) receives a report under section 46,
 - (b) has reason to believe that an adult is abused or neglected, or
 - (c) receives a report that the adult's representative, guardian or monitor has been hindered from visiting or speaking with the adult.
- (2) If the designated agency determines that the adult does not need support and assistance, the designated agency

- (a) must take no further action, and
- (b) may advise the Public Guardian and Trustee.
- (3) If the designated agency determines that the adult needs support and assistance, the designated agency may do one or more of the following:
 - (a) refer the adult to available health care, social, legal, accommodation or other services;
 - (b) assist the adult in obtaining those services;
 - (c) inform the Public Guardian and Trustee;
 - (d) investigate to determine if the adult is abused or neglected and is unable, for any of the reasons mentioned in section 44, to seek support and assistance.

48 (1) In conducting an investigation described in section 47 (3) (d), a designated agency must make every reasonable effort to interview the adult.

- (2) In addition, the designated agency may
 - (a) interview the adult's spouse, the adult's near relatives, the adult's friends or anyone else who may assist in the investigation, and
 - (b) obtain any information that the circumstances require, including a report from
 - (i) a health care provider who has examined the adult,
 - (ii) any agency that provides or has provided health or social services to the adult, and
 - (iii) any person that manages the adult's financial affairs.
- (3) Section 62 applies to information referred to in subsection (2) (b).

51 (1) After conducting an investigation described in section 47 (3) (d), the designated agency may do one or more of the following:

- (a) take no further action;
- (b) refer the adult to available health care, social, legal, accommodation or other services;
- (c) report the case to the Public Guardian and Trustee or another agency;
- (d) [Repealed 2007-34-10.]
- (e) apply to the court for an interim order requiring a person
 - (i) to stop residing at and stay away from the premises where the adult lives, unless the person is the owner or lessee of the premises,
 - (ii) not to visit, communicate with, harass or interfere with the adult,
 - (iii) not to have any contact or association with the adult or the adult's financial affairs, or

- (iv) to comply with any other restriction of relations with the adult, for a period of up to 90 days;
- (f) apply to the court for an order under Part 7 of the Family Law Act for the support of the adult;
- (g) prepare a support and assistance plan that specifies any services needed by the adult, including health care, accommodation, social, legal or financial services.
- (2) An order may be made under subsection (1) (e) without notice to the adult or a person against whom the order is sought, if there are reasonable grounds for believing that proceeding without notice is necessary for the immediate protection of the adult.
- (3) On application under subsection (1) (e), the court may make an interim order described in that subsection if the designated agency establishes that there is reason to believe
 - (a) the person has abused the adult, and
 - (b) the adult is unable, for any of the reasons mentioned in section 44 (c), to seek support and assistance.

52 The designated agency must involve the adult, to the greatest extent possible, in decisions about how to

- (a) seek support and assistance, and
- (b) provide the support and assistance necessary to prevent abuse or neglect in the future.

53 (1) A designated agency that prepares a support and assistance plan for an adult must explain the plan and the proposed services to the adult.

- (2) If health care services or admission to a care facility is proposed in the support and assistance plan, the designated agency must ensure that the Health Care (Consent) and Care Facility (Admission) Act is complied with.
- (3) When explaining the support and assistance plan to the adult, the designated agency
 - (a) must communicate with the adult in a manner appropriate to the adult's skills and abilities, and thank you
 - (b) may allow the adult's spouse or any relatives or friends who accompany the adult or who offer their assistance, to help the adult to understand or demonstrate an understanding of the support and assistance plan.
- (4) If the adult decides not to accept the services proposed in the support and assistance plan, they must not be provided except under section 56 (3).

- (5) If the adult decides not to accept the services proposed in the support and assistance plan and the adult appears to be incapable of making that decision, the designated agency may ask the Public Guardian and Trustee to arrange for an assessment of whether the adult is incapable.

54 (1) A designated agency that prepares a support and assistance plan may apply to the court for an order authorizing the provision of services to the adult if the report of the assessment under section 53 (5) is that the adult is incapable of deciding not to accept the services proposed in the plan.

- (2) At least 7 days before the date set for hearing the application, the designated agency must serve a copy of the application on the following:
- (a) the adult who is the subject of the application;
 - (b) the adult's spouse or, if the adult has no spouse, a near relative of the adult;
 - (c) the person in charge of any hospital, facility or residence where the adult may be residing or receiving care;
 - (d) the Public Guardian and Trustee;
 - (e) [Not in force. Repealed 2006-33-2.]
 - (f) the adult's attorney, representative or guardian;
 - (g) [Repealed 2001-2-5.]
 - (h) any person against whom an order is sought under section 56 (3);
 - (i) any other person that the court may direct.
- (3) The application must be accompanied by
- (a) a support and assistance plan that is prepared by the designated agency and includes a statement of the adult's wishes if known, and
 - (b) a report of the assessment under section 53 (5).
- (4) Subsection (3) (b) does not apply if the only order being sought is an order under section 56 (3) (c).

55 (1) Any of the following are entitled to be heard at the hearing of the application for the provision of services to the adult:

- (a) the adult;
- (b) any person served under section 54 (2);
- (c) any person supporting and assisting the adult who is the subject of the application;
- (d) any person from the designated agency;

- (e) any other person whom the court agrees to hear.
- (2) It is up to the designated agency to prove on the balance of probabilities, that the adult who is the subject of the application needs and would benefit from the services proposed in the support and assistance plan.

56 (1) On hearing the application for the provision of services to the adult, the court must consider whether or not the adult

- (a) is abused or neglected,
- (b) is unable to seek support and assistance because of an illness, disease, injury or other condition that affects his or her ability to make decisions about the abuse or neglect, and
- (c) needs and would benefit from the services proposed in the support and assistance plan.
- (2) When considering the things referred to in subsection (1), the court must take into account the information in the documents mentioned in section 54(3).
- (3) If the court is satisfied about the matters set out in subsection (1), the court may
 - (a) make an order for the provision of support and assistance to the adult without his or her consent,
 - (b) make an order under Part 7 of the Family Law Act for the support of the adult,
 - (c) order a person the court finds has abused the adult
 - (i) to stop residing at and stay away from the premises where the adult lives, unless the person is the owner or lessee of the premises,
 - (ii) not to visit, communicate with, harass or interfere with the adult,
 - (iii) not to have any contact or association with the adult or the adult's financial affairs, or
 - (iv) to comply with any other restriction of relations with the adult,
 - (d) order a person the court finds has abused or neglected the adult to pay for, or contribute towards, the adult's maintenance or services to be provided for the adult, or
 - (e) make any other order the court thinks is appropriate and in the best interests of the adult.
- (4) In an order under subsection (3) (a), the court must specify the kinds of support and assistance that are to be provided for the adult, including any of the following:
 - (a) admission to an available care facility, hospital or other facility for a specified period of up to one year;
 - (b) the provision of available health care;
 - (c) the provision of available social, recreational, educational, vocational or other similar services;

- (d) supervised residence in a care home, the adult's home or some other person's home, for a specified period of up to one year;
- (e) the provision, for a specified period of up to one year, of available services to ensure that the adult's financial affairs are properly managed and protected, yes I am including any services that may be offered by the Public Guardian and Trustee.
- (5) In an order made under this section, the court must choose the most effective, but the least restrictive and intrusive, way of providing support and assistance.
- (6) If an order is made under this section, the designated agency must serve a copy of the order on the persons who were served with the application under section 54 (2).
- (7) An order made under subsection (3) (a) terminates one year after it is made or on an earlier date specified by the court.

57 (1) A designated agency that obtained a support and assistance order under section 56 (3) (a) must review the need for the order if

- (a) the designated agency has reason to believe that any of the adult's needs or the adult's ability to make decisions about support and assistance has changed significantly since the order was made, or
- (b) the adult, or a spokesperson for the adult, requests a review and has a substantial reason for doing so.
- (2) If the review under subsection (1) demonstrates that any of the adult's needs or the adult's ability to make decisions about support and assistance has changed significantly, the designated agency must apply to the court to have the order changed or cancelled.
- (3) A designated agency that obtains a support and assistance order under section 56 (3) (a) may do either or both of the following:
 - (a) review the need for the order before it terminates;
 - (b) apply to the court for a renewal of the order.
- (4) On application under subsection (2) or (3), the court may
 - (a) change or cancel the order if the court is satisfied that any of the adult's needs or the adult's ability to make decisions about support and assistance has changed significantly, or
 - (b) renew the order for a further period of up to one year if the court is satisfied that the adult still needs the support and assistance provided under section 56 (3) (a).
- (5) A support and assistance order under section 56 (3) (a) may be renewed only once.

58(1) A person against whom an order is made under section 56 (3) may apply to the court to change or cancel the order.

- (2) On application under subsection (1), the court may change or cancel the order or make any other order it considers to be in the best interests of the adult who has been found to be abused or neglected.

59 (1) A person from a designated agency may do anything referred to in subsection (2) without the adult's agreement if

- (a) the adult is apparently abused or neglected,
- (b) it is necessary, in the opinion of the person from the designated agency, to act without delay in order to
 - (i) preserve the adult's life,
 - (ii) prevent serious physical or mental harm to the adult, or
 - (iii) protect the adult's property from significant damage or loss, and
 - (iv) the adult is apparently incapable of giving or refusing consent.
- (2) In the circumstances described in subsection (1), the designated agency may do one or more of the following:
 - (a) enter, without a court order or a warrant, any premises where the adult may be located and use any reasonable force that may be necessary in the circumstances;
 - (b) remove the adult from the premises and convey him or her to a safe place;
 - (c) provide the adult with emergency health care;
 - (d) inform the Public Guardian and Trustee that the adult's financial affairs need immediate protection;
 - (e) take any other emergency measure that is necessary to protect the adult from harm.
- (3) After providing the adult with the assistance and services mentioned in subsection (2), the designated agency may conduct investigations under sections 48 and 49.

60 (1) A party may appeal to the Supreme Court from an order made by the Provincial Court under this Part.

- (2) The time limit for bringing an appeal under subsection (1) is 40 days, beginning on the day after the order is made by the Provincial Court.
- (3) An appeal is brought by
 - (a) filing a notice of appeal in a registry of the Supreme Court, and
 - (b) serving a copy of the notice of appeal on the parties to the proceeding in which the order of the Provincial Court was made, unless a judge of the Supreme Court orders otherwise.

- (4) The Supreme Court Civil Rules apply to an appeal under subsection (1) to the extent that they are consistent with this section.
- (5) An appeal does not operate as a stay or suspend the operation of the order under appeal, unless a judge of the Supreme Court orders otherwise.
- (6) After hearing the appeal, the Supreme Court may do one or more of the following:
 - (a) confirm or rescind the order of the Provincial Court;
 - (b) make any order that the Provincial Court could have made;
 - (c) direct the Provincial Court to conduct a new hearing.
- (7) On application, the Supreme Court may extend the time limit for bringing an appeal.

[Emphasis added.]

[31] The CRMA stated:

Limitation periods in court proceedings

1 (1) Subject to subsection (2), every mandatory limitation period and any other mandatory time period that is established in an enactment or law of British Columbia within which a civil or family action, proceeding, claim or appeal must be commenced in any of the following courts is suspended:

- (a) the Court of Appeal;
 - (b) the Supreme Court;
 - (c) the Provincial Court.
- (2) Subsection (1) does not apply to a mandatory limitation period and any other mandatory time period established under the following enactments:
- (a) the Builders Lien Act;
 - (b) Division 5 [Builders Liens and Other Charges] of Part 5 [Property] of the Strata Property Act.

[32] The Order of the Minister of Public Safety and Solicitor General No. M098 repealed the previous order concerning limitations, MO 86\2020 and made a new order, Limitation Periods (COVID-19) Order No. 2, that included the following:

- 2. Subject to subsection (2), every mandatory limitation period and any other mandatory time period that is established in an enactment or law of British Columbia within which a civil or family action, proceeding, claim or appeal must be commenced in the Provincial Court, Supreme Court or Court of Appeal is suspended
- 3. A person, tribunal or other body that has a statutory power of decision may waive, suspend or extend a mandatory time period relating to the exercise of that power.

The Issues

- [33] The parties are agreed that the standard of proof on this appeal is the correctness of the Provincial Court decisions.
- [34] The first issue raised by the appellant turns on whether the court had the necessary statutory power of decision, within the meaning of s. 3 of the Ministerial Order under the CRMA, to grant an extension of statutory termination of the Initial Order date beyond October 29, 2020 to facilitate an application for a new SAO order.
- [35] The appellant's second ground of appeal is that the Provincial Court exceeded its jurisdiction in issuing the December 11, 2020 support and assistance order (the "New Order") without her consent under s. 56(3) of the AGA, in contravention of the termination date of the Initial Order set out in the AGA.
- [36] This last point was also argued by the Interveners in the appeal.

The October 26, 2020 Order

- [37] The respondent addressed the first issue in its submission that this Court should decline to exercise its discretion to hear the appeal because the October 26, 2020 order was no longer relevant or applicable after the New Order was issued December 11, 2020. Because the issue was moot, the court should not consider this aspect of the appeal.

Mootness

- [38] I will address the first question posed by FHA, which is whether the appeal of the October 26, 2020 order extending the Initial Order is moot, in which case the appeal on that point should be dismissed without any further analysis of the claims.
- [39] The appellant contends that the October 26 order made under the CRMA was unlawful because among other things, the Provincial Court did not have express jurisdiction to extend the Initial Order under the AGA, nor did it have authority by necessary implication or by operation of the AGA stemming from CRMA.
- [40] The appellant argued that this Court should review the New Order in the context of a purposive and plain reading of the AGA, in light of her circumstances as an extremely vulnerable adult whose liberty has been restricted for at least four years, in order to determine the legality of an extension of her detention. FHA did not rely on the emergency power available under s. 59 of Part 3 of the AGA, with no explanation for that choice. In this case, FHA simply invoked the CRMA to justify an extension of the initial Order, inviting the court to broadly interpret ss. 56 and 57.

- [41] The appellant argued that, notwithstanding the COVID-19 pandemic issues, this was not a case where the Court prioritized her liberty interests in the face of ss. 56 and 57 which mandated the expiry of the initial order on October 29. It was as if the Court "put on hold" expiry of the Initial Order in order to find ways to ensure the appellant's continuing safety, notwithstanding that the order would otherwise have terminated on October 29.
- [42] The appellant did not specifically address s. 3 of Limitation Periods (COVID-19) Order No. 2, which included the following:
3. A person, tribunal or other body that has a statutory power of decision may waive, suspend or extend mandatory time period relating to the exercise of that power.
- [43] The leading authority on mootness issues is *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 1989 CanLII 123 [Borowski] in which Justice Sopinka wrote the following:

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. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.

The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a whole moot issue if the circumstances warrant.

- [44] One aspect of the *Borowski* test is whether the appeal of this expired order should be considered because the appeal involves mispending judicial resources on an issue that, if decided, will have no practical effect.

- [45] The first step of the Borowski test is to consider whether the tangible and concrete dispute has disappeared and the issues become academic. I accept that the challenge to the Court's reliance on the CRMA has disappeared and become academic because the extension of the termination date of the Initial Order is passed and the question has become somewhat academic.
- [46] The second part of the Borowski test requires the court to consider whether the court should exercise its discretion because there is a "live controversy" concerning the deprivation of the appellant's liberty pending the December 11, 2020 application hearing.
- [47] In *Maxwell's Plumbing and Heating Ltd. v. British Columbia*, 2017 BCCA 285, our Court of Appeal referred to comments by Sopinka J. in *Borowski* on the question of whether a point in issue is likely to recur, thereby warranting the judicial resources used on an inquiry into a decision that might be moot:
- [16] Sopinka J. determined that the expenditure of judicial resources was warranted where the point in issue is likely to recur, as is the case here. He said (at 360-361):

Similarly an expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration. In order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly. This was the situation in *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, *supra*. The issue was the validity of an interlocutory injunction prohibiting certain strike action. By the time the case reached this Court the strike had been settled. This is the usual result of the operation of a temporary injunction in labour cases. If the point was ever to be tested, it almost had to be in a case [page361] that was moot. Accordingly, this Court exercised its discretion to hear the case. To the same effect are *Le Syndicat des Employés du Transport de Montréal v. Attorney General of Quebec*, 1970 CanLII 192 (SCC), [1970] S.C.R. 713, and *Wood, Wire and Metal Lathers' Int. Union v. United Brotherhood of Carpenters and Joiners of America*, 1973 CanLII 135 (SCC), [1973] S.C.R. 756. The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.

There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law. See *Minister of Manpower and Immigration v. Hardayal*, 1977 CanLII 162 (SCC), [1978] 1 S.C.R. 470, and *Kates and Barker*, *supra*, at pp. 1429-1431. Locke J. alluded to this in *Vic Restaurant Inc. v. City of Montreal*, *supra*, at p. 91: "The question, as I have said, is one of general public interest to municipal institutions throughout Canada."

[Emphasis added.]

(See also Yukon Teachers Assoc. v. Yukon, 2011 YKCA 4.)

- [48] The respondent contends this is not a case appropriate for the exercise of the court's discretion to hear this part of the appeal because the issue is moot.
- [49] The respondent argued further that the order extending operation of the 2018 SAO was made to give the respondent time to apply for a new SAO order without interrupting the limits and protections placed on the appellant by the Initial Order due to COVID-19 circumstances. Much of the preparatory work had been completed before October 29 but filing of the application did not happen until November 25, 2020 and well before the hearing and decision on December 11.
- [50] The respondent argues that the court should follow recognized and established principles before deciding a moot issue and this discretion be exercised sparingly. In the respondent's view, limiting use of the court's discretion to consider moot issues respects the importance of managing judicial resources carefully and the circumstances of this appeal do not merit use of the courts discretion to decide this moot issue. They argue that any decision on this point will be of no practical effect because nothing will turn on a decision either way.
- [51] The principles discussed in Borowski include three primary concerns relevant to this appeal. The first consideration is to determine the adversarial relationship between the parties and whether there are "collateral consequences" to the outcome that create an adversarial context. Second, whether there are special circumstances which override the reluctance to expend "judicial resources" on moot cases. Third, whether the court is departing from its traditional role or intruding into the legislative branch.
- [52] The court's analysis should take into account whether:
- a) the concrete dispute between the parties disappeared or the issues had become academic: Borowski;
 - b) there are any practical results flowing from a decision on the appeal;
 - c) the court is following established principles: see Holmberg v. McMullen, 2019 BCCA 475 at para. 11; and
 - d) the appeal concerns an expired order.
- [53] FHA contends that it was fulfilling a statutory duty under the AGA and there were no collateral consequences to the extension order which would bring the parties into an adversarial relationship. FHA argues that an adversarial relationship is an essential element informing an assessment of the court's discretion to decide a moot issue and no such relationship exists between the parties.

- [54] Moreover, it contends that there can be no practical result flowing from a decision on this appeal because the order expired on the making of the New Order. The appellant was confined by the Initial Order beyond the termination date of October 29 mandated under s. 56(7) and s. 57(5); however, since December 11, 2020 there has been no controversy or issue that can be resolved at this stage. Proceeding to decide the issue now raises only a hypothetical or abstract question which the court normally avoids.
- [55] The respondent points out that the appellant has not appealed the 2022 SAO order since the December 11, 2020 SAO order terminated. Further, the respondent contends the appellant's circumstances are not unique, nor is there urgency in addressing them.
- [56] In A.H., Warren J. applied the test in Borowski to determine the exercise of the court's discretion to consider a moot issue relating to detention under the AGA. She said:
- [71] The stakes here remain high. F.H.A. detained an adult, against her will, for nearly a year, without any independent oversight. On its face, this was a severe interference with A.H.'s most fundamental rights, which no doubt explain the comprehensive and vigorous manner in which all parties argued their respective positions on the merits.
- [72] Furthermore, there is a substantial likelihood of collateral consequences or future impacts here. Both respondents continue to assert the right, under the AGA, to indefinitely detain adults as an emergency measure. There is an immense power imbalance between an AGA-designated agency and the vulnerable adults who are subject to its authority. The serious consequences of their view of the scope of that authority for future cases cannot be overstated.
- [57] On the mootness issue, in A.H., Warren J. concluded there was sufficient evidence that the dispute placed the appellant and respondent in an adversarial context. She noted that FHA is one entity that will most likely be involved on an ongoing basis if the Provincial Court orders are set aside: at paras. 74-75.
- [58] Justice Warren also found that that the use of scarce judicial resources to resolve the question of a person's liberty will have ongoing and practical effects because of the possibility of ongoing relationships even after the current controversy is ended: at para. 77. Lastly, Warren J. concluded that persons in the appellant's situation will find it difficult to challenge detention orders generally if the mootness doctrine can stymie an effort to have judicial reviews of decisions depriving that person of their liberty. If the mootness argument prevents consideration of the propriety of an SPA order, important issues concerning those orders will likely to evade challenge if an appeal is not allowed: at paras. 78 and 80.
- [59] In summary, Warren J.'s conclusions that it was important to clarify the power of the state to deprive individual adults of fundamental liberty rights without independent oversight, particularly on a long-term basis are apposite to this dispute: at para. 83.

- [60] In my view, the liberty interests of the appellant are similar to those discussed in H.A. which were at a high level and the inquiry into whether the COVID-19 extension granted by the Provincial Court was lawful is an important issue. Although COVID is no longer a factor, FHA argued that the application to extend the Initial Order beyond two years under the CRMA was made on the basis that COVID-19 had delayed the capacity assessment process undertaken by the PGT as part of the new support and assistance order process that Fraser Health had commenced. This happened because FHA had not been able to have a new application for a new SAO made by the date the Initial Order terminated.
- [61] Detention of an adult under Part 3 is always preceded by many requirements intended to protect the individual's rights. If an order is made without engaging these protections, an SAO would not be approved in the context of actions against an adult under scrutiny. The extension of the Initial Order was an attempt by FHA to continue the appellant's detention beyond October 29 on the basis of COVID-19 issues, but arguably for the improper purpose of facilitating a new application which required FHA to prove that the appellant was abused or neglected.
- [62] It may well be important to other individuals in the appellant's circumstances and to the appellant on an ongoing basis, that SAO extensions will be allowed to facilitate the administrative processes to obtain new SAO orders.
- [63] Moreover, the issues raised on this application must be considered in light of the alternative FHA submissions that the Provincial Court had jurisdiction by necessary implication to extend the term of an expiring SAO order.
- [64] As noted in Borowski, the court retains the discretion to address a moot issue if the circumstances warrant. In this case, with respect to the first primary consideration, FHA and the appellant are likely to be adversaries every two years for as long as the appellant is incapable of deciding whether to accept or reject support and assistant plans prepared for her by FHA.
- [65] I find that the expenditure of judicial resources is also warranted to address the issues raised by FHA concerning its alternate grounds justifying the court's extension of the initial order's expiry. This in my view is an important public policy issue involving the restriction of liberty of an adult at a time before the facts supporting that restriction have been proved. Although the narrow issue concerning the extension of the Initial Order will not be affected by this hearing, the broader question of whether the termination of the Initial Order could be extended by the Provincial Court under the CRMA or under the implied jurisdiction of the Provincial Court to extend a termination order is an important issue with ongoing and practical implications for the appellant.

[66] This is an exceptional case where the expenditure of judicial resources will address broader and likely recurring questions regarding the limits to efforts to extend the limitation and impinge on an adult's freedom beyond the two-year limit is proscribed in the AGA. In my view it is in the public interest to allow this issue to be argued.

The Extension Order and the CRMA

[67] The analysis on this point begins with the CRMA measures and also engages principles applicable to ongoing and repetitive SAOs under the AGA.

[68] The respondent contends that the state of emergency legislation, triggered by the COVID-19 pandemic extant in September 2020, was sufficient authority to permit the Court to extend the expiry of the Initial Order to a date after the hearing of the application contemplated by the respondent.

[69] If I find that the CRMA legislation did not authorize the Provincial Court to extend the order that was terminating on October 29, 2020; absent a new order, the appellant would have been entitled to be released from the SAO and to pursue her own future unless or until she was subsequently found to be abused or neglected.

[70] Judge Stark recognized the appellant's argument that there was no application before the court to make an order under the AGA and no new order could be made without a fresh application: see RFJ at para. 12.

[71] The judge went on to say that the Court had the statutory power of decision granted under the AGA to make a support and supervision order and therefore had jurisdiction "under [Limitation Periods (COVID-19) Order No. 2] to extend that order for a very short period due to all of the factors put before me": RFJ at para. 15.

[72] Thus, Stark P.C.J. granted the application to extend the period of time for which a support and assistance order covered the appellant.

[73] For the reasons that follow, I have concluded it was beyond the Court's jurisdiction to rely on the CRMA to change the termination date of the Initial Order because, fundamentally, the Court did not have the power to make the decision to extend the termination date of the Initial Order for the purposes of facilitating an application a new SAO at a time when no application for such order was before the court.

[74] The AGA is clear that SAOs cannot deprive adults of their liberties pursuant to a support and assistance plan by way of a Provincial Court order of the court, beyond a maximum of two years.

- [75] Judge Stark concluded that the Court had the statutory power to make the Initial Order and the extension of the order to a maximum of two years was related to an exercise of a "statutory power of decision ". Because the Initial Order did not terminate until October 29, she believed the Provincial Court could exercise a statutory power to vary the Initial Order thereby creating enough time for FHA to bring a new application.
- [76] In this case, the purpose of exercising a statutory power could only have been related to the power to make the Initial Order. The Court said it possessed the authority under s. 3 of Limitation Periods (COVID-19) Order No. 2 to extend the order for a short period to allow "all of the factors put before me"; the application for the new order was not before the Court on October 26, although the judge described it as an emergency provision and was not an application for a long-term extension of the order in a way that might "be imposing effectively a new order".
- [77] In my view, Judge Stark aired in concluding that she had the statutory decision-making power under the AGA the order extending the reach of the Initial Order duty, presumably, because she believed the statutory power of decision under the old process was sufficient to extend the Initial Order to enable FHA to file its application and schedule the hearing for December 11, 2020.
- [78] The statutory authority relied upon by FHA was under s. 3:
3. A person, tribunal or other body that has a statutory power of decision may waive, suspend or extend a mandatory time period relating to the exercise of that power.
- [79] In preparation for a new application under Part 3 of the AGA, FHA began its inquiry into the appellant's circumstances on September 28, 2020 followed by the PGT's assessment of her capacity that was completed October 2, 2020. These were all completed before the expiry of the Initial Order.
- [80] Consequently, the Provincial Court was considering only risks faced by the appellant before expiry of the Initial Order rather than a determination of actual abuse or self-neglect under a new application. Until the application was made, the Provincial Court had no power of decision it could make at the time.
- [81] As noted, FHA could have taken steps under s. 59 but did not.
- [82] Accordingly, in this case, I find that the Provincial Court did not have a statutory power of decision on October 26 that would have permitted it to make any "order extending a mandatory time period relating to the exercise of that power" for a purpose not authorized under the AGA. There was no decision-making power extant on October 26, to extend the statutory termination of the Initial Order solely for the purpose of providing FHA with time to make a new application, discharge its obligations to the appellant under Part 3 conduct a hearing and render a decision.

- [83] The statutory termination of the Initial Order was mandated under ss. 56(7) and 57(5) of the AGA. and the CMRA could not be interpreted as empowering the Provincial Court to extend the termination date of the Initial Order under the guise of extending a mandatory time related to the exercise of the Provincial Court's power for a purpose not permitted under the AGA.
- [84] In my view, the Court's authority under the AGA was exhausted by October 26, 2020 because, absent the impacts of COVID-19, the Initial Order terminated on October 29. After that date, the only power in the court was to hear and decide the new application for a new SAO.
- [85] Due to the appellants liberty interests at stake, I cannot interpret the phrase "extend a mandatory time". As authorizing exercise of the courts power on October 26 to extend the statutory termination of the Initial Order. I cannot accept an interpretation that the statutory termination date of the Initial Order within the meaning of the exercise of statutory decision under CRMA, the Provincial Court jurisdiction to make an order to facilitate the bringing of the new application. However, s. 3 of the AGA might have permitted the court to abridge or extend time limits for steps to be taken in support of a new application for an order; this was not done.
- [86] It is important to recognize that FHA, PGT, and the Provincial Court were deeply concerned with the appellant's health and welfare and all participants were seeking to protect her. Nevertheless, there is a tension between the public concern for individuals struggling with mental health and addiction issues and their rights to live independently and free of oversight. These rights could have been limited only with compliance to the AGA and CRMA.
- [87] The respondent contends that the CRMA prevails whenever there is a conflict between that statute and any other acts or regulations: see *Redmond v. Wiebe*, 2021 BCSC 1405 at para. 71, rev'd on other grounds 2022 BCCA 244:
- [71] As a result of the COVID 19 pandemic, there was a suspension of limitation periods generally under the Covid-19 Related Measures Act, S.B.C. 2020, c. 8 [CRMA]. It adopted all of the emergency orders listed in Schedule 2 as part of the Act, including Limitation Periods (COVID-19) Order No. 2, M098/2020 (B.C. Reg. 199/2020, O.C. 453/2020) [Order No. 2]. Section 2 of Order #2 provides:

Limitation periods in court proceedings

2 (1) Subject to subsection (2), every mandatory limitation period and any other mandatory time period that is established in an enactment or law of British Columbia within which a civil or family action, proceeding, claim or appeal must be commenced in the Provincial Court, Supreme Court or Court of Appeal is suspended.

[Emphasis added.]

[88] The circumstances in Redmond concerned a requirement under s. 142.1 of the Vancouver Charter that applications to court were required to be made within 45 days after discovery of certain underlying facts. The Court relied on s. 2 of the CRMA concerning limitation periods and concluded that the CRMA suspended the expiry of that limitation period.

[89] In this case, there was no limitation period involved in the application nor was there any conflict as described in Redmond. The preamble to the CRMA Ministerial Order No. 089 is as follows:

And Whereas, as a result of the pandemic and necessary public health measures to be taken in response to it, it may not be possible for a person involved in legal or administrative proceedings to takes steps required by the legislation;

[90] This preamble highlights the distinction between the appellant's circumstances and cases where persons involved in legal or administrative proceedings are required to take steps required by the legislation. In regard to the termination of the Initial Order, there were no legal or administrative proceedings required by legislation to be taken at any time. There was no nexus between the prospect of a new application and the extension of the Initial Order except to simply make it possible for FHA to bring its application and obtain a new order. Nothing in the AGA suggests that the Provincial Court could extend the time for termination of the Initial Order, in part because any concerns for the safety and security of the appellant could have been addressed by FHA's authority under the emergency power of s. 59 of the AGA. That option could have been used to maintain protection of the appellant.

[91] The liberty of the appellant was an extremely important aspect of the extension order and December 11, 2020 order. The Court was obliged to exercise caution when imposing or continuing measures under an SAO that deprived the appellant of her liberty without strict respect for the requirements of ss. 56 and 57 of the AGA.

[92] While the core goal of the AGA is to provide support and assistance for abused or neglected adults, it does not create a regime that can impact the rights of an adult without first complying with Part 3 of the AGA before an order can be granted. The entitlement to seek the New Order was dependent on proving facts showing that the appellant "is abused or self-neglected". The burden of proof rested with FHA and the matters to be considered on a court application were fundamental to the making of a new order

[93] Additionally, it cannot be said that invoking the CRMA to extend the power of the Initial Order was essential to the appellant's ongoing safety. If FHA had concerns that the appellant was facing serious risks if no order was in place when the Initial Order terminated, it was open to FHA to act under the s. 59 emergency power "to act without delay" in order to preserve her life or prevent serious harm to her. It was also possible for FHA to make that case after her release from the Initial Order to confine the appellant under the emergency power in s. 59 of the AGA. Moreover, if the appellant had been released from the Initial Order on October 29, a new order could have been obtained on an expedited basis because she was abused or self-neglected at the moment and the new order made.

- [94] Finally, FHA contends that the Provincial Court received jurisdiction to make an extension order in reliance of powers given under 2(3) of the Provincial Court Act, R.S.B.C. 1996, c. 379. That authorizes every judge to perform all duties conferred or imposed on a judge of the Provincial Court under an enactment of British Columbia.
- [95] In this case, the Provincial Court Judge was not performing duties conferred upon her under an enactment of British Columbia. In this case, the enactment was clear that the SAO terminated no later than two years from the date of the Initial Order and the court's power to preserve imposition of the Initial Order until the new application was made was not authorized.
- [96] I can see no way to interpret s. 2(3) as empowering Judge Stark to ignore the legislation mandating the termination of the SAO.
- [97] In conclusion, I find that the Provincial Court lacked jurisdiction to make the extension order under the CRMA and that that order should be set aside.

Provincial Court Jurisdiction to make the Extension Order by Necessary Implication

- [98] Next, the respondent argues that if this Court rejects the mootness submissions, the respondent can invoke the Provincial Court's jurisdiction prescribed in s. 2(3) of the Provincial Court Act empowering it to exercise all powers and perform all duties conferred on a judge, which would have included an extension of the Initial Order.
- [99] In addition, the respondent contends the Provincial Court's jurisdiction extended to powers which can be reasonably implied from the enabling statute, including powers which were practically necessary for accomplishing the object of the statutory scheme: see *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para. 51. The respondent also contends that an extension of the Initial Order was necessarily implied to achieve the purpose of the statutory regime. This enabled the Provincial Court to carry out the statutory mandate despite a reference in the statute to the power that might be required to achieve that goal.
- [100] In *Santics v. Vancouver (City) Animal Control Officer*, 2019 BCCA 294 [Santics] at para. 50, the Court of Appeal reiterated the principle that provincial courts are creatures of statute and have only those powers conferred upon them expressly or by necessary implication.
- [101] *Santics* involved a dog posing an unacceptable risk to the public that was ordered destroyed. The Court held that the grammatical and ordinary meaning of the offences charged allowed only for a destruction order and not a lesser remedy against an assertion by the appellant that the court had authority to make conditional orders as a "necessary implication" of the offences. Justice Abrioux said at para. 53 of *Santics* that "[t]he concept of necessary implication relates to those powers without which an administrative decision-maker would be unable to carry out its statutory mandate."

[102] The Supreme Court of Canada reaffirmed how courts must approach statutory interpretation in *Michel v. Graydon*, 2020 SCC 24 [Michel] at para. 21:

It is now trite law in Canada that statutory interpretation entails discerning legislative intent by examining statutory text in its entire context and in its grammatical and ordinary sense, in harmony with the statute's scheme and objects.

[103] The respondent argues that FHA's delay in making a new application for an SAO order and setting a hearing date for that application was caused by COVID-19 issues and absent the extension, would have created a result incompatible with the purpose of the AGA. Thus, applying the Provincial Court's powers under the AGA was an entirely procedural necessity contemplated by the doctrine of jurisdiction by necessary implication.

[104] The decision to extend the Initial Order was based on the finding at the time of the Initial Order that the appellant was abused or neglected and the extension was for a short period to facilitate the bringing of the new application.

[105] FHA contends also that the extension order was justifiable as an exercise of authority by implication. As mentioned by Abrioux J.A., "[t]he concept of necessary implication relates to powers without which an administrative decision-maker would be unable to carry out its statutory mandate." In this case, concerns with the appellant's safety or exposure to abuse or neglect could, in the short-term, have been satisfied if, the AGA had proceeded to address those concerns in s. 59. Extending the statutory termination date was not necessary to the administrative decision-maker being unable to carry out its statutory mandate.

[106] The Provincial Court also addressed the respondent's contention that individuals who "remain at risk of abuse, neglect or self-neglect" must be investigated by the PGT whether or not the statutory requirements have been met to support a fresh application. If the appellant remained at risk of abuse or neglect in October 2020, extension of the Initial Order was not necessary. If FHA was concerned with "risk" of harm to the appellant, it may have been necessary that she be freed from any obligations created by the First Order to determine de novo if she could function safely. Even in the short-term, s. 59 could have been employed to obtain a protection order pending the hearing of the new application.

[107] The issue addressed by the Provincial Court was whether the statute could be interpreted as a "one and done process". The Court stated the requirement that the designated agency must "commence a fresh application once an order expires". In this case, the designated agency began its fresh application well before the order expired.

[108] However, the Court went on to conclude the extension order application was not brought as a hearing de novo with an evidentiary record informing its decision-making.

[109] In my view, any reliance on the necessary implication doctrine to support the making of the extension order would have been in error. Nothing in the circumstances suggests that the Provincial Court statutory mandate would have been frustrated without implied powers to extend the Initial Order. Section 59 would have been adequate to limit the appellant's activities to ameliorate risks of abuse or neglect that might have continued after October 29 but for the extension of the Initial Order.

[110] In the result, I conclude that the Provincial Court was in error in approving an extension order based on the authority of the CRMA or the Court's implied power.

The Provincial Court Jurisdiction to Make the 2020 SAO Order

Appellant's Submissions

[111] The appellant contends that the Provincial Court lacked express or implied jurisdiction to make the December 11, 2020 support and assistance order. She argued that the December 11, 2020 order had the impact of imposing successive support and assistant plans, allowing for potentially indefinite detention contrary to the fundamental purpose of the AGA which was "to prioritize self-determination in a tonic with adults with disabilities".

[112] She said Stark P.C.J. was in error in describing that process as a "fresh" application and that the hearing was "de novo" under s. 56 of the AGA.

[113] In Stark P.C.J.'s reasons, she said:

[18] As I indicated earlier, there were no issues raised as to the opinions, set out in the affidavit material by Fraser Health, that Nikki is a person at risk of self neglect and puts her at risk of abuse, that she is not in a position because of her condition to seek out the support and assistance she requires, and that Nikki is incapable of accepting or rejecting the support and assistance plan prepared and presented to her by Fraser Health Authority. I accept those conclusions.

[114] I have observed that in the "Application To Obtain an Order" filed November 25, 2020, the assessment of incapability dated October 13, 2020 and prepared by Deborah O'Connor, PhD, RSW, begins with the following:

Fraser Health Authority is concerned that [N.C.] remains at serious risk of self neglect, physical abuse and sexual exploitation due to vulnerability related to combined effects of an acquired brain injury and a history of alcohol abuse.

[115] The appellant argued that the December 11, 2020 order was implicitly an extension of the October 2018 order and constituted an extension beyond the two-year maximum for an SAO order as set out in ss. 57(4) and (5). The ultimate result of the New Order was simply a continuation of the Initial Order, which was not permitted.

[116] Judge Stark had said in her reasons:

- [59] Although this application would result in successive support and assistance orders being imposed on Nikki, I do not view this as tantamount to an extension of the earlier order but rather as an entire hearing de novo and that the evidentiary burden on the health authority, the designated agency, must be met before any new order can be made. Accordingly, I find that this is not simply an extension of the existing order beyond the two-year maximum allowable. I find it is a fresh application involving new investigation and assessment and I do have jurisdiction to hear the application and grant a new support and assistance order.
- [117] Judge Stark rightly concluded that she did not have power to extend the Initial Order, except under the CRMA, and that the New Order was made on a new application supported by a new investigation and assessment.
- [118] The appellant further contends the AGA is narrowly drawn legislation and that the procedures and powers should be interpreted in the ordinary grammatical sense and in keeping with the purpose of the scheme: see *Schreiber v. Canada (Attorney General)*, 2002 SCC 62 [Schreiber] at para. 54.
- [119] She contends that ss. 2(a) and (b) of the AGA, along with the comments of Warren J. in *A.H.* at para. 108, indicate the balancing exercise created by the AGA to respect an individual's right to live free from interference from the state contrasts with the state's goal of ensuring the health and safety of individuals with significant cognitive disabilities.
- [120] She argued that the AGA is designed to provide adults with procedural fairness protections, rights to notice of the case against them and an opportunity to obtain legal assistance: see *Horan v. Fraser Health Authority*, 2022 BCSC 1951 at para. 34.
- [121] The appellant then argued that there was no need for the Provincial Court to rely on implied powers under the AGA because there was specific jurisdiction requiring the court to consider the text of s. 56, which in turn requires the court to take into account both the assessment and the SAO before making an SAO order.
- [122] In her conclusion, the appellant argued that FHA could not "simply impose the same plan" on her at the hearing and call it a new application. The appellant disagrees with the Provincial Court's conclusion that the FHA had brought a fresh application because the proposed SAO was in essence the same plan that was imposed under the Initial Order. She submits that the procedural safeguards that should have been in place for a de novo application were abrogated.
- [123] These submissions by the appellant are supported by the interveners, who invite this Court to interpret the AGA in the context of the United Nations Convention on the Rights of Persons with Disabilities (the "CRPD") that aims "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity". The CRPD was signed by Canada in 2007 and ratified in 2010.

- [124] The legislature has clearly prohibited the making of any renewal order exceeding one year after an initial order permitted under the AGA it should be interpreted as curtailing the authority from simply allowing new orders being made without gaps to enable the adults to live without limitations from time to time The liberty of individuals is of paramount importance and in cases where the legislature seeks to deprive persons of their liberty, even if this deprivation is in the best interests of the person, the court should be cautious in depriving p of their liberty.
- [125] Without question, there is a tension between the rights of the appellant to live in the manner she wishes and to accept or refuse support, assistance or protection as long as she does not harm others: see s. 2(a) of the AGA.

Respondent's Submissions

- [126] FHA contends that the plain wording of s. 54(1) provides that the designated agency "may apply to the court" for a support and assistance order without limit as to how many times the agency may bring such an application.
- [127] FHA contends that the other provisions of the AGA support this interpretation. They contend that the safeguards preceding the making of an order, including an investigation, a capacity assessment and the requirements of a notice of hearing, are not activated when the designated authority is only changing or renewing a support assistance order under s. 57 and those orders can only be renewed once.
- [128] There is a distinction in the AGA between a renewal of an order and an initial order of support and assistance. To accede to the appellant's contention that there was no power in the Provincial Court to make a new SAO order would have expressly excluded the possibility of a new order being made if circumstances warranted. No part of the AGA expressly limits FHA to a single application concerning a person that expires no later than two years after making the order.
- [129] FHA contends that a reading of the statute taking into account the principles of statutory interpretation are not helpful to the appellant's argument. The goal of the AGA is to provide support and assistance for adults who are abused or neglected, while recognizing the right of those adults to live in the manner they wish to and to accept or refuse support and assistance when they are capable of making those decisions.
- [130] FHA pointed out that in A.H., Warren J. said in obiter that authorizations for support and assistance orders without consent could be renewed or reapplied for when ongoing concerns justify it.

- [131] FHA submits that nothing in the reading of the statute, taking into account the "entire context" and "grammatical and ordinary sense" of the legislation, suggests that persons who are abused or neglected and unable to make decisions to accept support and assistance should be left vulnerable to neglect or abuse solely because, at an earlier time, an SAO order had been made against them.
- [132] The respondent also argued that the appellant did not appeal the Court's findings that, at the time of the making of the New Order, she was not abused or neglected and the finding that she was at risk of abuse or neglect was an insufficient basis for making the New Order.
- [133] The respondent argued that the AGA does not provide for indefinite detention without judicial oversight but imposes requirements for oversight by the courts and the designated agencies. The FHA has a statutory duty to review the need for support and assistance order when it has reason to believe the adult's needs or capacity have changed. The adult may also request a review of the support and assistance order under s. 57.
- [134] At para. 16, Stark P.C.J. explained the conundrum inherent in the appellant's suggested interpretation of the AGA:
- To take N.C.'s argument to its logical conclusion, then once an order has been reached its maximum. The court can never impose a new order, regardless of need, risk, harm and incapability to the individual and regardless of when the new application is brought on.
- [135] The interpretation urged by the appellant would mean that an adult who was or became abused or neglected after the expiry of an SAO would be left to the forces of that person's circumstances even to the point of death.
- [136] FHA argues that the objective of an SAO is to assist the adult to function more independently; once they have acquired the appropriate skills and supports to overcome their illness or disability, then the need for an SAO disappears.
- [137] The Act does not relieve designated agencies from their obligation to make further applications for support and assistance orders for any adults who are unable to seek support and assistance that affects their decision-making power about the abuse or neglect: see s. 56(1)(b).
- [138] FHA contends that the words of s. 56 must be taken and read in the entire context of the grammatical and ordinary sense of those words in harmony with the scheme of the Act: see Elmer A. Driedger, *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) [Driedger] at 83 and *Bell Express View Limited Partnership v. Rex*, 2002 SCC 42 [Bell] at para. 47. They also contend that the context and purpose of the statute must be considered and that they inform the exercise of statutory interpretation: see *Wang v. British Columbia (Securities Commission)*, 2023 BCCA 101 [Wang] at para. 40.

- [139] FHA contends it would be absurd to interpret the AGA as authorizing SAO orders for two years but prohibiting the making of orders after the expiry of the first two-year period; they contend this interpretation would be illogical, incoherent, inequitable, unreasonable and incompatible with the other statutory provisions or objectives of the AGA.

Intervenors' Submissions

Disability Alliance BC Society, and Canadian Lawyers for International Human Rights

- [140] Disability Alliance BC Society ("DABC") and Canadian Lawyers for International Human Rights ("CLAIHR") intervene in this appeal to highlight concerns that persons with disabilities are denied the freedom to make fundamental decisions about their lives, resulting in a diminution of dignity and autonomy. They take no position on the outcome of the appeal.
- [141] DABC and CLAIHR contend that the AGA should be interpreted in a manner compliant with the values and principles set out in the. These principles include "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity".
- [142] Canada signed this convention in 2007 and ratified same in 2010.
- [143] The interveners contend that the imposition of coercive measures on a disabled person on a potentially indefinite basis is irreconcilable with the CRPD.
- [144] They contend that use of inadequate community supports to justify coercive measures against disabled persons is a marked departure from international human rights laws and norms.
- [145] They contend that the coercive measures permitted in the AGA should be limited or prohibited because of conflicts with the CRPD. They contend that the Provincial Court Judge did not take an active role in the inquiry on the question of other means of rendering the order acceptable to the adult or reducing the intrusive effect of the order.
- [146] They contend that this Court should strive to avoid the construction of a domestic statute that would place the state in violation of its international obligations, absent wording that the statute clearly compels such a result. They contend Canada is bound at the international level to fulfil this treaty obligation.
- [147] The interveners contend that the AGA should be interpreted in a manner consistent with the CRPD, notwithstanding that it was ratified after British Columbia enacted the statute.

- [148] They focused on paras. 31-34 and 38 of *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, and suggest that international law can act as an interpretive aid in cases where domestic law was enacted before Canada entered into its international obligations on the subject.
- [149] The interveners contend that governments in Canada should progressively eliminate coercive practices and increase supports and alternative services available in the community. By considering the CRPD in the context of the AGA, the court should engage in an inquiry about the legal impact of a statute on the individual and only in exceptional circumstances could it authorize coercive measures.
- [150] The interveners point to several principles, including the following:
- a) the AGA should be interpreted to permit the state to impose one SAO order that can be renewed only once;
 - b) individuals are entitled to respect for their inherent dignity, individual autonomy (including the freedom to make one's own choices), and independence. They should not be subject to discrimination and should have full and effective participation in society. This principle highlights the requirement to respect the rights of persons with disabilities to liberty and security of the person and to live independently;
 - c) detention of persons with disabilities without free and informed consent should be prohibited;
 - d) involuntary detention must not be permitted for the purposes of treatment or prevention;
 - e) persons with disabilities have the right to choose their place of residence on an equal basis with others and to have access to community services without being segregated from the community; and
 - f) detention of a disabled person can be imposed in emergency situations such as under s. 59 of the AGA; and, Canada's domestic laws should respect its international commitments to the CRPD, all of which can be implemented by an interpretation of s. 56 of the AGA that promotes autonomy of persons with individuals and use of coercive measures in exceptional circumstances only.
- [151] The interveners suggest that a more robust inquiry should have been made by the Provincial Court Judge into a broad range of issues including alternate and less intrusive terms of the orders.
- [152] The interveners relied on *Fraser Health Authority v. A.K.H.*, 2017 BCPC 355 at paras. 75-83, 85-86 as an example of the court conducting an active inquiry into the question of the circumstances of the proposed SAO order and the search for the least restrictive and intrusive way of providing support and assistance.

Community Legal Assistance Society

- [153] Community Legal Assistance Society ("CLAS") intervenes in this appeal but seeks no order with regard to the issues on appeal. CLAS submitted that ss. 56 and 57 of the AGA do not permit the Provincial Court to make new support and assistance orders upon or after the expiry of a renewed order without evidence of new instances of abuse or neglect of the adult.
- [154] CLAS focused on s. 56(1), stipulating that the precondition to an SAO is the presence of facts satisfying the court that the adult "is abused or neglected", unable to seek support and assistance because of illness, disease or injury affecting the adult's ability to make decisions about abuse or neglect, and is in need of services proposed in an SAO.
- [155] These SAO orders are in force for a maximum of one year with potential renewals for one additional year.
- [156] CLAS argued that legislatures do not intend to create absurd consequences including results that are illogical or incoherent: see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 1998 CanLII 837 at para. 21 and *Wang* at paras. 42-43.
- [157] CLAS contends that legislation restricting liberty of individuals must be read strictly and where ambiguity exists, the interpretation must be settled in a manner that least restricts the individual's liberty: *A.T. v. British Columbia (Mental Health Review Board)*, 2021 BCSC 1680 at para. 13; *R. v. D.L.W.*, 2016 SCC 22 at para. 55.
- [158] Moreover, CLAS submits that societal views and values are relevant in the context of statutory interpretation: *Michel* at para. 97.
- [159] The AGA permits detention of adults incapable of accepting supports and assistance from designated agencies to a maximum of two years. Under the Health Care (Consent) and Care Facility (Admission) Act, R.S.B.C. 1996, c. 181 [HCCFA], adults with mental health issues can be detained for longer periods subject to specific criteria and safeguards.
- [160] Multiple statutes enacted by the same government should be interpreted in harmony with other statutes relating to the same subject matter: *Therrien (Re)*, 2001 SCC 35 at para. 121. Similarly, statutes operating as part of a single regulatory scheme should be read in the context of one another and in light of the role of each statute in the overall scheme: *Bell* at para. 46.
- [161] The HCCFA provides for admission of adults into care facilities and should work in conjunction with Part 3 of the AGA and for the continued care of persons incapable of providing consent. These provisions were intended to eliminate the need to continually apply for SAOs and provides more safeguards to the autonomy of patients: *A.H.* at paras. 109-111.

- [162] Section 45 of Part 3 of the AGA does not override s. 4 of the HCCFA or an adult's representative guardian from refusing health care in accordance with the adult's wishes "even if the refusal will result in the adult's death".
- [163] There are differences in the operation of the AGA and HCCFA. For example, s. 23 of the HCCFA requires the adult's previously expressed wishes to be taken into account; this provision is not in the AGA.
- [164] In light of these differences, CLAS argues that the AGA was designed as a limited term solution for adults with disabilities while recognizing their rights to autonomy.
- [165] They argue that the principles of deinstitutionalization and normalization of adults with mental disabilities underlie the principles and presumptions in s. 2 of the AGA. The Act should be interpreted to avoid institutionalization in minimizing state infringement on adults' rights to live their lives in a manner they choose.
- [166] Because the AGA limits the duration of support and assistance orders to a maximum of one year followed by one renewal for a maximum of one year, the adult's right to live independently should be respected, providing some opportunity to have liberty and autonomy after the termination of the SAO and before he knew SAO is imposed. CLAS did not suggest that a US 80 could not be imposed in some circumstances but should not be imposed until there is new evidence of abuse or self-neglect that interferes with their ability to make choices and to live independently after taking into account all procedural safeguards available.
- [167] CLAS contends the legislation did not set the evidentiary burden for orders against an adult as "will likely face abuse or neglect" or "has been abused or neglected". CLAS argues that the language chosen by the legislature was a deliberate attempt to respect rights of adults pursue life outside of the restrictions of the AGA until that person is found to be abused or neglected again. This is not a preventative statute; it is a statute activated by evidence that the individual "is" being abused or neglected while free of an SAO.
- [168] CLAS does not argue against the possibility of the imposition of new SAOs; rather, they contend adults must have the opportunity to have liberty in accordance with the purpose of the AGA until new evidence clearly shows the person is incapable of deciding to accept support and assistance after the termination of the initial order.

Analysis and Conclusions

- [169] The primary issue to be determined on this appeal is whether the Provincial Court had jurisdiction to make the New Order in circumstances where the New Order was imposed contiguously to the Initial Order. The question of jurisdiction concerns interpretation of the AGA and whether termination of the Initial Order would prevent the Provincial Court from making new orders that might effectively confine or detain the appellant.

- [170] The appellant and interveners raise the question of whether the AGA can be used to confine or detain an adult with repetitive applications made under ss. 56 and 57.
- [171] There is clearly a tension between the interests of the appellant, who seeks her liberty, and her inability to choose to accept or reject services as was objectively assessed by FHA and the PGT. The appellant desires to be free of state control over her welfare and to pursue her own future, notwithstanding that she might be at risk of abuse or self-neglect, even to the point of causing death. It is noteworthy that s. 45(2) of the AGA provides that Part 3 does not prevent an adult's representative or guardian from refusing health care in accordance with the wishes of the adult while capable, even if refusal might result in the adult's death.
- [172] This analysis will address the interpretation of the AGA in an effort to assess the Provincial Court judge's decision to order the New Order imposing a further SAO on the appellant on the findings of fact she made.
- [173] The appellant contends that the New Order was not made in compliance with procedural safeguards set out in the AGA. Although the appellant argued that the New Order was made "without entitling her to the same procedural safeguards that would be in place for a true de novo application", she did not articulate which procedural safeguards had been ignored and offered little or no evidence of that assertion.
- [174] I infer that the appellant believes that some or all of ss. 46, 47, 48, 51, 52, 53, 56 and 57 were not complied with in bringing the FHA application for the New Order.
- [175] DABC made submissions urging that the AGA be interpreted in a manner consistent with the CRPD. They suggested a more robust inquiry should have been made by the Provincial Court Judge into questions surrounding the proposed SAO and the search for the least restrictive and intrusive support and assistance plans before imposing the contiguous SAO.
- [176] CLAS submitted that ss. 56 and 57 of the AGA did not permit the Provincial Court to make the New Order upon or after expiry of the Initial Order without fresh evidence of the appellant's abuse or neglect at the time.
- [177] For reasons that follow, I accept the FHA submission that the continued availability of SAOs, and orders to impose SAOs, on adults who are abused or neglected and unable to seek support and assistance because of illness, disease or other conditions are not prohibited if made after a previous SAO terminates. It is clear that the interpretation of the AGA urged by the appellant could expose adults who are abused or neglected and unable to accept much needed supports and assistance to serious harms that can only be avoided if the adult is bound by another SAO, even without their consent.
- [178] The AGA must be interpreted in the context of the steps necessary to obtain an SAO, which begin with receipt of information indicating an adult "is abused or neglected": see s. 46(1) (a). A designated agency is then required to determine if there is information that this adult is abused or neglected (or there is reason to believe that the adult is abused or neglected: see s. 47(1)). If the adult is abused or neglected and is incapable of making decisions to

accept support and assistance, then applications to the Provincial Court can be made by the designated authority for an order imposing an SAO. On a hearing of this application the court must consider, among other things, whether the person is "abused or neglected": s. 56(1)(a).

- [179] Once the court is satisfied that the matters set out in s. 56(1), including whether the adult "is abused or neglected and is unable to seek support and assistance because of illness, disease or other condition that affects his or her ability to make decisions about the abuse or neglect" are present, the court must determine if the adult would benefit from the services proposed in the SAO: see s. 56(3)(a). Once all of these factors are considered, the court can impose an SAO on the adult.
- [180] The AGA does not impose any limitations on future applications for orders under Part 3 and the grammatical and ordinary sense of the words in harmony with the scheme of the act cannot be construed to the contrary. The purposes of the act are to safeguard against harms to adults who are abused or neglected. Nothing in the statute reflects a limitation on the legislature's decision authorizing the imposition of SAOs when adults meet the criteria.
- [181] Contrary to the appellant's submissions, the application for the December 11, 2020 order did not involve a simple renewal of the Initial Order notwithstanding the similarity of terms between the New Order and the Initial Order. There was a standalone application, albeit not commenced until November 25, 2020 for the new SAO, which was made on December 11, 2020.
- [182] Section 44 describes the purpose of the AGA as supporting and assisting "adults who are abused or neglected and who are unable to seek support and assistance because." Part 3 applies "whether an adult is abused or neglected in a public place, the adult's home, a relative's home, a care facility or any other place except a correctional centre".
- [183] I do not accept the appellant's submissions that the termination date of the Initial Order and renewals (AGA ss. 56(7) and 57(5)) was intended to prevent FHA from obtaining a new order immediately after termination of an initial Order.
- [184] There is no "one time only" limit for SAOs and I have accepted FHA's argument that the AGA does not prohibit the court making subsequent orders imposing new SAOs on adults who are abused or neglected and unable to make decisions concerning support services. I was not asked to consider this issue in the context of a challenge under the Charter of Rights and Freedoms accept where the appellant referred to the Charter in argument. She did not raise a Charter challenge to the AGA, nor does she seek a Charter remedy to address this appeal.
- [185] The role of the Charter in the interpretation of statutes arises only if there is a genuine ambiguity in the interpretation of statutory provisions. In Bell at para. 62, the Court said:

62 Statutory enactments embody legislative will. They supplement, modify or supersede the common law. More pointedly, when a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that "it is appropriate for courts to prefer interpretations that tend to promote those [Charter] principles and values over interpretations that do not" (Sullivan, *supra*, at p. 325), it must be stressed that, to the extent this Court has recognized a "Charter values" interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations.

[Emphasis in original.]

[186] The respondent cites the principles of statutory interpretation set out in *Driedger* at 83:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(See also: *Bell Express Vu Limited Partnership v. Rex*, 2002 SCC 42 at para. 27.)

[187] The respondent contends that the approach set out by Ruth Sullivan in *The Construction of Statutes*, 7th ed. (Toronto: LexisNexis, 2022) is key to this analysis. It is described by Sullivan as follows:

Under the modern principle, a court's primary duty is to harmonize the ordinary meaning of the text with the other indicators of legislative intent gleaned from reading the text in its entire context.

[188] The respondent concurs with the appellant on the principle that the court is not permitted to renew a SAO after the expiry of two years. Rather, the legislation is not ambiguous and distinguishes between renewal orders and new orders. FHA does not argue that indefinite detention without judicial oversight is permitted under the AGA; however, nothing in the AGA limits a designated authority from acting on concerns that any adult may be abused or neglected and in need support and assistance. These findings must be made taking into consideration ss. 55 (2) and 56(1) and the information and documents referred to in s. 54.

[189] FHA has an express duty to follow procedures in relation to adults in need of support and assistance while being unable to agree to those terms.

[190] The powers under Part 3 of the AGA should be read in its entire context and the interpretation be informed by the purpose of the scheme: see *Schreiber* at para. 54.

[191] Although A.H. was addressing the problem of long-term detentions under s. 59 of the AGA, the Court's comments frame the broader issue of confining an adult under the AGA:

- [108] Thus, the AGA's purpose is to prioritize self-determination and autonomy for adults with disabilities and impose involuntary measures only as a last resort, in a manner as minimally intrusive as possible, and by court order.
- [192] The appellant contends the New Order was "the same" as the order extant on October 29 and the AGA does not permit a new SAO that is merely an extension of a previous SAO, rather than a new SAO that was justified on the basis of fresh evidence.
- [193] I do not accept this claim. The appellant was assessed by FHA and by the PGT before the December 2020 application was presented to the court. The appellant does not suggest that FHA failed to conduct an inquiry into her need for supports and assistance before referring their concerns to the PGT. She did not contend that FHA failed to make any reasonable efforts to interview her as required under s. 48. She did not allege that FHA failed to involve her "to the greatest extent possible, in discussions about" seeking support and assistance and providing support and assistance to prevent abuse or neglect in the future as required under s. 52. Moreover, she did not suggest that FHA failed to explain the proposed plan to her as required under s. 53. Last, the order was made only after a hearing of the application by Stark P.C.J.
- [194] Further, the appellant did not contest the finding that she needed support and assistance at the time of the December 2020 application based on the investigations undertaken in September and October 2020, while she remained subject to the Initial Order when she was represented by counsel. Clearly, the new application was based on a new inquiry by the FHA and PGT into the appellant's needs and capacity and the order was made after the requisite statutory requirements were satisfied.
- [195] I accept that the Provincial Court endorsed the imposition of "successive support and assistance plans" with consideration for the fundamental purposes of the AGA. The guiding principle is that the AGA is designed to "prioritize self-determination and autonomy for adults with disabilities and impose involuntary measures only as a last resort, in a manner as minimally intrusive as possible, and by court order: A.H. at para. 108.
- [196] The AGA contains no indication or inference that a new order could not be made after the steps set out in ss. 47-56 had been complied with or prohibit a designated authority from seeking an SAO more than once in the lifetime of person who is abused or neglected and incapable of accepting or refusing support.
- [197] I find that the effect of these prerequisite procedures followed by FHA complied with the statute and that the order eventually made was not a mere extension of the Initial Order; rather, the order was made on fresh evidence that might have supported the conclusions of the Provincial Court Judge.
- [198] I find that the appellant was accorded all of the procedural protections required by the AGA before the December 11, 2020 was imposed.

- [199] This conclusion does not end the inquiry. The court must still address the submissions of the interveners and the appellant's contention that the New Order was not justified on the facts.
- [200] I have accepted that FHA was mandated and required to seek the new SAO on evidence that met the balance of probabilities standard. The next question was whether the evidence at the December 2020 hearing was sufficient to meet the evidentiary burden. CLAS argued that the New Order could only have been made on proof that the appellant was "abused or neglected". It was important to ensure the evidentiary burden was met for a fresh application failing which no order could have been made.
- [201] The question raised by the CLAS is whether the AGA could be used to confine or detain adults with repetitive orders made under ss. 56 and 57 on the basis that the adult was not "abused or neglected" but might be or will likely be abused or neglected.
- [202] When making the New Order, Stark P.C.J. concluded:
- a) that the appellant was "a person at risk of self neglect and this risk puts her at risk of abuse": (RFJ at para. 18);
 - b) the results of the FHA investigation and assessment were that the appellant "is a person at risk of abuse or neglect due to her condition": (RFJ at para. 4).
- [203] Judge Stark did not differentiate between the statutory requirement that the appellant be "abused or neglected" when the order was made on a finding she was "at risk" of being abused or self-neglected.
- [204] This finding did not conform to the statutory requirement that the appellant was in fact "abused or neglected" when the order was made. This issue touches upon the question posed by CLAS, that proof only that an adult will likely face abuse or neglect or is at risk of abuse or neglect does not establish the facts necessary for the court to make an SAO.
- [205] The definitions of "neglect" and "self-neglect" can be prospective in nature because neglect and self-neglect are defined in s. 1 of the AGA to include a condition that is "reasonably likely to cause within a short period of time, the adult serious physical, mental or emotional harm or substantial damage". The definition of neglect to include harms that were reasonably likely to happen within a short period of time but does not include a simple risk of those events happening.
- [206] Judge Stark concluded that the order sought was not tantamount to an extension of the earlier order, but rather was an entire hearing de novo and that the evidentiary burden on the health authority, the designated agency, must be met before any new order can be made: RFJ at para. 17.

- [207] Thus, although "self-neglect" includes a condition that is reasonably likely to cause her harm within a short period, if the adult is simply at risk of "self-neglect", the finding does not establish that she would likely suffer harm within a short period of time, only that she was at risk to suffer harm. This conclusion is not sufficient to meet the statutory requirement.
- [208] This point was argued by CLAS in which it contended that adults should be given the opportunity to have liberty and autonomy restored in accordance with the purposes of the AGA after an SAO terminates.
- [209] CLAS contends that a future risk of abuse or neglect is not part of the test set out in the AGA. On the contrary, the legislature chose not to use such language as "will likely face abuse or neglect" or "has been abused or neglected" or "Is at risk of abuse or risk of neglect." They contend that the legislature purposively chose the language and the AGA should be interpreted according to the words used: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Toronto: Irwin Law Inc., 2007) at 206.
- [210] Thus, adults with a history of past abuse or neglect might reasonably be subject to support and assistance orders indefinitely due to mental disabilities rendering them at risk but not actually abused or neglected. Moreover, to the extent that the order impinges on the liberty of an adult, the criteria should not be relaxed to include adults "at risk of abuse or neglect". It cannot be claimed that past histories of abuse and neglect, or risks of future abuse or neglect, will justify a new order due only to the increased risk associated with current or past mental health conditions.
- [211] The appellant referred to Horan at para. 34, where Justice Iyer discussed the more serious consequences of a finding that an adult is incapable of making decisions about their support and assistance, and the more stringent decision-making framework that applies to Part 2.1.
- [212] In that case, the Court found that it was required to make the finding that an adult was or was not abused or neglected and whether she was unable to seek support and assistance. The Court was required to decide the question of the adult's capability after considering the assessment report and SAO.
- [213] Justice Iyer commented that the plan imposed on the adult involved extreme limitations to her liberty and that she is powerless to control the basic elements of her life.
- [214] The respondent pointed out that no appeal was taken from the finding that the appellant was at risk of abuse or neglect; thus, it was accepted that establishing the risk of abuse or neglect was sufficient to warrant a new SAO or court order.

- [215] The statutory interpretation of the AGA that recognizes all context as an important factor in interpreting the written words. FHA stresses that the protection of adults who are unable to care for themselves is one purpose set out in s. 44 of the AGA. The FHA is charged with a duty to act and did act to obtain the New Order based on its understanding of the appellant's circumstances in September and October 2020.
- [216] Supporting the respondent's contention, is that if a new application is made, the designated authority must meet the evidentiary burden as prescribed by s. 55(2) and ss. 56(1) and 56(3). At the new application hearing, the person is entitled to be present, represented by counsel, and to receive information and discuss the proposed as a period. Subsequent to making an order for a new SAO, the person is entitled to request reviews of h any SAO from time to time.
- [217] However, the evidence on the application and the conclusions reached by Stark P.C.J. did not meet the underlying test that the court find the person to be "abused or neglected" at the time of the order. The court's finding that the Appellant was only at risk of abuse and self neglect was insufficient to meet the statutory requirement that she actually be abused or neglected. Absent a finding that the appellant was abused or failing to take care of herself and was reasonably likely to cause (herself) harm "within a short period of time" the court did not have jurisdiction to make an SAO.
- [218] Accepting this analysis, the AGA requires that a new application for an SAO order must include a finding that the person is abused or neglected. Thus, when an SAO order expires after two years, the person should be released from the SAO and be entitled to carry on her life without the restrictions set out in the previous order.
- [219] CLAS contends that a new SAO can be made under the AGA if the adult was currently experiencing abuse or neglect but, before issuing a new order, the more appropriate mechanism for addressing the adult's circumstances would be under complementary legislation such as HCCFA.
- [220] The Court's finding was that the appellant was a person "at risk of self-neglect at risk of abuse" resulting in her incapacity to accept or reject the support and assistance plan prepared by FHA did not accord with the statutory criteria. This finding suggests that the appellant was not neglected or abused when the October 26 order was made or the December 11, 2020 order was pronounced.
- [221] In the result, the appellant would have been entitled to immediate release from the SAO conditions on the statutory termination date of the Initial Order. This result is consistent with the requirement that there be evidence of actual abuse or neglect as preconditions to the purposes (s. 44) of the AGA, the conduct of an investigation by the designated agency (s. 47), and the court's inquiry into abuse or neglect on the hearing (s. 56).
- [222] The principle engaged is similar to that applied by the Ontario Court of Appeal in *R. v. J.P.G.*, 2000 CanLII 5673 (ONCA) [J.P.G.].

- [223] In J.P.G., a youth was sentenced to four months in open custody but was transferred to secure custody because of his misbehaviours in open custody. The Young Offenders Act, R.S.C. 1985, c. Y-1. gave the provincial director the authority to transfer the offender to a secure facility for 15 days. The 15-day period was renewed twice.
- [224] The Crown contended that it had the discretion to renew the transfer to secure custody because the provincial director determined that open custody was inappropriate for the appellant. There was no question that this determination was made in good faith.
- [225] The Court said it was not the good faith of the decision-maker that was in issue, but whether there was any jurisdiction to detain the appellant in secured custody beyond 15 days. The Court concluded that the Crown was permitted to make subsequent orders transferring the youth to closed custody for a further 15-day period but that the young person was entitled to be returned to open custody after that time.
- [226] The Court accepted that fresh consideration of a transfer to secured custody could be required but that the transfer "must be made based on matters that occur in open custody after the young person has been returned there": at para. 19.
- [227] The Court noted that administrative convenience does not deprive a person of a legislative right to rely on the statutory requirements.
- [228] Although the facts and the statute at issue in J.P.G. are different, the principle dealing with the liberty interests of J.P.G. are not dissimilar to the appellant. In my view the principle discussed in J.P.G. was applicable and the appellant was entitled to be freed from the Initial Order until the conditions for a new order had been proved and the court made the requisite findings for the new order. Any other treatment of the appellant was a breach of the statutory termination of the Initial Order.
- [229] If past abuse or neglect or risks of abuse and neglect could justify ongoing restrictions of SAO, then the criteria for intervention would always be met under the presumption that the adult's history repeating itself or risk factors could justify continuing limits on the adult's liberty with little or no new evidence. Given the importance administering and interpreting the AGA according to the principles set out in ss. 2 and 3 that all adults are entitled to live in the manner they wish and to refuse support, assistance and protection as long as they do not harm others and they are capable of making decisions about those matters, there is a heavy burden on the designated authority to rebut the presumption that an adult is capable of making decisions about their personal care, health care and financial matters.
- [230] If the Appellant was at risk of failing to take care of herself and "reasonably likely to cause within a short period of time, serious harm" a finding that she was neglected could have been made but was not.

- [231] The impact of permitting the court to make an SAO order based on risks undermines the appellant's entitlement to live in the manner she wishes and to accept or refuse support, assistance or protection until the new order is made.
- [232] I conclude that finding the appellant was at risk of abuse or self-neglect does not rebut the presumption under s. 3 of the AGA nor does it address the burden of proof on the applicant.
- [233] The appellant was entitled to be released from the terms of the SAO after the expiry of two years and that the SAO was not supported by a new finding that the person "is abused or neglected". As noted, applications must not function as a pre-emptive effort to detain adults on the basis that there is a risk of becoming abused or a risk of being neglected.
- [234] I find that the Provincial Court Judge was in error in making the New Order for the reasons noted above and declare that the Provincial Court was in error when granting the New Order.

The Interveners

- [235] CLAS contended that the AGA, the HCCFA and the Public Guardian and Trustee Act, R.S.B.C. 1996, c. 383 were part of the same broad regulatory scheme and were intended to work in conjunction with each other to ensure continued care of persons requiring support and assistance but who are incapable of accepting those services. They contend the group of statutes was intended to eliminate the need to repetitively apply for SAOs.
- [236] The AGA, in contrast to the HCCFA, does not require designated agencies to consider wishes of the adult expressed while capable and does not allow a substitute decision-maker to reject support and assistant plans. Under the AGA, the strict statutory time limit on orders under Part 3 of the AGA is intended to be a short-term solution for adults facing abuse and neglect. I do not accept that the correct interpretation of these related statutes is that adults requiring longer-term solutions can only be addressed under the HCCFA not with standing differences in the alternative route to caring for adults with expanded provisions for protecting the autonomy of those adults.
- [237] The AGA is precise and comprehensive statute that is drafted in a way to ensure FHA adheres to procedural fairness on each new application for an SAO. On that basis, I am not satisfied the interests of mentally disabled adults detained against their will are ignored under the AGA which does not override the rights set out in s. 4 of the HCCFA. The terms of ss. 8 and 11 of the HCCFA are not dissimilar to the AGA. I do not find that the Provincial Judge erred in failing to take into account the interpretation of the AGA because of other measures set out in the HCCFA.

- [238] DABC focused submissions on statutory interpretation that emphasizes the liberty rights of persons with disability insofar as legislation compromises their human rights. They contend it is inappropriate to impose coercive measures on disabled persons to make up for inadequate community supports.
- [239] The CRPD was not ratified by Canada until after the AGA was enacted although it can be relevant to the exercise of statutory interpretation, it would be difficult to interpret the AGA based on the subsequent ratification of the convention when that treaty had not been ratified: *Canada (Attorney General) v. Heffel Gallery Limited*, 2019 FCA 82 at para. 55.
- [240] FHA concedes that the general principles of autonomy, freedom and dignity of disabled people included in the CRPD are relevant. Although DABC characterizes the treatment of disabled people under the AGA as coercive, it fails to address the tension between the dangers stemming from the disabled adults self-neglect and harm and the impact of an SAO on that person's safety and quality of life.
- [241] DABC suggests that Provincial Court Judges should perform a more robust inquiry into alternate and less intrusive orders. To the extent that disabled adults are represented by counsel at a hearing of these questions, these adults have the opportunity to challenge FHA decisions and can provoke a wider inquiry into less intrusive orders.
- [242] Prior to making an SAO, there are extensive measures to engage the adult in the process, consultations independent capacity assessments, access to legal advice and representation at a hearing. The legislature has determined that society and the FHA have an interest and obligation in caring for these individuals who are unable to make decisions for themselves. Although these orders involve the detention of the adult or limitations to the adult's autonomy, the AGA balances the rights of disabled persons to be free of state control while recognizing that their independence and freedom to reject support and assistance makes them highly vulnerable. These procedural safeguards address the general principles included in the CRPD of promoting autonomy, freedom and dignity of disabled people consistent with the need to protect extremely vulnerable adults.
- [243] Nevertheless, without the availability of an SAO, adults with disabilities may suffer, even to the point of death, if not bound to comply.
- [244] I am satisfied that ratification by Canada of the CRPD together with the circumstances described above do not permit this Court to apply the treaty to the extent that it could put vulnerable adults at risk of serious harms.

Conclusion

- [245] In the result, I allow the appeal but in view of the fact that the SAO order under appeal has long since expired, I will make no other order at this time.

[246] If either party wishes to address the issue of what order, if any, should be made at this stage, they have liberty to make submissions within 30 days.

[247] Additionally, if either party wishes to make submissions as to costs, those submissions should be made within 30 days.

"Armstrong J."

Schedule "A"

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Prepared on 26 October 2026 · Esheria