Court File No. CV-25-00099970-0000

ONTARIO SUPERIOR COURT OF JUSTICE

(EAST REGION)

B E T W E E N:

STEVEN LEONARD REYNEN

Appellant

-and-

DR. TABITHA ROGERS

Respondent

-and-

PUBLIC GUARDIAN AND TRUSTEE

Respondent

FACTUM OF THE PUBLIC GUARDIAN AND TRUSTEE

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Respondent

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PART I: NATURE OF THE APPEAL

1. The respondent, the Public Guardian and Trustee (the "PGT"), is the substitute decision maker ("SDM") of last resort with respect to health care and treatment decisions for the appellant, Mr. Steven Reynen ("Mr. Reynen"), pursuant to Section 20(5) of the *Health Care Consent Act* ("HCCA").[1] The PGT made several decisions on behalf of Mr. Reynen in 2021 but most recently began acting as SDM for Mr. Reynen in January 2025 after he was found incapable with respect to treatment with antipsychotic medication in January of 2025.[2] It is anticipated that the PGT will continue to act as Mr. Reynen's SDM of last resort with respect to health care and treatment decisions under the HCCA on future findings of incapacity.

2. On April 15, 2025, the respondent, Dr. Tabitha Rogers ("Dr. Rogers"), applied to the Consent and Capacity Board (the "Board" or "CCB") for directions on whether the wish made by Mr. Reynen in a letter to his out-patient psychiatrist in July of 2024 (stating "I never, ever, wish to be put on any psychotropic medication (including antipsychotics, antidepressants, etc.) ever again. Under any circumstance") ("July 2024 letter"), qualifies as a prior capable wish that is applicable to Mr. Reynen's current circumstances.[3]

3. The Board convened on May 14, 2025 to determine any directions to the SDM regarding treatment with antipsychotic medication in light of the previously expressed wish (a Form D application), and if applicable, whether to provide permission to the SDM to depart from that wish (a Form E application).[4] The Board found that Mr. Reynen had made a prior capable wish, but found that the wish is not applicable to his circumstances at the time of the hearing. The Board directed the SDM to give or refuse consent to the proposed treatment in accordance with Section 21(2) of the HCCA.[5] The Board dismissed the Form E application as redundant.[6]

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[1] Transcript of Proceedings, p. 105; *Health Care Consent Act*, 1996, SO 1996, c 2, Sched A, s. 20(5).
[2] Transcript of Proceedings, p. 104; *SR (Re)*, 2025 CanLII 27115 (ON CCB).
[3] Order of the Board, dated May 15, 2025, Record of Proceedings Volume 1, p. 32/PDF p. 37; Exhibit 2, Record of Proceedings Volume 1, pp. 223-224/PDF pp. 228-229
[4] Decision re: Form D Record of Proceedings Volume 1, p. 31/PDF p. 36.
[5] Reasons for Decision, Record of Proceedings Volume 1, p. 19/PDF p. 24.
[6] Order of the Board, dated May 15, 2025, Record of Proceedings Volume 1, p. 32/PDF p. 37.

4. Mr. Reynen is appealing the Board's decision.

5. The PGT is a statutory party under the CCB applications (Form D and Form E), and as such, a statutory respondent under this appeal.[7]

PART II: FACTS

6. The PGT adopts the facts and background information regarding the case as set out under Part II. Summary of the Facts in the Factum of *Amicus Curiae* ("*Amicus*"), paragraphs 3 to 28, with the following additions.

7. As SDM of last resort for Mr. Reynen, the PGT is tasked with the statutory duty to make substitute treatment decisions for him on a case-by-case basis, and when he is found to be incapable of making treatment decisions for himself, in accordance with provisions of the HCCA.[8]

8. The PGT as SDM for treatment provided consent for injectable antipsychotic medication in January and March 2025, before the PGT was made aware of a potential prior wish expressed by Mr. Reynen in his July 2024 letter.[9]

9. In April 2025, the PGT was advised by Dr. Rogers and Mr. Reynen's treating team of the July 2024 letter's discovery, and further consent to treatment involving antipsychotic medication was put on hold pending Dr. Rogers' applications to the Board seeking directions.[10]

10. The PGT did not take a position regarding the CCB applications, as the PGT was not involved in the care of Mr. Reynen around the time when he wrote the July 2024 letter, and did not have personal information or knowledge regarding Mr. Reynen's capacity and medical conditions at that time.[11]

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[7] *Health Care Consent Act*, 1996, s. 35(2), s. 36(2).
[8] *Health Care Consent Act*, 1996, s. 20(5).
[9] Transcript of Proceedings, pp. 104-105; Exhibit 5: CCB Summary, Record of Proceedings Volume 1, p. 227/PDF p. 232.
[10] Transcript of Proceedings, p. 106.
[11] Transcript of Proceedings, p. 118

11. Following the Board's decision and Mr. Reynen's immediate appeal of that decision, the PGT continues to withhold consent to the proposed treatment of antipsychotic medication pending the outcome of this appeal, in accordance with Section 25(1) of the *Statutory Powers Procedure Act* ("SPPA").[12]

PART III: ISSUES

12. The PGT takes no position regarding Mr. Reynen's capacity at the time when the wish was made in July 2024 and adopts the Board's finding that Mr. Reynen was capable and has made a prior capable wish based on the evidence presented by his physicians.

13. The PGT takes the position that the Board has erred in its analysis and interpretation of the law to find that Mr. Reynen's prior capable wish was not applicable to the current circumstances at the time of the hearing. In this regard, the PGT agrees with the grounds for appeal as raised by the *Amicus* under paragraphs 39 to 43.

14. The PGT submits that the Board's error frustrates the PGT's ability to fulfill her statutory duty in giving or refusing consent to treatment for Mr. Reynen in accordance with provisions under the HCCA.

PART IV: LAW AND APPLICATION

The Law on Applicable Prior Capable Wishes

15. Section 5 of the HCCA provides that a person, while capable, may express wishes with respect to treatment.[13] Any such wishes may be expressed in any written form, orally or in any other manner.[14]

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[12] *Statutory Powers Procedure Act,* R.S.O 1990, c. S. 22, s. 25(1).
[13] *Health Care Consent Act*, 1996, s. 5(1).
[14] *Health Care Consent Act*, 1996, s. 5(2).

16. Section 21(1) of the HCCA further provides the following principles for SDMs with respect to giving or refusing consent when making substitute decisions on behalf of a person who is incapable of making treatment decisions:

> **21(1)** A person who gives or refuses consent to a treatment on an incapable person's behalf shall do so in accordance with the following principles:
>
> > **1.** If the person knows of a wish applicable to the circumstances that the incapable person expressed while capable and after attaining 16 years of age, the person shall give or refuse consent in accordance with the wish.
> >
> > **2.** If the person does not know of a wish applicable to the circumstances that the incapable person expressed while capable and after attaining 16 years of age, or if it is impossible to comply with the wish, the person shall act in the incapable person's best interests.[15]

17. The SDM does not have a free hand to grant or refuse consent and must respect any prior applicable wishes made while the patient was capable.[16]

18. The SDM or the health practitioner may apply to the Board (a Form D application) made under Section 35(1) of the HCCA, seeking directions from the Board if it is not clear whether the patient has made a prior capable wish that is applicable to the current circumstances.[17] In giving directions, the Board *shall* apply s. 21, which in turn requires consent be given or refused in accordance with any known wish applicable to the circumstances. [18]

19. The Board is tasked with the role of determining (1) whether the patient had made a prior wish that was sufficiently clear; (2) whether the patient was capable when they expressed this prior wish; and (3) whether the prior capable wish is applicable to the current

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[15] *Health Care Consent Act*, 1996, s. 21(1).
[16] *Cuthbertson v. Rasouli*, 2013 SCC 53, [2013] 3 SCR 341, at para. 26.
[17] *Health Care Consent Act*, 1996, s. 35(1).
[18] *Rasouli*, at paras. 145.

circumstances faced by the patient – in other words, whether, when the wish was expressed, the patient intended its application to their current circumstances.[19]

20. In determining whether the patient is capable of consenting or refusing a specific treatment decision, Section 4(1) HCCA sets out the two-pronged test: that a person is capable with respect to a treatment if the person is (1) able to understand the information that is relevant to making a decision about the treatment, and (2) able to appreciate the reasonably foreseeable consequences of that decision.[20]

21. In determining whether the prior expressed wish remains applicable to the current circumstances faced by the patient, the physician's evidence on the patient's condition, prognosis, treatment options, and any adverse effects of the proposed treatment would be relevant to the Board's assessment of applicability.[21] The patient does not have to identify every possible future development or change in circumstances for a prior wish to remain applicable.[22]

22. As mentioned in paragraph 35 of the Factum of the *Amicus*, under Section 35(1) of the HCCA, the Board must not usurp the role of the SDM, or make a determination based on the best interests of the patient.[23]

23. Section 36 of the HCCA permits a SDM or health practitioner who seeks the consent for treatment, despite known wishes to refuse the treatment, to apply to the Board to depart from that wish (a Form E application).[24] The Board may override the known wishes only if the patient, if capable, would have likely consented in the current circumstances because "the likely result of the treatment is significantly better than would have been anticipated in comparable circumstances at the time the wish was expressed".[25] Notably, a section 36 analysis, involving both findings of facts and law, though important and

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[19] *Rasouli,* at paras. 80 to 82.
[20] *Health Care Consent Act*, 1996, s. 4(1).
[21] *Rasouli*, at paras. 82, 84.
[22] *Rasouli*, at para. 83.
[23] Factum of the Amicus Curiae, at para. 35; *Friedberg v. Korn*, 2013 ONSC 960, at para. 61.
[24] *Health Care Consent Act*, 1996, s. 36(1).
[25] *Health Care Consent Act*, 1996, s. 36(3).

relevant in Mr. Reynen's case, was not conducted because the Board dismissed the Form E application as redundant following their decision on the Form D application.

Standard of Review

24. Section 80(1) of the HCCA provides an appeal to the court from an administrative decision, and states that "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".[26]

25. Where a statutory right of appeal from an administrative decision is provided, the reviewing court must apply appellate standards of review.[27]

26. Questions of law, including statutory interpretation and jurisdiction, attract the correctness standard.[28] The court is thus free to consider questions of statutory interpretation and replace the opinion of the Board with its own.[29]

27. Questions of fact, or mixed fact and law where the legal principle is not readily extricable, are reviewed for palpable and overriding error, one that is plain to see.[30] The appellate court cannot reverse the finding of fact unless the trial judge – in this case, the Board – has made a "palpable and overriding error".[31]

The Board Erred in Finding the Prior Capable Wish Does Not Apply to Mr. Reynen's Current Circumstances

28. The PGT submits that the Board has erred in its analysis and interpretation of the law on the applicability of a prior capable wish and that the appeal should be allowed on that basis. If the appeal is allowed, the Court may exercise all the powers of the Board, substitute its opinion for that of a health practitioner, an evaluator, a substitute decision-

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[26] *Health Care Consent Act*, 1996, s. 80(1).
[27] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 SCR 653, at para. 37
[28] *Vavilov*, at para. 37; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8
[29] *Housen,* at para.8.
[30] *Vavilov*, at para. 37; *Housen*, at paras 10, 19, 26-37.
[31] *Housen*, at paras 10.

maker or the Board, or refer a matter back to the Board, with directions, for rehearing in whole or in part, as permitted under Section 80(10) of the HCCA.[32]

29. The Board accepted the physician's evidence and found that Mr. Reynen was deemed capable with respect to treatment with antipsychotic medication in July 2024:

> "…given Dr. Baines' evidence that SR had reached capacity for treatment decisions, proceeded with my analysis on the basis that SR was presumed capable when he wrote his wish. I therefore found SR had made a clearly expressed prior capable wish." [33]

30. The Board's finding of Mr. Reynen's capacity means he passed the two-pronged test for capacity as outlined under s. 4(1) of the HCCA and was, therefore, able to understand the information provided by his treating physician that was relevant to making the decision about antipsychotic medication and able to appreciate the reasonably foreseeable consequences of consenting or not consenting to the use of antipsychotic medication.

31. Once the Board found that Mr. Reynen made a prior capable wish, the Board was then only required to determine whether Mr. Reynen's prior capable wish applied to his circumstances at the time of the hearing. As previously mentioned, this analysis is often focused on whether there have been any significant changes to the patient's current medical condition, prognosis, and proposed treatment options.[34]

32. The Board instead re-focused its analysis on the second branch of the test for capacity. Notably, the Board made the following statements in its Reasons after finding Mr. Reynen was capable when he made his wish:

    - **Pages 12:** "In her note of October 17, 2023 (Exhibit 1, page 52) Dr. Baines had noted that SR was likely approaching capacity for treatment decisions. However, in her very next consultation note date November 14, 2023 (Exhibit 1, page 58) Dr. Baines had noted as follows:

      …

[32] *Health Care Consent Act*, 1996, s. 80(10).
[33] Reasons for Decision, Electronic Record of Proceedings Volume 1 of 2, p. 19/PDF p. 24.
[34] *Rasouli*, at paras. 82, 84.

This clearly was an indication of incapacity. If you are not able to acknowledge that your symptoms are manifestations of a mental condition that needs treatment with psychotropic medication, you clearly fail the second branch of the capacity test."[35]

- **Page 13:** "In such case, I wondered how SR could have been capable. The only reason I could think of why Dr. Baines may have deemed him capable in June 2024 (notwithstanding the obvious contradiction presented by his deeply entrenched belief of being the target of some experiment) would be to preserve the therapeutic relationship and keep SR on board with treatment.

  …

  As noted above, it was noted throughout Dr. Baines *[sic]* notes (right up to June 2024 when he was deemed capable) that SR's insight was partial, and I accepted that as a fact that notwithstanding that SR was deemed capable, his insight into his mental condition and the need for treatment was partial at best. However, as I noted earlier in these reason *[sic]*, given Dr. Baines *[sic]* evidence, I proceeded with my analysis on the basis that SR was presumed capable when he wrote the wish. [36]
- **Page 15**: "I therefore did not agree with the submission that SR made the wish not to take any psychotropic medication because of the side effects. While that was his stated reason, I found his reason for not taking antipsychotic medication was his belief that he did not suffer from a mental illness that needed treatment with antipsychotic medication.

  …

  The 2nd branch of the test for capacity is "ability to appreciate the reasonably foreseeable consequences", not actual appreciation. While the legal test for capacity is simply the "ability to appreciate", in my view to make to a capable wish applicable to all future circumstances, no matter what the consequences, there needs to more than mere ability to appreciate. When a capable person makes a treatment decision that may be seen as unwise, the person is allowed

[35] Reasons for Decision, Electronic Record of Proceedings Volume 1 of 2, p. 20/PDF p. 25.
[36] Reasons for Decision, Electronic Record of Proceedings Volume 1 of 2, p. 21/PDF p. 26.

to do so, however an incapable person should not be deprived of treatment (which is one of the purposes of the HCCA) because of a prior capable wish without making some inquiries into the person's understanding and appreciation of the consequences of the wish."[37]

- **Page 21:** "Notwithstanding having been deemed capable at law meaning that he had the ability to appreciate the reasonably foreseeable consequences, given his partial insight I found SR did not have a true appreciation of the consequences and likely would not have anticipated the extreme consequences he was faced with currently and therefore his circumstance had changed. The wish was therefore inapplicable to his circumstance.

  …

  As noted earlier in these reasons, notwithstanding my doubt, I accepted Dr. Baines' evidence that SR was deemed capable at the time he made his wish not to receive treatment with any psychotropic medication."[38]

33. The Board's decision that Mr. Reynen's prior capable wish was not applicable to the current circumstances because he did not fully appreciate the consequences of stopping antipsychotic medication was based on an incorrect application of the second part of the two-pronged test as outlined under s. 4(1) of the HCCA for capacity and is an error of law.[39]

34. The PGT agrees with the submission made by the *Amicus* under paragraphs 47 to 49 of the *Amicus'* Factum, that based on the evidence provided by his treating physicians, Mr. Reynen's circumstances at the time of the hearing in May 2025, including his medical diagnosis, prognosis, and proposed treatment, had remained largely the same as when he made the wish to "…never, ever, wish to be put on any psychotropic medication

[37] Reasons for Decision, Electronic Record of Proceedings Volume 1 of 2, p. 23/PDF p. 28.
[38] Reasons for Decision, Electronic Record of Proceedings Volume 1 of 2, p. 29/PDF p. 34.
[39] Reasons for Decision, Electronic Record of Proceedings Volume 1 of 2, p. 29/PDF p. 34.

(including antipsychotics, antidepressants, etc.) ever again. Under any circumstance", as set out in the July 2024 letter.[40]

35. The PGT further submits that, had the Board properly applied the legal analysis under Section 35 (the Form D application) and had the Board found Mr. Reynen's prior capable wish applied to his current circumstance at the time of the hearing, it would have been appropriate for the Board to consider the application of Section 36(1) of the HCCA (Form E application) regarding whether the SDM should consent to the treatment despite the wish, and whether, if capable, Mr. Reynen would have consented to the treatment in the current circumstances, rather than dismissing the application as redundant.[41]

36. As the PGT must consider the prior capable wishes of individuals for whom the PGT acts as SDM of last resort for treatment decisions on a case-on-case basis, the PGT wishes to ensure the prior capable wishes of individuals are correctly determined by the Board. Given the Board's error in applying the law to its analysis of whether Mr. Reynen's wish applies to his current circumstances, the PGT requests that the Court allow the appeal and determine the issues under the previous CCB applications in whole or in part, as permitted under Section 80(10) of the HCCA; or, in the alternative, order a new hearing before a different panel at the Board.[42]

[40] Factum of the Amicus Curiae, at paras 47 to 49; Exhibit 2, Electronic Record of Proceedings Volume 1 of 2, pp. 223-224/PDF pp. 228-229.
[41] *Health Care Consent Act*, 1996, s. 36(1), (3).
[42] *Health Care Consent Act*, 1996, s. 80(10).

All of which is respectfully submitted.

Dated at Toronto this 10th day of October 2025.

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SCHEDULE A: AUTHORITIES TO BE CITED

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, [2019] 4 SCR 653

Cuthbertson v. Rasouli, 2013 SCC 53, [2013] 3 SCR 341

Friedberg v. Korn, 2013 ONSC 960

Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235

SCHEDULE B: LEGISLATION TO BE CITED

Health Care Consent Act, S.O. 1996, Chapter 2, Schedule A, as amended.

Capacity

4 (1) A person is capable with respect to a treatment, admission to a care facility or a personal assistance service if the person is able to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service, as the case may be, and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision. 1996, c. 2, Sched. A, s. 4 (1).

Presumption of capacity

(2) A person is presumed to be capable with respect to treatment, admission to a care facility and personal assistance services. 1996, c. 2, Sched. A, s. 4 (2).

Exception

(3) A person is entitled to rely on the presumption of capacity with respect to another person unless he or she has reasonable grounds to believe that the other person is incapable with respect to the treatment, the admission or the personal assistance service, as the case may be. 1996, c. 2, Sched. A, s. 4 (3).

Wishes

5 (1) A person may, while capable, express wishes with respect to treatment, admission to a care facility or a personal assistance service. 1996, c. 2, Sched. A, s. 5 (1).

Manner of expression

(2) Wishes may be expressed in a power of attorney, in a form prescribed by the regulations, in any other written form, orally or in any other manner. 1996, c. 2, Sched. A, s. 5 (2).

Principles for giving or refusing consent

21 (1) A person who gives or refuses consent to a treatment on an incapable person's behalf shall do so in accordance with the following principles:

1. If the person knows of a wish applicable to the circumstances that the incapable person expressed while capable and after attaining 16 years of age, the person shall give or refuse consent in accordance with the wish.

2. If the person does not know of a wish applicable to the circumstances that the incapable person expressed while capable and after attaining 16 years of age, or if it is impossible to comply with the wish, the person shall act in the incapable person's best interests. 1996, c. 2, Sched. A, s. 21 (1).

Application for directions

35 (1) A substitute decision-maker or a health practitioner who proposed a treatment may apply to the Board for directions if the incapable person expressed a wish with respect to the treatment, but,

(a) the wish is not clear;

(b) it is not clear whether the wish is applicable to the circumstances;

(c) it is not clear whether the wish was expressed while the incapable person was capable; or

(d) it is not clear whether the wish was expressed after the incapable person attained 16 years of age. 1996, c. 2, Sched. A, s. 35 (1); 2000, c. 9, s. 33(1).

Notice to substitute decision-maker

(1.1) A health practitioner who intends to apply for directions shall inform the substitute decision-maker of his or her intention before doing so. 2000, c. 9, s. 33 (2).

Parties

(2) The parties to the application are:

1. The substitute decision-maker.
2. The incapable person.
3. The health practitioner who proposed the treatment.
4. Any other person whom the Board specifies. 1996, c. 2, Sched. A, s. 35 (2).

Directions

(3) The Board may give directions and, in doing so, shall apply section 21.

Application to depart from wishes

36 (1) If a substitute decision-maker is required by paragraph 1 of subsection 21 (1) to refuse consent to a treatment because of a wish expressed by the incapable person while capable and after attaining 16 years of age,

(a) the substitute decision-maker may apply to the Board for permission to consent to the treatment despite the wish; or

(b) the health practitioner who proposed the treatment may apply to the Board to obtain permission for the substitute decision-maker to consent to the treatment despite the wish. 2000, c. 9, s. 34 (1).

Notice to substitute decision-maker

(1.1) A health practitioner who intends to apply under clause (1) (b) shall inform the substitute decision-maker of his or her intention before doing so. 2000, c. 9, s. 34 (2).

Parties

(2) The parties to the application are:

1. The substitute decision-maker.
2. The incapable person.
3. The health practitioner who proposed the treatment.
4. Any other person whom the Board specifies. 1996, c. 2, Sched. A, s. 36 (2).

Criteria for permission

(3) The Board may give the substitute decision-maker permission to consent to the treatment despite the wish if it is satisfied that the incapable person, if capable, would probably give consent because the likely result of the treatment is significantly better than would have been anticipated in comparable circumstances at the time the wish was expressed. 1996, c. 2, Sched. A, s. 36 (3).

Appeal

80 (1) 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. 1996, c. 2, Sched. A, s. 80 (1); 2000, c. 9, s. 48.

Time for filing notice of appeal

(2) The appellant shall serve his or her notice of appeal on the other parties and shall file it with the court, with proof of service, within seven days after he or she receives the Board's decision. 1996, c. 2, Sched. A, s. 80 (2).

Notice to Board

(3) The appellant shall give a copy of the notice of appeal to the Board. 1996, c. 2, Sched. A, s. 80 (3).

Record

(4) On receipt of the copy of the notice of appeal, the Board shall promptly serve the parties with the record of the proceeding before the Board, including a transcript of the oral evidence given at the hearing, and shall promptly file the record and transcript, with proof of service, with the court. 1996, c. 2, Sched. A, s. 80 (4).

Time for filing appellant's factum

(5) Within 14 days after being served with the record and transcript, the appellant shall serve his or her factum on the other parties and shall file it, with proof of service, with the court. 1996, c. 2, Sched. A, s. 80 (5).

Time for filing respondent's factum

(6) Within 14 days after being served with the appellant's factum, the respondent shall serve his or her factum on the other parties and shall file it, with proof of service, with the court. 1996, c. 2, Sched. A, s. 80 (6).

Extension of time

(7) The court may extend the time for filing the notice of appeal, the appellant's factum or the respondent's factum, even after the time has expired. 1996, c. 2, Sched. A, s. 80 (7).

Early date for appeal

(8) The court shall fix for the hearing of the appeal the earliest date that is compatible with its just disposition. 1996, c. 2, Sched. A, s. 80 (8).

Appeal on the record, exception

(9) The court shall hear the appeal on the record, including the transcript, but may receive new or additional evidence as it considers just. 1996, c. 2, Sched. A, s. 80 (9).

Powers of court on appeal

(10) On the appeal, the court may,

(a) exercise all the powers of the Board;

(b) substitute its opinion for that of a health practitioner, an evaluator, a substitute decision-maker or the Board;

(c) refer the matter back to the Board, with directions, for rehearing in whole or in part. 1996, c. 2, Sched. A, s. 80 (10).

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