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New Standard of Review for Treatment Capacity Appeals – The *Vavilov* Effect

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In December 2019, the Supreme Court of Canada established a new framework that is designed to guide courts on applying the standard of review in judicial review applications. The Court's long-awaited "trilogy" of cases in Canada (Minister of Citizenship and Immigration) v Vavilov and the two companion appeals heard together in Bell Canada v Canada (Attorney General) (collectively, *Vavilov*) represents an express departure and evolution from the framework that the Court set out in previous cases. Consequently, these decisions will affect the standard upon which Consent and Capacity Board (CCB) appeals will be heard by the courts.

CCB Appeals Generally

The *Health Care Consent Act, 1996* (HCCA) sets out the framework for determining whether a person has the capacity to make treatment decisions. If a patient at a psychiatric facility is found incapable to make such decisions with respect to a mental disorder, Ontario's *Mental Health Act* regulations set out certain requirements that must be met. These requirements include advising the patient of their right to apply to the CCB for a review of the finding of incapacity.

If the CCB upholds the finding of treatment incapacity, the patient has a further right of appeal to a single judge of the Ontario Superior Court of Justice, then to the Ontario Court of Appeal and finally to the Supreme Court of Canada.

The Standard of Review Pre-*Vavilov* in CCB Appeals

Before *Vavilov*, there were two standards of review: correctness and reasonableness. The CCB's interpretation of the law relating to treatment capacity was reviewable on a standard of correctness.[1] This meant that the court would not show deference to the CCB's reasoning process. Rather, the court would undertake its own analysis of the question and decide whether it agreed with the determination of the CCB.

On the application of the law to the facts, the CCB's decision was subject to review on the basis of reasonableness. Because the legislature assigned to the CCB the task of hearing the witnesses and assessing evidence, absent demonstrated unreasonableness, there was no basis for judicial interference with findings of fact by the CCB or the inferences drawn from the facts. This meant

that the court would uphold CCB's conclusion, provided the decision fell within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.[2]

Vavilov and the Presumption of Reasonableness

The new approach to the standard of review set out in *Vavilov* begins with the presumption that an administrative decision is reasonable. This avoids the need for courts to engage in a contextual inquiry in order to identify the appropriate standard, thereby streamlining and simplifying the standard of review framework.

However, the Court set out two ways in which this presumption can be rebutted:

1. Where the legislature has indicated that it intends a different standard to apply. This will be the case where the legislature has:

(a) explicitly prescribed the applicable standard of review, or

(b) provided for a statutory appeal mechanism from an administrative decision to a court which signals the legislature's intent that appellate standards apply when a court reviews the decision.

2. Where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of legal questions, namely:

(a) constitutional questions,
(b) general questions of law of central importance to the legal system as a whole, and
(c) questions related to the jurisdictional boundaries between two or more administrative bodies.

While the Court left open the possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case, it stated that any new basis for correctness review would be "exceptional."

Implications for CCB Appeals

Subsection 80(1) of the HCCA states as follows:

A party to a proceeding before the Board may appeal the Board's decision to the Superior Court of Justice on a question of law or fact or both.

Based on *Vavilov*, the HCCA provides for a statutory appeal mechanism from the CCB to the Superior Court of Justice, signaling the legislature's intent that appellate standards apply to the court's review of a CCB decision. As such, this provision in the HCCA rebuts the presumption of reasonableness review.

Moving forward, the court hearing a CCB appeal will apply appellate standards of review in accordance with the case of *Housen v Nikoaisen*[3] and the question of whether the CCB's decision was reasonable will no longer be the standard when determining whether the CCB properly applied the law to facts.

Post-*Vavilov,* the standard of correctness will continue to apply to appeals involving questions of law, including questions of statutory interpretation and those concerning the scope of the CCB's authority.[4]

However, where the scope of the appeal includes questions of fact, or questions of mixed fact and law, the appellate standard of review will now be "palpable and overriding error".[5] A palpable error is one that is "plainly seen"[6] and is therefore a deferential standard.

Treatment capacity is complex and each patients matter is fact-specific. As such, it is important to seek legal advice when patients seek to appeal a decision of the CCB.

For assistance in dealing with appeals of Consent and Capacity Board decisions, please contact your regular Hicks Morley lawyer.

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[1] *Starson v Swayze*, 2003 SCC 32 (***Starson***) at para. 5; *Dunsmuir v New Brunswick*, 2008 SCC 9, (***Dunsmuir***) at para. 50.

[2] *Starson,* at para 5*; Dunsmuir* at para. 47. See also *W.C. v. Patyk*, 2019 ONSC 2484 for a recent application of the standard of review in a CCB appeal pre-*Vavilov*. https://www.canlii.org/en/on/onsc/doc/2019/2019onsc2484/2019onsc2484.html?searchUrlHash=AAAAAQAHbWF5ZXNraQAAAAAB&resultIndex=20

[3] [2002] 2 S.C.R. 235.

[4] *Ibid*. at para. 8

[5] *Ibid* at paras. 10, 26-37.

[6] *Ibid* at para. 6