Court File No. 234080
New Westminster Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**
(ON APPEAL FROM THE PROVINCIAL COURT OF BRITISH COLUMBIA)

BETWEEN:

N.C.

Appellant

and

FRASER HEALTH AUTHORITY

Respondent

and

COMMUNITY LEGAL ASSISTANCE SOCIETY, DISABILITY ALLIANCE BC SOCIETY, and CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS

Interveners

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# INTERVENERS' FACTUM

DISABILITY ALLIANCE BC SOCIETY AND CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS

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

**Mark Iyengar**
**Sarah Pringle**
Peck and Company Barristers
610-744 West Hastings Street
Vancouver, BC V6C 1A5
T: (604) 669-0208
F: (604) 669-0616
E: miyengar@peckandcompany.ca
E: springle@peckandcompany.ca

Counsel for the appellant, N.C.

**Frances Mahon**
Pender Litigation
1175-510 Burrard Street
Vancouver, BC V6C 3A8
T: (604) 669-6699
F: (604) 681-0652
E: fdm@penderlitigation.com

**Kate Kirkpatrick**
755 Burrard Street, #428
Vancouver, BC V6Z 1X6
T: (604) 637-6380
F: (604) 637-6385
E: kate@talaw.ca

Counsel for the respondent, Fraser Health Authority

**Scott Boucher**
**Roslyn Grant**
Norton Rose Fulbright Canada LLP
1800–510 West Georgia Street
Vancouver, BC V6B 0M3
T: (604) 641-4920
E:
scott.boucher@nortonrosefulbright.com

Counsel for the Public Guardian and Trustee of British Columbia

**Sarah Watson**
Public Guardian and Trustee
700-808 West Hastings Street
Vancouver, BC V6C 3L3
T: (604) 660-4425
E: swatson@trustee.bc.ca

Counsel for Vancouver Coastal Health Authority

**Deanna Fedio**
Vancouver Coastal Health Authority
11th Floor, 604 West Broadway
Vancouver, BC V5C 4C2
T: (604) 818-5244
E: deanna.fedio@vch.ca

Counsel for the intervener, Community Legal Assistance Society

**Jonathan G. Blair**
Community Legal Assistance Society
300 – 1140 West Pender Street
Vancouver, BC V6E 4G1
T: (604) 673-3134
E: jblair@clasbc.net

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## PART 1 – OVERVIEW AND BACKGROUND

### A. Overview

1. Historically, coercive state practices — like forced institutionalization — have denied persons with disabilities the freedom to make fundamental decisions about their lives. These practices persist today at great cost to the dignity and autonomy of those affected.

2. Over time, this injustice has garnered international attention, leading the United Nations to adopt the *Convention on the Rights of Persons with Disabilities*[1] (the *CRPD*). The *CRPD* 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." Canada signed the *CRPD* in 2007 and ratified it in 2010.

3. Section 56 of the *Adult Guardianship Act*[2] (the *AGA*) permits the Provincial Court to impose support and assistance orders on persons with disabilities without their consent for a maximum of one year. This type of order may include involuntary detention in an institution. The statute permits the court to renew the order once for up to one year. In this appeal, this Court must interpret the *AGA* and decide whether a court has jurisdiction to grant involuntary orders beyond one original order and one extension.

4. Disability Alliance BC Society (DABC) and Canadian Lawyers for International Human Rights (CLAIHR) intervene in this appeal to submit that the *AGA* must be interpreted to comply with the values and principles of the *CRPD*, which form an important part of the legal context in which the *AGA* operates.

5. Two features of the *CRPD* are salient.

6. First, imposing coercive measures on a person because of their disability on a potentially indefinite basis is irreconcilable with the *CRPD*. Against this backdrop, allowing coercive measures (particularly detention) to be perpetually imposed on persons with disabilities does not conform to the *CRPD* and would constitute a marked departure from

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[1] *Convention on the Rights of Persons with Disabilities*, Can. T.S. 2010 No. 8.
[2] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6.

international human rights law and norms.

7. Second, it would be inconsistent with the *CRPD* to use inadequate community supports to justify coercive measures against persons with disabilities. The application judge should actively inquire about the reasons for the adult's rejection of the proposed support and assistance and about whether those reasons can be addressed.

## B. Statutory background

8. Part 3 of the *AGA* governs the voluntary and involuntary imposition of services for adults who are abused or neglected and are unable to seek support and assistance.

9. Upon determining that an adult needs support and assistance, a designated agency may prepare a support and assistance plan that specifies the needed services (s. 51(1)(g)). The designated agency must then explain the plan and proposed services to the adult (s. 53).

10. If the adult decides not to accept the plan, the designated agency may ask the Public Guardian and Trustee to arrange for an assessment of whether the adult is incapable (s. 53(5)). If the Public Guardian and Trustee concludes that the adult is incapable, then the designated agency may make an application to the Provincial Court of British Columbia for an order authorizing the provision of services to the adult (s. 54(1)).

11. Under s. 56 of the *AGA*, the Provincial Court can make a variety of involuntary support and assistance orders if satisfied that an adult is (a) abused or neglected, (b) unable to seek support and assistance because of a condition that affects their ability to make decisions about that abuse or neglect, and (c) needs and would benefit from the proposed services. The agency bears the onus (s. 55(2)) and the order must terminate within a year (s. 56(7)).

12. The agency can apply to the Provincial Court for the renewal of involuntary orders (s. 57(3)(b)). These orders, however, can be renewed only once (s. 57(5)) and can be extended for only one year, provided the court is satisfied the adult still needs the services (s. 57(4)(b)). The Court may also change or cancel the order if satisfied that the adult's

needs or ability to make decisions has significantly changed.

13. The court below interpreted the *AGA* as permitting health authorities to obtain coercive orders for an indefinite period, so long as the health authority applies for a "new" order as opposed to an extension of an existing order.

## PART 2 – POSITION

14. DABC and CLAIHR intervene to make two submissions.

15. First, the interpretation adopted in the court below and supported by the respondent belies the international legal context in which the *AGA* operates, as the *CRPD* suggests that imposing coercive measures on a person due to impairments is, and should be, exceptional, if not prohibited.

16. Second, in any guidance this Court provides for the Provincial Court's benefit, it should include that it would belie the *CRPD* to use inadequate community supports to justify coercive measures against persons with disabilities. On a s. 56 application, the judge should take an active role, inquiring about any means of rendering the order acceptable to the adult or reducing the intrusiveness of the order.

## PART 3 – ARGUMENT

### A. The international legal context must inform statutory interpretation of the *AGA*

17. The *CRPD*, which Canada has signed and ratified, forms part of the legal context in which the *AGA* operates and therefore it must be considered under the modern approach to statutory interpretation. The modern approach requires the court to interpret the statute in its "entire context". This includes any relevant international treaty obligations and principles of international law.[3]

18. As far as possible, interpretations of the *AGA* that reflect the values and principles

[3] *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association,* 2022 SCC 30 at para. 44; R. Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (2014), §18.30.

embodied in international law ought to be preferred over those that do not. It is a well-established principle of statutory interpretation that legislation is presumed to comply with international law.[4] Courts should strive to avoid constructions of domestic statutes that would place the state in violation of its international obligations, unless the wording of the statute clearly compels that result.[5]

19. Even when international law is not implemented domestically, the values it imparts may still inform the contextual approach to statutory interpretation.[6] Canada is bound at the international level to fulfil its international treaty obligations even when they are not expressly implemented by statute or regulation.[7]

20. The *CRPD* is relevant to the statutory interpretation of the *AGA* even though it was ratified after the province of British Columbia enacted the provisions at issue. In *Canadian Foundation for Children Youth and the Law*, for example, McLachlin C.J. relied on international conventions that came into existence long after the impugned provision was enacted and amended.[8] International law can still act as an interpretive aid when domestic law precedes Canada's international obligations.

21. The *CRPD*, which Canada has signed and ratified, promotes the autonomy of those with disabilities by requiring States Parties to progressively eliminate coercive practices and increase support and alternative services available in the community. Taking the *CRPD* to form part of the context in which the *AGA* operates requires courts to favour interpretations that facilitate autonomy and that only exceptionally authorize coercion.

22. The *AGA* should therefore be interpreted as consistently as possible with the *CRPD,* since the *CRPD* is part of the legal context in which the *AGA* operates.

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[4] R. Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (2014), §18.5.
[5] *R. v. Hape*, 2007 SCC 26 at para. 53.
[6] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 69–71.
[7] J.H. Currie, *Public International Law*, 2nd ed. (Toronto: Irwin Law, 2008) at pp. 237–38.
[8] *Canadian Foundation for Children Youth and the Law v. Canada,* [2004] 1 S.C.R. 76 at paras. 31–34, 38.

## B. Canada's international obligations require that coercion be only exceptionally imposed on the basis of impairment

23. The principles of the *CRPD* favour an interpretation of the *AGA* that would strictly limit the circumstances under which the state may unilaterally impose coercive measures on a person because of their impairments. Interpreting the *AGA* to allow for one coercive order, which can be renewed only once, would bring the legislation closer to conforming to Canada's international obligations than the interpretation favoured by the respondent.

24. Among other general principles, the *CRPD* is based on "[r]espect for inherent dignity, individual autonomy, including the freedom to make one's own choices, and independence of persons", "non-discrimination", and "full and effective participation and inclusion in society" (art. 3). These values infuse arts. 14 and 19, which require States Parties to ensure that persons with disabilities, on an equal basis with others, enjoy the right to liberty and security of person, as well as the right to live independently, with the opportunity to choose their place of residence and where and with whom they live.

25. Article 14 of the *CRPD* unambiguously forbids the detention of persons with disabilities without their free and informed consent, where disability — in whole or part — is the basis for that detention.[9] The drafting committee rejected proposals that would limit this prohibition of detention to cases "solely" determined by disability.[10]

26. The Committee on the Rights of Persons with Disabilities (the Committee) has consistently informed States that statutes authorizing involuntary commitment based on impairment violates art. 14 and must be repealed.[11] This includes any law that allows involuntary confinement for the purposes of treatment or preventative detention.[12] For example, in 2017, the Committee commented on Canada's failure to comply with art. 14,

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[9] Article 14 provides that "the existence of a disability shall in no case justify a deprivation of liberty" (emphasis added).
[10] Office of the High Commissioner for Human Rights, *Thematic Study on Legal Measures for Ratification and Implementation of CRPD* (2009), A/HRC/10/48 at para. 48.
[11] See, e.g., Committee on the Rights of Persons with Disabilities, *Guidelines on the right to liberty and security of persons with disabilities* (2015), A/72/55 at para. 10.
[12] Office of the High Commissioner for Human Rights, *Thematic Study on Legal Measures for Ratification and Implementation of CRPD* (2009), A/HRC/10/48 at paras. 48–49.

writing, “The Committee is concerned about… detention of persons with psychosocial disabilities in psychiatric institutions on the basis of impairment, across various State party jurisdictions”.[13]

27. When the Committee has inquired about Canada’s failure to end involuntary detention of persons with disabilities on the basis of impairment,[14] Canada has responded by emphasizing the strict limits on such detention imposed by provincial legislation.[15]

28. In a similar vein, under art. 19, persons with disabilities have the rights to choose their place of residence on an equal basis with others, to have access to community services, and to not be segregated from the community. Accordingly, arrangements for residential care made against the wishes of a person with disabilities are contrary to international law.[16]

29. The *AGA*’s purpose is consistent with the overarching values of the *CRPD.* As Warren J. recognized in *A.H.*, the purpose of the *AGA* 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.”[17] The *AGA* ensures, in her words, “[a]n adult's right to receive beneficial help when needed, but not to excess”, recognizing that “[a] suffocating blanket of paternalism can be as detrimental as neglect”.[18]

30. The text of the *AGA* does intend to depart from arts. 14 and 19 insofar as a court can impose a support and assistance order against a person’s wishes and that order may

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[13] Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Canada* (2017), CRPD/C/CAN/CO/1 at para. 31(a).
[14] Committee on the Rights of Persons with Disabilities, *List of issues prior to submission of the combined second and third periodic reports of Canada* (2019), CRPD/C/CAN/QPR/2-3 at para. 13(a).
[15] Department of Canadian Heritage, *Canada’s Second and Third Periodic Reports on the Convention on the Rights of Persons with Disabilities* (2022), CRPD/C/CAN/2-3 at para. 75.
[16] Office of the High Commissioner for Human Rights, *Thematic Study on Legal Measures for Ratification and Implementation of CRPD* (2009), A/HRC/10/48 at para. 50.
[17] *A.H. v. Fraser Health Authority,* 2019 BCSC 227 at para. 108.
[18] *A.H. v. Fraser Health Authority,* 2019 BCSC 227 at para. 102.

include detention. Even so, the statute authorizes such an order sparingly and in strictly defined circumstances. Again, s. 57 sets limits on the time period for which such an order can be imposed, and the number of times it can be renewed. Similarly, in *A.H.*, Warren J. found that the purpose of the *AGA* meant that any detention imposed as an emergency measure pursuant to s. 59 must be strictly circumscribed.[19]

31. The court below concluded, and the respondent submits in this appeal, that it would be absurd for the *AGA* to authorize only one order and one renewal. The court below rejected the appellant's jurisdictional submission in part because it would mean that "once an order has reached its maximum period the court can never impose a new order, regardless of need, risk of harm and incapability of the individual and regardless of when the new application is brought on".[20] Similarly, the respondent submits that the appellant's submission would "provide an arbitrary and one-time maximum of two years' of support and assistance" and would "completely undermine[] the purpose of the *AGA* to provide effective support and assistance to vulnerable adults".[21]

32. The implication that such a state of affairs would be absurd is based on the assumption that coercive measures must always be available to be imposed on those with disabilities, an assumption belied by the international legal norms reflected in the *CRPD*. The *CRPD* reveals that limiting the court's jurisdiction to one original order and one renewal cannot be considered absurd. To the contrary, this interpretation would be *more* consistent with the guiding principles of the *CRPD,* which emphasize that depriving a person's liberty on the basis of their disability unjustifiably compromises their human rights. And to the extent the text allows, the values inherent in the *CRPD* should be given effect in statutory interpretation.

33. In light of the foregoing, to ensure that Canada's domestic law respects these international human rights norms, the correct interpretation of s. 56 of the *AGA* must promote the autonomy of persons with disabilities and consider the authorization of

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[19] *A.H. v. Fraser Health Authority,* 2019 BCSC 227 at para. 126.
[20] *Fraser Health Authority v. N.C.*, Oral Ruling on Application dated December 11, 2020 at para. 16.
[21] Respondent's Factum at para. 158.

coercive measures to be exceptional.

## C. The *AGA* must not be used to impose coercive measures to make up for inadequate community supports

34. In a s. 56 hearing, the application judge should be attuned to whether the adult has decided not to accept the proposed support and assistance plan due to inadequate community supports, including a failure to facilitate the adult's autonomy and dignity. The judge should actively inquire about the availability of less intrusive options that may be more acceptable to the adult. Detaining persons with disabilities due to a lack of community supports necessary for an adequate standard of living would violate the rights recognized in the *CRPD*. This would use use one rights violation (lack of adequate community supports to facilitate autonomy and provide an adequate standard of living) to justify another (forced intervention and involuntary detention).

35. Although the parties do not appear to raise the merits of the application in their written materials, DABC and CLAIHR make this submission to assist the Court in the event that it decides to provide guidance to the Provincial Court on the procedure to follow and factors to consider in imposing a support and assistance order.

36. The *CRPD*'s respect for dignity and autonomy not only protects persons with disabilities from coercive practices, but also requires that their *dignity and autonomy be promoted and facilitated* by the government. Article 19 of the *CRPD* recognizes a right to live in the community "with choices equal to others". Similarly, under art. 28 of the *CRPD*, persons with disabilities have the right to an adequate standard of living.

37. Giving effect to these protections for persons with disabilities means "providing for support services that facilitate independence in their daily lives."[22] Deinstitutionalization envisages "systemic transformation and the progressive increase of support and alternative services available in the community".[23] Institutionalization is "not just about

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[22] Human Rights Council (HRC), *Thematic study on the right of persons with disabilities to live independently and be included in the community* (2014), A/HRC/28/37 at para. 9.
[23] Human Rights Council (HRC), *Thematic study on the right of persons with disabilities to live independently and be included in the community* (2014), A/HRC/28/37 at para. 53.

living in a particular setting; it is, above all, about losing control as a result of the imposition of a certain living arrangement."[24] Persons with disabilities have the rights to choose their place of residence on an equal basis with others, to have access to services such as "in-home, residential and other community support services", and to not be isolated or segregated from the community. It is the government's obligation to ensure the availability of these supports so that these rights do not ring hollow.

38. For these reasons, the application judge should take an active role in a s. 56 hearing, making inquiries about whether a less intrusive, more effective order is possible, including solutions that would address any identifiable reasons for the adult's rejection of the support and assistance plan. For example, if the adult's rejection of the plan was partially or wholly due to the proposed location of the services, the application judge should inquire about other possible locations, potentially standing the matter down to allow the designated agency's counsel to make inquiries, or even ordering the designated facility to attempt to secure acceptable services and to report back to the court within a certain period of time.

39. Courts applying the *CRPD* have recognized the necessity of services that facilitate the autonomy and dignity of a person with disabilities. In *Jivan v. Romania*, the European Court of Human Rights interpreted a Romanian law in accordance with arts. 19 and 28. In explaining why the domestic Romanian courts erred in finding that the applicant did not require a personal assistant, the Court found:

> In particular, the applicant's right to autonomy and respect for his dignity do not seem to have been taken into account in the domestic assessments in question …. His living conditions and the lack of a support network – provided either by neighbours or by his family – were not mentioned in those decisions either. Moreover, the authorities did not take into account the applicant's age or the fact that he had lost his leg at the age of eighty-five (see paragraph 5 above). The implications that such a drastic change must have had on the life of an old person were not referred to in the domestic assessments either. Nothing in the impugned decisions explained the apparent discrepancies between the applicant's particular situation of a lack of autonomy and support, and the finding that he was not entitled, under the domestic law, to a personal

[24] Human Rights Council (HRC), *Thematic study on the right of persons with disabilities to live independently and be included in the community* (2014), A/HRC/28/37 at para. 21.

> assistant. As a consequence of those decisions, the applicant was left to fend for himself and the authorities did not offer any alternative practical arrangements to ensure him the constant support he needed.[25]

40. The Provincial Court has inquired about and imposed a less intrusive support and assistance order than was sought by the designated agency in the context of a s. 56 application. In *A.K.H.*, the designated agency sought to place the adult in a shared living home in Abbotsford.[26] The adult was Indigenous and objected to placement in Abbotsford because it was far away from her First Nation. The application judge found that this was not the least restrictive and intrusive way of providing support and assistance, and instead ordered that an alternative residence in Richmond, Delta, or Surrey — closer to the First Nation — be secured.

41. In other words, it should be incumbent on the health authority to satisfy the court that there are no other feasible, less restrictive alternatives. And the court, where circumstances call for it, ought to take a proactive role in canvassing other possibilities before making an order that would restrict a person's liberty more than necessary.

## PART 4 – ORDER SOUGHT

42. DABC and CLAIHR take no position on the appropriate order in this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 29th day of May, 2023.



**Mark Iyengar**



**Sarah Pringle**

[25] *Jivan v. Romania*, 62250/19 at para. 49 (E.C.H.R.).
[26] *Fraser Health Authority v. A.K.H. et al.*, 2017 BCPC 355 at paras. 75–83, 85–86.

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