Citation: Jablonski v Director of Psychiatric Services, 2025 MBCA 34
Date: 20250422
Docket: AI23-30-09947

# IN THE COURT OF APPEAL OF MANITOBA

*Coram:* Madam Justice Diana M. Cameron
Mr. Justice James G. Edmond
Madam Justice Anne M. E. Turner

***B E T W E E N**:*

| | | |
|---|---|---|
| | ) | ***J. Duncan*** |
| ***FRED JABLONSKI*** | ) | *for the Appellant* |
| | ) | |
| | ) | ***E. I. Goldenberg** and* |
| *(Applicant) Appellant* | ) | ***B. Noyes*** |
| | ) | *for The Director of* |
| | ) | *Psychiatric Services* |
| *- and -* | ) | |
| | ) | ***A. L. Kaufmann*** |
| | ) | *for The Public Guardian* |
| ***THE DIRECTOR OF PSYCHIATRIC*** | ) | *and Trustee* |
| ***SERVICES and THE PUBLIC GUARDIAN*** | ) | |
| ***AND TRUSTEE*** | ) | *Appeal heard:* |
| | ) | ***October 7, 2024*** |
| | ) | |
| *(Respondents) Respondents* | ) | *Judgment delivered:* |
| | ) | ***April 22, 2025*** |

On appeal from *Jablonski v Director of Psychiatric Services*, 2023 MBKB 47 [*Jablonski*]

## CAMERON JA

### Introduction

[1] This decision addresses the refusal of the application judge to cancel the appointment of the respondent, the Public Guardian and Trustee (the PGT), as committee of property and personal care over the applicant

(Mr. Jablonski), (the order), in circumstances where the application judge determined that she was not prepared to rely on the medical opinion of the doctor (Dr. Etkin) supporting the appointment. It also addresses the condition placed on the order by the application judge providing that the order did not authorize the PGT to consent to Mr. Jablonski's medical treatment or health care (the consent to medical treatment prohibition).

[2] The order was made by the respondent, the Director of Psychiatric Services (the director), pursuant to section 61(1) of Part 8 of *The Mental Health Act*, CCSM c M110 [the *MHA*]. Mr. Jablonski applied to the Court of King's Bench to cancel the order pursuant to section 62(1) of the *MHA*. After a two-day hearing, the application judge dismissed the application but added the consent to medical treatment prohibition.

[3] Mr. Jablonski appeals the decision of the application judge dismissing his application to cancel the order. The PGT cross appeals, asking that the consent to medical treatment prohibition be set aside.

[4] For the following reasons, I would dismiss Mr. Jablonski's appeal and allow the cross appeal of the PGT.

Background

[5] At the time the application judge provided her reasons, Mr. Jablonski was seventy-five years of age. He lived alone in the house that he owned. Mr. Jablonski's problems appear to have started in 2019 when he refused to allow Manitoba Hydro into his home to install a new hydro meter, which resulted in his electrical service being discontinued. As a result, his furnace did not work and he had no heat.

[6] As well, his water service had been shut off for a few years prior to the hearing. While the water was shut off at Mr. Jablonski's request, the application judge noted that it was not clear whether it was shut off because his pipes had burst as he had no heat when his electricity was discontinued or due to an ongoing dispute he was having with the City of Winnipeg regarding his water bill. In addition, Mr. Jablonski was not paying his property taxes and risked losing his house to a tax sale.

[7] Mr. Jablonski had recurrent frostbite. In March 2022, he developed a wound on his toe as a result of frostbite. A surgeon recommended that he have the toe removed but he refused. In May 2022, he attended the wound clinic that was run by home care (the clinic) where he met with Hillary Hilderman, a registered psychiatric nurse (Nurse Hilderman). This meeting had been arranged by the nurse who had been attending to Mr. Jablonski's wound on a regular basis.

[8] Nurse Hilderman worked with a program called My Health Team as a chronic diseases management clinician. Her job included working with family doctors and their patients in complex situations. The purpose of the meeting was to discuss Mr. Jablonski's outstanding utility bills so that she might help him with figuring them out. As a result of Nurse Hilderman's discussions with Mr. Jablonski, she became concerned about his well-being, as well as his thought content regarding the outstanding utility bills. Among other things, he shared paranoid thoughts about Manitoba Hydro, as well as the government and arrangements it made with Donald Trump. He also shared his belief that his neighbours were filling their pools with water from his home. She learned that he was also in arrears with his property taxes. She testified that she felt "stuck" and needed further assessment as to what to do

next, so she contacted the Health Outreach and Community Support team and arranged for Mr. Jablonski to meet with Dr. Etkin.

[9] In June 2022, Mr. Jablonski attended the clinic where he met with Nurse Hilderman and Dr. Etkin. Dr. Etkin testified that, at the time, he was a psychiatrist with a team that was a project of the Winnipeg Regional Health Authority named the Health Outreach Service. The team's job was to work with people who were homeless, or at risk of becoming homeless, and people who were unsafe in their houses or people who were living in shelters or housing-first situations. The purpose of the meeting was for Dr. Etkin to complete a psychiatric assessment of Mr. Jablonski based on the concerns raised about his ability to manage his property and affairs. However, Mr. Jablonski indicated that he did not want to have anything to do with Dr. Etkin, although he did describe to Dr. Etkin his understanding of the PGT and why that did not apply to him. Dr. Etkin said that the entire interaction with Mr. Jablonski only lasted a few minutes as Mr. Jablonski refused to be interviewed.

[10] As a result of all the information that he had, including Mr. Jablonski's medical records and his history as presented mostly by Nurse Hilderman, Dr. Etkin issued a Form 21 certificate of mental incapacity as provided for in section 60(1) of the *MHA* (the certificate of incapacity). The certificate of incapacity was supported by the psychiatric evaluation prepared by Dr. Etkin and the social history prepared by Nurse Hilderman regarding Mr. Jablonski's mental condition and his living conditions. These documents were then forwarded to the director and the Chief Provincial Psychiatrist for the Department of Mental Health, Wellness and Recovery for the Province (Dr. Simm).

[11] Upon reviewing the certificate of incapacity, Dr. Simm was satisfied that a committee should be appointed and notified Mr. Jablonski of his intent to issue an order appointing the PGT as committee over some or all of Mr. Jablonski's property or personal care and notifying him of his right to object pursuant to section 60(6) of the *MHA*.

[12] Mr. Jablonski filed a written objection. However, he failed to follow through with an objection interview, nor did he contact Dr. Simm's office to discuss his objection.

[13] In his capacity as director, Dr. Simm issued the order in July 2022.

The Decision of the Application Judge

[14] As earlier stated, Mr. Jablonski made an application pursuant to section 62(1) of the *MHA* to cancel the order. He represented himself at the subsequent hearing and testified on his own behalf.

[15] I pause here to note that, at a pre-hearing conference regarding Mr. Jablonski's application to cancel the order, the application judge asked the director to arrange for an assessment by an independent psychiatrist, which was done. However, Mr. Jablonski refused to see the appointed psychiatrist because he believed the psychiatrist was Jewish.

[16] In her reasons dismissing the application, the application judge reviewed the background leading up to the proceedings. She then summarized the applicable provisions of the *MHA*. She noted that the *MHA* provides two processes for the appointment of a committee of property and/or personal care. Part 8 of the *MHA* is titled "Committeeship Without a Court Order". It is the

process that was used in this case. It authorizes the director to issue an order appointing the PGT as committee of a person based on a certificate of incapacity filed by a physician that states that, "because of a mental condition, the person is incapable of managing his or her property or of personal care" (the *MHA*, s 60(1)).

[17] Next, the application judge referred to another process by which a committee could be appointed over an individual's property and personal care. That process involves an application made pursuant to Part 9 of the *MHA* titled "Court-Appointed Committees". This process empowers the Court to appoint a committee of a person. Such an order requires evidence of incapacity from at least two physicians (see the *MHA*, s 72(1)(d)). The application judge noted that such orders are usually applied for by a family member.

[18] In determining the matter, the application judge stated that the issue was whether Mr. Jablonski suffered a "mental condition" that caused him to be incapable of managing his property or personal care. She noted that the *MHA* does not define a "mental condition" but that it is something other than a "mental disorder" (*Jablonski* at para 19), which is defined in the *MHA*.

[19] She felt that the case involved "an assessment of whether the evidence crosse[ed] the line from showing that Mr. Jablonski [was] a person who exercis[ed] bad judgment to showing that he [was] a person whose mental condition caus[ed] him to do so" (*Jablonski* at para 15).

[20] After considering the evidence, the application judge stated that she placed no weight on Dr. Etkin's evidence regarding Mr. Jablonski's incapacity to manage his property or personal care on the basis that Dr. Etkin

did not interview Mr. Jablonski. As well, she discounted his opinion as it was based on the social history prepared by Nurse Hilderman, who had only spoken to Mr. Jablonski once before preparing it. She noted that Nurse Hilderman's social history information had been received from others. In addition, she stated that she was troubled by Dr. Etkin's reluctance to attend the hearing and be cross-examined. Based on this, she questioned his engagement in the process and the strength of his opinion.

[21] Given her findings regarding Dr. Etkin's evidence, the application judge concluded that she had no medical evidence regarding Mr. Jablonski's mental condition. She mentioned that Mr. Jablonski had refused to seek a psychiatric report based on an assessment arranged by the director because, based on the psychiatrist's last name, Mr. Jablonski believed the psychiatrist was Jewish and refused to see him.

[22] The application judge stated that she could order Mr. Jablonski to submit to a medical examination pursuant to section 74 of the *MHA*. However, given the circumstances of his previous refusals, she felt that such an order would be pointless. She concluded that a consideration of both Part 8 and Part 9 of the *MHA* provided her the authority to consider the other evidence called at the hearing in determining whether the order should be cancelled. Alternatively, she found authority to allow the Court to proceed without medical evidence pursuant to the Court's *parens patriae* jurisdiction.

[23] The application judge agreed that Mr. Jablonski's living conditions were placing his life in jeopardy and his financial mismanagement put him at risk of losing his home and living on the streets.

[24] She then considered Mr. Jablonski's argument that he had the right to make bad choices and agreed that some of his explanations for not paying his utility bills were understandable. However, his explanation that he was not paying income tax because he disagreed with the way the Prime Minister was spending taxpayer money was not reasonable.

[25] Relying on Dr. Etkin's definition of the term "delusional" she found that it applied to Mr. Jablonski (*Jablonski* at paras 34-35). She found that Mr. Jablonski:

- is paranoid and believes everyone is out to get him and that his neighbours are trying to sell his house;
- believes that Dr. Etkin, Dr. Simm and Nurse Hilderman were trying to control him, sell his house and put him in a hotel;
- believes that Nurse Hilderman arranged the meeting with Dr. Etkin to entrap him and refuses to believe either she or Dr. Etkin were motivated by a concern for his well-being;
- is unwilling to accept even the most obvious truths, such as it was Nurse Hilderman who he saw at the clinic and not someone else;
- maintains beliefs regarding the dispute he has with his neighbour that caused him to build a fence around his property and put several padlocks on his door, which he believes the neighbour breaks through to siphon water from his property and to enter his residence at night to steal his property;

- refused to be interviewed by Dr. Etkin or the psychiatrist suggested in the pre-hearing process (despite being told by the application judge that this was important medical evidence to support his application) and is convinced the medical personnel he dealt with were acting illegally;

- gave conflating explanations for events that made it impossible to determine the veracity of what he said and, the more he spoke in court, the more he convinced her the order was required; and

- exhibits extreme distrust of everyone, which causes him to refuse to engage with anyone who may be able to assist him.

[26] The application judge concluded that the above, along with the concerns raised in Nurse Hilderman's social history report, satisfied her that Mr. Jablonski's mental condition rendered him "incapable of managing his affairs and that it [was] in his best interests that the PGT act[ed] as committee" (*ibid* at para 37).

[27] Despite dismissing his application to cancel the order of committeeship, the application judge determined that "[t]he ***MHA*** creates a higher threshold for determining if a person is incapable of managing their personal care than managing their property" (*Jablonski* at para 38). After quoting the test for the meaning of incapacity, found in section 3 of the *MHA*, the application judge said that, while Mr. Jablonski had made bad decisions about his personal care, his decision not to consent to the amputation of his toe turned out to be the right one. She added that, even if it was not the right

decision, she was not sure that it was an unreasonable one. She stated that Mr. Jablonski should be involved in his future health care decisions.

[28] Regarding the consent to medical treatment prohibition, the application judge acknowledged the limitations on the PGT's authority to make health care decisions found in the *MHA*. Nonetheless, she determined that she would not allow the PGT the authority to override Mr. Jablonski's consent or lack thereof to medical treatment or health care. She stipulated that the PGT would require a court order to do so.

The Appeal

*Grounds of Appeal*

[29] Mr. Jablonski asserts that the application judge did not have the jurisdiction to uphold the order made pursuant to Part 8 and had no jurisdiction to appoint a committee pursuant to Part 9 of the *MHA*. Alternatively, he submits that the application judge erred in finding that he was not capable of managing his property and personal care.

*The Positions of the Parties*

Mr. Jablonski

[30] Mr. Jablonski was represented by counsel at the appeal. He argues that the appointment of a committee of a person's property and/or personal care is a significant interference with their personal autonomy and right to life, liberty and security of the person pursuant to section 7 of the *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act*, *1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. He submits that

these rights must be zealously protected by the courts. Thus, he argues that strict interpretation of the *MHA* and compliance with it is essential.

[31] He also submits that the application judge did not specify whether her refusal to cancel the order was made pursuant to Part 8 or Part 9 of the *MHA*. Regarding Part 8, he argues that the application judge did not have jurisdiction to uphold the order made by the director on the basis that section 60 of Part 8 of the *MHA* requires a physician to examine the person before completing a certificate of incapacity. He argues that Dr. Etkin did not examine him. Furthermore, he asserts that Dr. Etkin's opinion was based on his conversation with Nurse Hilderman. Therefore, Mr. Jablonski submits that the opinion provided for the certificate of incapacity was not that of a physician. Absent compliance with the legislation, he argues that the order is invalid.

[32] Next, Mr. Jablonski submits that, in addition to the Court not having jurisdiction to confirm the order pursuant to Part 8, the application judge did not have jurisdiction to appoint a committee pursuant to Part 9 of the *MHA*. He argues that subsections 75(1) and 75(2) of Part 9 of the *MHA* only authorize the Court to appoint a committee where a person has applied for it. In this case, he says there has been no such application.

[33] In the alternative, Mr. Jablonski argues that the application judge erred by finding that he was incapable of managing his property and personal care. He argues that there is no authority for a court to determine capacity in any part of the *MHA*. He submits that a finding of incapacity can only be made by a physician pursuant to section 60 of Part 8 of the *MHA*. He asserts that incapacity is a medical conclusion alone.

[34] In oral argument, Mr. Jablonski argued that there was no gap in the legislation, that the *MHA* covered the issue of persons who do not have capacity to take care of themselves and that the *parens patriae* jurisdiction of the Court therefore did not apply.

The Director

[35] The director agrees that section 60(1) of Part 8 of the *MHA* requires a physician to examine a person prior to completing a certificate of incapacity. However, the director asserts that the application judge erred in her interpretation of the word "examine" in that section. The director submits that the word "examine" must be interpreted broadly. Relying on *Nelson v Livermore*, 2017 ONCA 712 [*Nelson*] and *Mullins v Levy*, 2009 BCCA 6 [*Mullins*], the director submits that the legislative scheme cannot be overcome simply by a person refusing to be interviewed. Rather, an examination must be interpreted to include a review of the individual's medical information, history, other information and, where possible and necessary, interviewing the person. The director agrees that the physician must attempt to interview the individual but submits that the actions taken by Dr. Etkin complied with the definition of the term "examination".

[36] Additionally, the director argues that the application judge had the jurisdiction under the *MHA* to determine whether, due to a mental condition, Mr. Jablonski was incapable of managing his property and personal care independent of the medical evidence. He submits that the statutory interpretation engaged in by the application judge correctly allowed her the discretion to determine incapacity absent a physician's opinion.

[37] In the alternative, the director submits that the application judge did not err in relying on the Court's *parens patriae* jurisdiction.

The PGT

[38] The PGT relies on the director's arguments regarding the interpretation of the word "examination" in section 60(1) of the *MHA*. In addition, the PGT submits that the application judge erred in finding that Dr. Etkin's evidence should be disregarded.

[39] The PGT further submits that the application judge did not decide the matter pursuant to Part 9 of the *MHA*.

[40] Regarding the application judge's ability to uphold the order even if the certificate of incapacity has been found to be invalid, the PGT submits that a finding that such a certificate is valid is not a condition precedent to upholding an order of committeeship. Rather, the PGT submits that, on hearing an application to cancel an order pursuant to sections 62(1) and 62(5) of Part 8 of the *MHA*, the Court is allowed "to make any order that is appropriate based on the evidence presented by the person alleged to be incapable and any other party to the proceeding."

*The Issues Reframed*

[41] The application judge dismissed the application to cancel the order of committeeship made pursuant to Part 8 of the *MHA*. She did not purport to have the authority to appoint a committee or to otherwise deal with Mr. Jablonski's application pursuant to Part 9 and did not do so. Therefore, I

need not consider Mr. Jablonski's argument that she lacked jurisdiction to make the order pursuant to Part 9 of the *MHA*.

[42] Given the above, I would re-frame the issues raised as being threefold. The first is whether the application judge erred in placing no weight on Dr. Etkin's testimony given in support of the certificate of incapacity on the basis that he did not examine Mr. Jablonski (the examination issue). The second is whether she erred in interpreting the *MHA* in a manner that provided her the authority to proceed with the application absent medical evidence to determine Mr. Jablonski's capacity to manage his property and personal care (the interpretation issue). The final issue is whether the application judge had jurisdiction pursuant to the *MHA* to make an independent finding of incapacity (the jurisdiction issue).

*The Purposive Approach to Statutory Interpretation*

[43] Each of the issues raised involves a question of statutory interpretation. They are questions of law subject to appellate review on the standard of correctness (see *Housen v Nikolaisen*, 2002 SCC 33 at para 8 [*Housen*]).

[44] The modern principle of statutory interpretation enunciated by Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis, 2022), and endorsed in *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 (SCC), is well-known. Namely, "[t]he 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" (*ibid* at para 21) (the purposive approach).

[45] In order to understand the context and intent of the legislation, it is helpful to briefly consider the nature of orders of committeeship.

*Committeeship*

[46] At stated at page 19 in Anita Szigeti & Ruby Dhand, eds, *Law and Mental Health in Canada: Cases and Materials* (Toronto: LexisNexis, 2002): "Civil mental health legislation [such as the *MHA*] is rooted in the State's *parens patriae* powers", which were described by the Supreme Court of Canada in *E (Mrs) v Eve*, 1986 CanLII 36 (SCC) as being "founded on necessity, namely the [State's] need to act for the protection of those who cannot care for themselves" (at para 73).

[47] While protection of others is a meritorious goal, as stated by the application judge, "[c]ommittee orders are a significant invasion of a person's autonomy" and "are not issued simply because a person exercises bad judgment or because a person is not acting in their own best interests" (*Jablonski* at para 16).

[48] The application judge also accurately observed that courts should be cautious in considering evidence regarding a person's capacity. In reviewing the nature of proof required in such cases, she stated (*ibid* at para 17):

> In ***Temoin v. Martin***, 2012 BCCA 250 (CanLII), the appellant sought a court order requiring her 87 year old father to submit to medical examination by a psychiatrist to determine if he was capable of managing his affairs. In commenting on the standard of proof, Nielson J.A. said:
>
> > [60] There is considerable support for a high evidentiary threshold in these circumstances. The analysis must begin with the premise that Mr. Martin enjoys the benefit of the presumption of capability. The decisions of this Court in

> *McNeal* and *Kartsonas* affirm the significance of losing personal autonomy to a committee. The Supreme Court in *Re Eve* advocated a cautionary approach to exercising *parens patriae* jurisdiction, and emphasized it must be used for the benefit of the person in need of protection, and not to benefit others. That Court has also repeatedly affirmed that the common law should be informed and guided by the values set out in the Canadian Charter of Rights and Freedoms: *R.W.D.S.U. v. Dolphin Delivery Ltd*., [1986] 2 S.C.R. 573 at 603, 33 D.L.R. (4th) 174; *Hill v. Church of Scientology of Toronto* (1995), 126 D.L.R. (4th) 129 at 155 (S.C.C.); *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd*., 2002 SCC 8 at paras. 18 and 21, [2002] 1 S.C.R. 156. Ms. Temoin's application unquestionably implicates principles of liberty, autonomy and equality, and Charter values are thus inescapably engaged. Those values are given meaning by requiring a level of proof that is commensurate with both the importance of the individual interests and the seriousness of the intervention at stake.
>
> [emphasis added by application judge]

[49] In my view, the above accurately reflects the nature of such orders and the evidence required to justify such an order.

[50] Having considered the standard of review, the approach to statutory interpretation and the nature of the order in question, I now turn to the issues identified.

*The Examination Issue*

[51] Section 60(1) of the *MHA* provides:

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|---|---|
| **Physician's certificate of incapacity**<br>**60(1)** When a physician examines a patient who is about to be discharged from a facility, or a person who is not | **Certificat médical d'incapacité**<br>**60(1)** Peut remplir un certificat d'incapacité le médecin qui examine un malade sur le point d'obtenir son congé d'un |

a patient in a facility, and is of the opinion that

(a) because of a mental condition, the person is incapable of managing his or her property or of personal care; and

(b) the incapacity is not due exclusively to an intellectual disability as defined in *The Adults Living with an Intellectual Disability Act*;

the physician may complete a certificate of incapacity, with reasons for the opinion.

établissement ou une personne qui n'est pas un malade dans un établissement, s'il est d'avis à la fois :

a) qu'en raison de son état mental, la personne touchée est incapable de gérer ses biens ou de s'occuper de ses soins personnels;

b) que l'incapacité n'est pas uniquement attribuable à une déficience intellectuelle au sens de la *Loi sur les adultes ayant une déficience intellectuelle*.

L'avis du médecin doit être motivé.

[52] The term "examine" is not defined in the *MHA*. The meaning of the word "examine" in the *MHA* did not arise in the proceedings before the application judge and was not considered by her. In my view, its meaning is essential in the determination of Mr. Jablonski's argument that he was not examined and therefore the certificate of incapacity was invalid because the procedural requirements were not followed.

[53] The case law referred to by the director indicates a broad interpretation of the term "examine" in similar legislation in other jurisdictions. For example, in *Mullins*, the Court considered the definition of the term "examine" in the context of the then section 22 of the *Mental Health Act*, RSBC 1996, c 288 that, at the relevant time, required examinations be completed and medical certificates be filed by two physicians prior to a person

being involuntarily admitted to a mental health facility (see *Mullins* at para 33). In that case, the Court considered expert medical evidence, medical dictionaries and the purpose of mental health legislation in holding that the trial judge erred in narrowly construing the word "examination" as necessitating a personal interview of the person subject to involuntary admission. The Court stated at para 106:

> Having regard to the views of the physicians, the purpose of the ***Act***, and the interpretation of the word in its ordinary usage in the medical context, in my opinion the term "examination" must be given a broad interpretation so as to be applicable in the myriad of circumstances that confront physicians called upon to make the serious decision to involuntarily commit persons to a psychiatric facility. "Examination", in this context, must mean observing the person, reviewing the patient's chart (if there is one), reviewing the available history and collateral information, and where possible (in the sense that the person complies) and necessary (in the sense that the information to be gained is not available from other sources) conducting a personal interview with the person to be admitted.
>
> [emphasis added]

[54] In *Nelson*, the Court endorsed the above definition of "examination" in the context of the involuntary admission provisions of the *Mental Health Act*, RSO 1990, c M.7. In considering the refusal of the individual to participate in an interview, the Court stated that "[t]he scheme cannot be so easily defeated by the simple failure of an individual to participate in the assessment process. . . . [T]here may be factors, such as a mental disorder itself, that prevent individuals from having meaningful interactions with a physician" (*Nelson* at para 79). The Court concluded that, in such situations, other measures may have to be taken to evaluate the individual.

[55] In my view, the above definitions of the term "examination" utilized by courts interpreting similar legislation are persuasive. I see no reason why they should not be applied to the situation in this case and I would adopt them.

[56] I would also observe that the application judge's reasons demonstrate that she was well versed in the specific wording of the *MHA,* as well as the jurisprudence regarding committeeship. In this regard, I note that the application judge did not state that Dr. Etkin did not *examine* Mr. Jablonski. In her reasons, she repeatedly stated that Dr. Etkin did not *interview* Mr. Jablonski. Therefore, I question Mr. Jablonski's assertion that the application judge held that he was not examined.

[57] Furthermore, I am of the view that the determination as to whether an examination occurred, as opposed to whether the examination was sufficient, are two different questions. In my view, the application judge found that the examination was not sufficient, as opposed to non-existent. This is reinforced by the language she used in her reasons, stating that she did not rely on his "*opinion*" (*Jablonski* at para 18) [emphasis added] or his "*evidence*" (*ibid* at para 21) [emphasis added] in part because he did not *interview* Mr. Jablonski (as opposed to *examine* him). It is also reinforced by the application judge's reference in *Jablonski* at para 21 to *Cepuran v Carlton*, 2022 BCCA 76 at paras 110-20, when she acknowledged that the fact that Dr. Etkin did not interview Mr. Jablonski did not preclude her from relying on Dr. Etkin's opinion.

[58] The issue then becomes whether the application judge erred in finding that she could not rely on the opinion of Dr. Etkin, as argued by the PGT. This finding is reviewable on the standard of palpable and overriding

error (see *R v Thomas (RT)*, 2010 MBCA 91 at paras 51, 67; *Housen* at paras 10-28).

[59] Aside from her findings that Dr. Etkin did not interview Mr. Jablonski and that his opinion relied on Nurse Hilderman's information, the application judge was also concerned about Dr. Etkin's engagement in the process. She emphasized Dr. Etkin's refusal to attend court even though the Court had accommodated him being out of town over the winter by permitting him to testify by video. She noted that his lawyer ultimately convinced him to attend by video. She stated: "But, the fact that he was the linchpin of the process under Part 8 of the ***MHA***, yet was reluctant to be cross-examined, leads one to question his engagement in the process and undermines the strength of his opinion" (*Jablonski* at para 22).

[60] While I note with some sympathy the director's position that the apparent refusal to testify was a simple misunderstanding on Dr. Etkin's part, I am not persuaded that the application judge made any palpable and overriding error in this regard.

[61] In summary, the application judge did not find that Dr. Etkin did not *examine* Mr. Jablonski. Rather, she found that he did not *interview* him and this, along with the other factors discussed above, led her to place no weight on Dr. Etkin's opinion. I am not persuaded that she made a palpable or overriding error in this latter regard.

*The Interpretation Issue*

Reasons of the Application Judge

[62] In order to fully understand the arguments regarding this issue, it is important to highlight the basis on which the application judge held that she had the authority to consider whether the order should be upheld absent medical evidence. She stated (*ibid* at para 25):

> While medical evidence is usually required in these cases, in my view, it is open for me to consider, in fact I would be remiss to ignore, the other evidence before the court in determining whether the committee order should be cancelled. I say that for the following reasons. First, on an application to cancel an order of committeeship under Part 8, the court has broad discretion to make any order under the Act that it considers appropriate (s. 62(5)). This supports some flexibility in the process. Second, Part 9 of the ***MHA*** allows orders of committeeship to be made without medical evidence. Section 72 states that opinions from two physicians is required "unless the court directs otherwise." Third, to ignore the non-medical evidence of Mr. Jablonski's mental condition may place him at risk. To the extent that there is any gap in the legislation regarding the court's jurisdiction to protect vulnerable people, that is to say, to allow the court to proceed without medical evidence, the *parens patriae* jurisdiction would provide that authority.
>
> [emphasis added]

[63] *Parens patriae* aside, the application judge held that she could consider all the evidence that she did not reject and that such an interpretation was supported by her interpretation of the *MHA*.

[64] First, I agree with the application judge that she was obligated to consider all the evidence in the proceedings—including that of Mr. Jablonski. The issue is whether, given the provisions of Part 8 of the *MHA*, she could

find that Mr. Jablonski lacked capacity without relying on Dr. Etkin's certificate of incapacity or his opinion in that regard. If she could, the issue becomes whether she erred in reaching her conclusion regarding his incapacity. That involves a question of mixed fact and law subject to appellate review on the standard of palpable and overriding error (see *Housen* at para 25).

The Jurisprudence Regarding Evidence of Capacity

[65] In order to understand the significance of evidence regarding capacity, it is important to understand that the term "capacity" is a legal construct that is nuanced and differs in various contexts but, ultimately, it addresses "an ability to understand the relevant facts and an appreciation of the consequences of taking or not taking specific actions" (Sarah Lawson, "Testamentary Capacity in Canada: A Call for Medical-Legal Co-Operation" (2022) 43 Windsor Rev Legal Soc Issues 76 at 79).

[66] While the type of capacity at issue in this case (capacity to manage property and personal care) is one that is governed by statute (see the *MHA*, s 3, which is later reproduced in these reasons), others, such as testamentary capacity, have been developed at common law (see Kimberly A Whaley et al, "Standardizing the Assessment of Testamentary Capacity" (2017) 46:4 Adv Q 441 at 444). Given that, in essence, all forms of capacity consider one's mental condition and its impact on one's ability to make decisions about one's affairs, the determination of one form is informative of the others.

[67] Certainly, in the context of testamentary capacity, courts have recognized that medical evidence, while worthy of consideration, is not necessarily more important than layperson evidence in this regard. For

example, in *Stirling Estate, Re*, [1993] 134 NBR (2d) 17, 1993 CanLII 15509 (NBCA) [*Stirling*], a number of people gave evidence suggesting that the testator had testamentary capacity at the time she executed the impugned will. These persons included her lawyer, her long-time friend, her nurses and her doctors, who had observed the testator close to the time that she made her will. On the other hand, two doctors opined that her mental capacity was impaired, although neither had observed her. Their opinion was based on her medical records, including the nature of the medications she was on. The probate judge relied heavily on the opinions of the two doctors in determining that the testator did not have testamentary capacity.

[68] In overturning the decision of the probate judge, the appellate court noted that the two doctors had not observed the testator. It commented that the law does not require sophisticated medical evidence, such as a psychiatric report or a neurological examination, to support an evaluation of one's capacity (see *ibid* para 30) and, that in certain circumstances, the evidence of a layperson will be more informative (see *ibid* at para 31). In reaching its conclusion, it relied on the case of *Re Davis* (1963), 40 DLR (2d) 801, 1963 CanLII 118 (ONCA) [*Davis*], which stated at 809:

> Whether a person has testamentary capacity, *i.e*., whether he has a sound and disposing mind, raises a practical question which, so far at least as evidence based on observation and experience is concerned, as contrasted with evidence based on pathological findings, may be answered by laymen of good sense as by doctors.

[69] *Davis*, in turn, relied on the case of *O'Neil v Royal Trust Co*, 1946 CanLII 13 (SCC) in stating "that the testimony of the experts should not outweigh the testimony of eye-witnesses who had opportunities for observation and knowledge of the testatrix" (*Davis* at 810).

[70] Other cases reinforcing that the opinions of laypersons regarding testamentary capacity can be relied on include *James v Field*, 2001 BCCA 267 at paras 77-81, Rowles JA (not in dissent on this point) and at para 138, Prowse JA (for the majority); and *Laszlo v Lawton*, 2013 BCSC 305 at paras 198-99 [*Laszlo*].

[71] In the Manitoba case of *Slobodianik v Podlasiewicz*, 2003 MBCA 74, the trial judge accepted the evidence of a personal care home worker and the lawyer who executed the impugned will that the testator had capacity to execute it despite the doctor's opinion that he did not have capacity. Although, on the facts of that case, this Court found the trial judge's decision to be unreasonable, it stated, unequivocally, that "[t]here can be no doubt that the trial judge is entitled to accept cogent and compelling evidence contradicting [a medical opinion]" where such compelling evidence exists (at para 26).

[72] Although the above concerns testamentary capacity in the common law, in my view, the reasoning is informative when considering determinations of capacity to manage one's property or personal care. Courts have recognized that, while capacity focuses on the condition of a person's mind, thus often raising questions of a medical nature, ultimately, it is a legal construct and scientific or medical evidence is neither essential nor conclusive in determining its presence or absence (see *Laszlo* at para 198). Thus, a person of sound mind and reason, such as, for instance, a judge, exercising powers of observation and deduction, may form a judgment about capacity without the use of any scientific learning whatsoever (see *Re Price*, *Spence v Price* (1945), [1946] 2 DLR 592 at 595, 1945 CanLII 339 (ONCA), cited with approval in *Stirling* at para 31).

Statutory Interpretation—The *MHA*

[73] As earlier indicated, the process in this case was commenced pursuant to Part 8 of the *MHA*, which allows for committeeship appointments of the PGT by the director. The application judge determined that she could refuse Mr. Jablonski's application to cancel the order despite giving no weight to Dr. Etkin's opinion regarding Mr. Jablonski's incapacity. In reaching her conclusion, she relied on her discretion to make any order under the *MHA* she considered appropriate pursuant to section 62(5) of the *MHA*. She reinforced her conclusion by referring to section 72 of Part 9 of the *MHA* that she stated allows orders of committeeship to be made without medical evidence. She specifically noted that section 72(1)(d) requires opinions from two physicians "unless the court directs otherwise".

[74] Sections 62(1) and 62(5) of the *MHA* state:

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| **Application to court to cancel order**<br>**62(1)** A person who is notified under subsection 61(4) that the Public Guardian and Trustee has been appointed as committee, or any other person with leave of the court, may apply to the court for an order<br>(a) cancelling the order; or<br>(b) appointing a person other than the Public Guardian and Trustee as committee under Part 9. | **Requête en annulation**<br>**62(1)** La personne qui est avisée en application du paragraphe 61(4) de la nomination du tuteur et curateur public à titre de curateur ou une autre personne avec l'autorisation du tribunal peut demander à celui-ci une ordonnance :<br>a) d'annulation de l'ordre;<br>b) de nomination d'une personne autre que le tuteur et curateur public à titre de |

curateur en vertu de la partie 9.

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| **Order**<br>**62(5)** On hearing the application, the court may make any order under this Act that it considers appropriate. | **Ordonnance**<br>**62(5)** Après avoir entendu la requête, le tribunal peut rendre toute ordonnance que prévoit la présente loi et qu'il estime indiquée. |

[75] As suggested by the application judge, section 62(5) permits a broad discretion that supports a significant degree of flexibility in the way that the Court can conduct an application under Part 8.

[76] As well, I agree with the application judge's consideration of section 72(1) found in Part 9 of the *MHA*, the relevant portions of which state:

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| **Form of application: required documents**<br>**72(1)** Unless the court directs otherwise, an application under section 71 shall include the following: | **Documents à l'appui de la requête**<br>**72(1)** Sauf directives contraires du tribunal, la requête que vise l'article 71 est accompagnée : |
| . . . | . . . |
| (d) affidavits by at least two physicians describing the mental condition of the person alleged to be incapable. | d) des affidavits d'au moins deux médecins indiquant l'état mental du présumé incapable. |

[77] In contrast to Part 9, Part 8 does not require the Court to consider any specific evidence when deciding whether to cancel an order of committeeship pursuant to section 62(1) of the *MHA*.

[78] Nonetheless, the language of section 72(1) indicates that the Legislature deemed it appropriate for the Court, in certain circumstances, to determine if someone is mentally incapable in the absence of medical evidence speaking to their condition as indicated in section 72(1)(d).

[79] The only express reference to the Court's duties and powers in hearing applications to cancel committeeship orders under Part 8 is a provision that affords the Court the discretion to make *any* order that it deems appropriate under the *MHA* (see s 62(5)). Certainly then, under section 62, the Court would at the very least be afforded the same authority in that context as it would have when hearing and deciding an application under Part 9. It follows that, in hearing a section 62(1) application to cancel a committeeship order under Part 8, the Court would have the authority to decide the matter in the absence of medical evidence, as is the case in section 72(1)(d) of Part 9.

[80] I am reinforced in my view by the fact that other courts, considering similar statutory provisions addressing guardianship or committeeship orders, have held that medical assessments are not binding on the Court responsible for imposing, confirming or cancelling such orders (see e.g. *Horan v Fraser Health Authority*, 2022 BCSC 1951 at para 36).

[81] Thus, both the jurisprudence and an interpretation of the *MHA* support that the application judge did not err in concluding that she could determine Mr. Jablonski's application absent her acceptance of Dr. Etkin's evidence or the certificate of incapacity. It follows that she did not err in relying on the evidence of Nurse Hilderman and Mr. Jablonski, including her own observations of Mr. Jablonski throughout the proceedings, in dismissing his application to cancel the order.

*The Jurisdiction Issue*

[82] Section 60(1) of Part 8 of the *MHA* informs the criteria for appointing a committee of property or of personal care. It states:

**Physician's certificate of incapacity**
**60(1)** When a physician examines a patient who is about to be discharged from a facility, or a person who is not a patient in a facility, and is of the opinion that

(a) because of a mental condition, the person is incapable of managing his or her property or of personal care; and

(b) the incapacity is not due exclusively to an intellectual disability as defined in *The Adults Living with an Intellectual Disability Act*;

the physician may complete a certificate of incapacity, with reasons for the opinion.

**Certificat médical d'incapacité**
**60(1)** Peut remplir un certificat d'incapacité le médecin qui examine un malade sur le point d'obtenir son congé d'un établissement ou une personne qui n'est pas un malade dans un établissement, s'il est d'avis à la fois :

a) qu'en raison de son état mental, la personne touchée est incapable de gérer ses biens ou de s'occuper de ses soins personnels;

b) que l'incapacité n'est pas uniquement attribuable à une déficience intellectuelle au sens de la *Loi sur les adultes ayant une déficience intellectuelle*.

L'avis du médecin doit être motivé.

[83] Mr. Jablonski argues that the above provision provides that only a physician may make a finding of incapacity and that it is a medical conclusion alone.

[84] In my view, Mr. Jablonski's interpretation of Part 8 is too narrow. Given the scope of an application pursuant to Part 8 and my analysis of the authority of the Court provided pursuant to the *MHA*, I am of the view that this argument can be summarily dismissed.

*Conclusion on Appeal*

[85] The application judge was entitled to reject the evidence of Dr. Etkin's opinion regarding Mr. Jablonski's incapacity to manage his property and personal care. However, her finding did not go so far as to state that Dr. Etkin did not examine Mr. Jablonski. Rather, her conclusion was based on her finding that Dr. Etkin did not interview Mr. Jablonski, as well as on other issues she considered in the assessment of Dr. Etkin's evidence.

[86] The application judge did not err in determining that she had the authority to consider all of the evidence in this matter, including that of Mr. Jablonski, as well as her impressions of him in dismissing his request to cancel the committeeship order despite her rejection of Dr. Etkin's evidence.

[87] The application judge carefully considered Mr. Jablonski's contention that he was capable of managing his property and personal care. Nonetheless, despite engaging in a deeper probing of the issues than had been done by Nurse Hilderman, Dr. Etkin or the director, she determined that Mr. Jablonski was delusional and paranoid and, for reasons that she clearly articulated, his mental condition rendered him incapable of managing his

personal care or property. She found that it was in Mr. Jablonski's best interests that the PGT be appointed as committee (see *Jablonski* at para 37). Mr. Jablonski has not demonstrated that the application judge erred in law or that she made a palpable and overriding error in her application of the law to the facts in this regard.

[88] Given that I have found that the application judge did not err in her interpretation and application of the provisions of the *MHA*, I need not consider the issue of *parens patraie*.

[89] Based on the above, I would dismiss the appeal.

The Cross Appeal

[90] The PGT cross appeals the application judge's order to the extent that it provides that it "does not authorize the [PGT] to consent to medical treatment or health care."

[91] In support of the above, the PGT argues that the application judge erred in three respects:

a) she improperly conflated a finding of incapacity to manage personal care and incompetence to consent to medical treatment;

b) her decision to limit the PGT's authority was based on incorrect information regarding the PGT's powers and the health care decision-making process where the PGT has been appointed as guardian and trustee over an individual's personal care; and

c) her conclusions regarding Mr. Jablonski's health were unsupported by evidence and contrary to the testimony of health care professionals.

[92] Mr. Jablonski argues that, while the order made by the director was over personal care and property, the application judge inferentially found there had not been proof that he had been incapable of managing his personal care. Accordingly, he suggests the application judge found that the order regarding his property was valid but that the order as it related to his personal care was not.

[93] To start, I would disagree with Mr. Jablonski. The application judge's reasons state that Mr. Jablonski made bad decisions about his personal care (see *Jablonski* at para 39). Further, her order clearly stipulates that the order appointing the PGT *as committee of his person* and property does not authorize the PGT to consent to medical treatment.

[94] When appointed committee over a person's personal care pursuant to Part 8, the powers of the PGT are found in section 63(2) of the *MHA*, which provides:

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| **Powers re personal care**<br>**63(2)** The Public Guardian and Trustee may, for a person for whom an order is issued under section 61, | **Pouvoirs relatifs aux soins personnels**<br>**63(2)** Le tuteur et curateur public peut, pour la personne faisant l'objet de l'ordre visé par l'article 61 : |
| (a) determine where and with whom the incapable person shall live, either temporarily or permanently; | a) déterminer l'endroit où l'incapable doit demeurer et la personne avec qui il doit le faire, |

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| (b) subject to subsections (3) and (4), *consent or refuse to consent to medical or psychiatric treatment or health care on the incapable person's behalf, if a physician informs the Public Guardian and Trustee that the person is not mentally competent to make treatment decisions using the criteria set out in subsection 27(2);* | de façon temporaire ou permanente;<br><br>b) sous réserve des paragraphes (3) et (4), *consentir ou refuser de consentir à un traitement médical ou psychiatrique ou à des soins de santé au nom de l'incapable, si un médecin l'informe que celui-ci est mentalement incapable de prendre des décisions liées au traitement selon les critères énoncés au paragraphe 27(2)*; |
| (c) make decisions about daily living on the incapable person's behalf; and | c) prendre des décisions au sujet de la vie quotidienne au nom de l'incapable; |
| (d) commence, continue, settle or defend any claim or legal proceeding that relates to the person. | d) introduire, continuer, régler ou contester une demande ou une instance ayant trait à l'incapable. |

[emphasis added]

[95] The first two issues raised by the PGT involve the application judge's interpretation of section 63(2)(b). The PGT submits that the application judge erred when she conflated the question of capacity to make decisions regarding personal care and competence to make medical decisions. The PGT maintains that these are two distinct issues under the *MHA*. As well, the PGT submits that this error led the application judge to misunderstand the

powers and the health care decision-making process of the PGT when the PGT has been appointed as a committee of the personal care of an individual.

[96] The alleged errors constitute questions of law subject to appellate review on the standard of correctness (see *Housen* at para 8).

[97] In my view, the PGT's arguments are convincing. First, I note that an appointment of the PGT as committee over the personal care of an individual does not automatically mean that the PGT can make decisions about medical treatment or health care for a person. Before the PGT can act in the capacity of substitute decision maker in that regard, a physician must first determine that the person is not mentally competent to make decisions regarding their medical care..

[98] An examination of the legislation underscores the distinction between capacity to manage personal care and competence to consent to medical treatment.

[99] When determining whether to issue a certificate of incapacity pursuant to section 60(1) of the *MHA*, a physician must consider a number of relevant circumstances outlined in section 60(2), which states:

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| **Considerations**<br>**60(2)** In forming an opinion under subsection (1), the physician shall consider all the relevant circumstances, including the following:<br>(a) the nature and severity of the person's mental condition; | **Circonstances dont le médecin doit tenir compte**<br>**60(2)** Afin de se former une opinion, le médecin tient compte de toutes les circonstances pertinentes, et notamment :<br>a) de la nature et de la gravité de l'état mental de la personne; |

(b) the effect of the person's mental condition on his or her ability to manage property and capacity for personal care;

(c) the nature of the person's property and personal care requirements and any arrangements known to the physician that the person made, while competent, for the management of property and the appointment of a proxy; and

(d) whether or not decisions need to be made on the person's behalf about that property or with respect to personal care.

b) des conséquences de l'état mental de la personne sur sa capacité de gérer ses biens et de s'occuper de ses soins personnels;

c) de la nature des biens de la personne et de ses besoins en matière de soins personnels ainsi que des dispositions dont il a connaissance et que la personne a prises, pendant qu'elle était capable, en vue de la gestion de ses biens et de la nomination d'un mandataire;

d) de la question de savoir si des décisions doivent être prises au nom de la personne au sujet de ses biens ou à l'égard de ses soins personnels.

[100] Section 3 defines incapacity for personal care as follows:

**Meaning of incapacity for personal care**

**3** For the purpose of Parts 8 and 9, a person is incapable of personal care if he or she is repeatedly or continuously unable, because of mental incapacity,

**Incapacité relative aux soins personnels**

**3** Pour l'application des parties 8 et 9, une personne est incapable de s'occuper de ses soins personnels si elle ne peut, de façon répétée ou continue, en raison de son incapacité mentale :

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| (a) to care for himself or herself; and | a) prendre soin d'elle-même; |
| (b) to make reasonable decisions about matters relating to his or her person or appreciate the reasonably foreseeable consequences of a decision or lack of decision. | b) prendre les décisions voulues au sujet des questions qui ont trait à sa personne ou évaluer les conséquences raisonnablement prévisibles d'une décision ou d'une absence de décision. |

[101] It is significant that sections 3, 60(1) and 60(2) do not mention the competence of an individual to consent to medical treatment. This is underscored by the fact that section 63(3) specifically limits the ability of the PGT to make decisions regarding medical treatment, despite being appointed as committee of personal care, and the fact that section 27(2) sets out an independent list of factors to be considered when determining competence to consent to treatment. Section 27(2) of the *MHA* states:

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| **Determining competence**<br>**27(2)** In determining a patient's mental competence to make treatment decisions, the attending physician shall consider | **Détermination de la capacité du malade**<br>**27(2)** Afin de déterminer si un malade est mentalement capable de prendre des décisions liées au traitement, le médecin traitant se demande à la fois : |
| (a) whether the patient understands | a) si le malade comprend : |
| (i) the condition for which the treatment is proposed, | (i) l'état pour lequel le traitement est proposé, |

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| (ii) the nature and purpose of the treatment, | (ii) la nature et le but du traitement, |
| (iii) the risks and benefits involved in undergoing the treatment, and | (iii) les risques et les avantages découlant de l'administration du traitement, |
| (iv) the risks and benefits involved in not undergoing the treatment; and | (iv) les risques et les avantages découlant du défaut d'administrer le traitement; |
| (b) whether the patient's mental condition affects his or her ability to appreciate the consequences of making a treatment decision. | b) si l'état mental du malade influe sur sa capacité d'évaluer les conséquences que comporte la prise d'une décision liée au traitement. |

[102] At the oral hearing of this matter, counsel for Mr. Jablonski acknowledged the distinction between capacity to make personal care decisions and the ability to consent to medical treatment but chose not to make any further comment on it. Nonetheless, as the above demonstrates, the determination of competence to make medical decisions is an assessment made by the treating physician based on, among other things, the condition being treated. The determination is more time and treatment specific than the determination of capacity to make decisions regarding personal care. I repeat, personal care and medical treatment determinations are distinct decisions.

[103] I am of the view that the application judge erred in her statutory interpretation of the *MHA* by not recognizing the difference. The error is

evidenced by a consideration of the manner in which Mr. Jablonski presented his case before the application judge and her resulting reasons.

[104] I start by highlighting that the competence of Mr. Jablonski to consent to medical treatment was never at issue in these proceedings. No physician, including Dr. Etkin, conducted an evaluation of Mr. Jablonski in this regard and no opinion was offered. Mr. Jablonski's decision to proceed with the alternative treatment regarding his frostbitten toe was always respected and was not the basis for his interview with Nurse Hilderman.

[105] Nevertheless, at the hearing before the application judge, Mr. Jablonski repeatedly argued that, if an order appointing the PGT as committee had been made at the time that the surgeon had recommended that his toe be amputated, the PGT would have forced him to undergo such a procedure—a position which the PGT and the director strongly dispute.

[106] Nonetheless, the application judge appears to have accepted Mr. Jablonski's argument. She stated (*Jablonski* at para 39):

> Mr. Jablonski has made bad decisions about his personal care (living without heat and water for years). But his decision not to consent to amputation of his big toe turned out to be the right one. Even if it had turned out to be the wrong decision (i.e., if the toe had not healed), I am not sure that refusing an amputation is unreasonable. Reasonable people may have made the same choice. While amputation may have cured the infection, it would have left him disabled. In my view, Mr. Jablonski should be involved in his future health care decisions. While there are a number of limitations under the ***MHA*** on the PGT's authority to make health care decisions (ss. 28, 63), I am not prepared to allow them authority to override Mr. Jablonski's consent or lack of consent to medical treatment or health care. They will require a further court order to do so.

[107] Aside from the fact that there was no medical evidence as to whether the decision not to amputate was the right one, I agree with the PGT that the issue is not one of consent and it is incorrect to state that the PGT can override a person's consent or lack thereof. The issue, should it arise, is one of competence to make medical decisions.

[108] Based on the above, I would agree that the application judge erred in her interpretation of the *MHA* and her presumption regarding Mr. Jablonski's future health care decisions. There is nothing on the record to indicate that Mr. Jablonski was not competent to make medical decisions, nor was there any suggestion that the PGT had attempted or intended to make such decisions on his behalf.

[109] I would allow the cross appeal and remove the condition that "the [PGT] as the committee of [Mr. Jablonski's] person and property does not authorize the [PGT] to consent to medical treatment or health care."

[110] Given that I would allow the cross appeal on essentially the first two issues raised by the PGT, I need not consider the third issue.

Decision

[111] In the result, I would dismiss the appeal and allow the cross appeal.

[112] At the hearing of the matter the director confirmed that no order of costs was being sought. The PGT requested costs in the event that Mr. Jablonski was unsuccessful in his appeal only. No submission was made regarding the cross appeal.

[113] Given all of the circumstances of this case, as well as the nature of the proceedings, each party should bear their own costs.

Cameron JA

I agree: Edmond JA

I agree: Turner JA