CITATION: Sistermans v. CAA Insurance Co., 2025 ONSC 3809
DIVISIONAL COURT FILE NO.: 724/24-JR and 728/24
DATE: 20250702

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Lococo, D.L. Edwards and Shore JJ.

BETWEEN:	)	
	)	
CONNOR SISTERMANS by his litigation Guardian ANNIKA SISTERMANS	)	*Ashu Ismail*, for the Applicant/Appellant
	)	
Applicant/Appellant	)	
– **and** –	)	
	)	
	)	
CAA INSURANCE COMPANY and LICENCE APPEAL TRIBUNAL	)	*I. Caley Ross* and *William G. Woodward*, for CAA Insurance Company
	)	
Respondents	)	*Sabrina Fiacco*, for the Licence Appeal Tribunal
	)	
	)	
	)	**HEARD at Toronto:** May 29, 2025

REASONS FOR JUDGMENT

R. A. LOCOCO J.

I. Introduction

[1] Connor Sistermans ("Connor"), by his Litigation Guardian Annika Sistermans, appeals and seeks judicial review of the decision of the respondent Licence Appeal Tribunal (the "Tribunal") dated October 25, 2024, reported at 2024 CanLII 106217 (ON LAT) (the "Decision"), and the related reconsideration decision dated February 26, 2025, reported at 2025 CanLII 15948 (ON LAT) (the "Reconsideration Decision").

[2] In 2014, Connor, who was then 15 years old, was involved in a motor vehicle accident as a passenger. He claimed no-fault accident benefits from the respondent CAA Insurance Company ("CAA"). Shortly after turning 18 in 2016, he signed an agreement with CAA to settle his claim on a full and final basis upon the payment of $20,000. In May 2022, he brought an application

before the Tribunal, seeking to set aside the settlement agreement on the basis that he lacked capacity to enter into the agreement.

[3] In the Decision, the Tribunal dismissed Connor's application, finding that he had not established that he lacked capacity. In the Reconsideration Decision, the Tribunal dismissed Connor's request for reconsideration.

[4] Connor submits that the Tribunal erred by, among other things, failing to articulate and apply the governing legal standard to determine capacity and failing to consider relevant factors in making that determination. He also submits that the Tribunal denied him procedural fairness, including by refusing to admit a relevant expert report relating to capacity and then proceeding to consider and discount its contents without receiving evidence or submissions. He asks the court to set aside the Tribunal's decisions and order a new hearing before a different adjudicator.

[5] For the reasons below, I would dismiss the appeal and the judicial review application.

II. Background

[6] On July 7, 2014, Connor and his parents were involved in an automobile accident (the "2014 accident"). Connor was a passenger in the vehicle. At the time of the accident, Connor was 15 years old and in high school.

[7] On August 12, 2014, Connor made an application for no-fault accident benefits from CAA pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010*, O. Reg. 34/10 (the "*SABS*") under the *Insurance Act*, R.S.O. 1990, c. I.8. Connor's mother, Christina Sistermans, signed the application as substitute decision maker.

[8] In July 2016, Connor (by his mother as Litigation Guardian) also commenced a tort action arising out of the accident. Connor started attending university in August or September the same year.

[9] On September 30, 2016, Connor made an application to the Tribunal under s. 280 of the *Insurance Act* to resolve the parties' dispute relating to his entitlement under his accident benefit claim. The Tribunal has exclusive jurisdiction under s. 280 "with respect to the resolution of disputes in respect of an insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which an insured person is entitled": see *Insurance Act*, ss. 280(1), 280(3). Connor's mother signed the Tribunal application on his behalf. He turned 18 the following month.

[10] On November 22, 2016, the Tribunal application proceeded to a case conference. As set out in the Case Conference Report dated December 2, 2016, a paralegal from the office of Connor's counsel attended the case conference. Connor was not listed as attending. The Case Conference Report also stated that Connor "withdrew his application on a without prejudice basis and may reapply to the Tribunal subject to any limitation issues."

[11] On November 24, 2016, Connor signed a Settlement Disclosure Notice, indicating agreement to a final settlement of his accident benefit claim. In evidence before the Tribunal in

January 2024 in the application below, Connor testified that the settlement document was provided to him for signature by his counsel's paralegal and that his mother Christina was present at that time.

[12] On May 30, 2022, Connor made a further s. 280 application to the Tribunal for dispute resolution relating to his benefit entitlement arising from the 2014 accident. That application indicated that one of the issues under dispute was whether he had sustained a catastrophic impairment as defined in the *SABS*. In CAA's Response dated June 16, 2022, CAA disputed his entitlement to the claimed benefits "as the matter settled on a full and final basis with counsel representing [Connor]."

[13] By court order dated October 7, 2022, Connor's tort action arising out of the 2014 accident was dismissed on consent, following the settlement of the tort action that included a significant monetary payment to Connor. The tort action had previously been continued without a litigation guardian by order dated July 21, 2021, upon the requisition of Connor's then counsel. The order noted that Connor reached the age of majority on October 21, 2016.

[14] A Tribunal case conference in the May 2022 application was held on February 21, 2023. In the Case Conference Report and Order dated March 4, 2023, Connor and his counsel were listed as attending. In the case conference order under "Issues in Dispute", listed as a "Preliminary Issue" was the question of whether Connor was barred from advancing substantive issues because he executed a full-and-final settlement notice in November 2016. The listed substantive issues in dispute did not include whether Connor had sustained a catastrophic impairment. The order also stated that the preliminary issue and the substantive issues were to be heard together at a four-day videoconference hearing on dates to be set by the Tribunal. The hearing was subsequently set to commence on October 23, 2023. The order also included a timetable and directions relating to the exchange of documents between the parties, including CAA's production of internal records and other documents, redacted for privilege and reserves.

[15] On May 18, 2023, Connor's then counsel was removed from the record of the Tribunal application. Connor retained new counsel, who filed a motion on September 25, 2023, requesting production of CAA's complete file, including claim notes (without redactions) and all previous Tribunal orders. The motion was heard by videoconference by Adjudicator Ludmilla Jarda on October 12, 2023. Connor's newly-retained counsel argued that they needed the unredacted documents to proceed with the hearing. CAA's position was that it had produced the documents it was required to produce in the previous case conference order, redacted for privilege and reserves, as ordered. The adjudicator denied the motion, stating (among other things) that (i) she was not persuaded that the unredacted claims notes should be produced, and (ii) there was no evidence the applicant did not receive the Tribunal orders.

[16] The Tribunal application had previously been scheduled for a four-day virtual hearing to commence October 23, 2023. Appearing before the Tribunal that day, Connor's counsel advised the Tribunal that her client had recently met with Dr. Lynn Lightfoot, a capacity assessor, who was preparing a report indicating that Connor was mentally incapable of instructing counsel as a result of cognitive limitations arising from a brain injury, but the report would not be ready within the

four-day scheduled hearing. At the request of Connor's counsel, the hearing was adjourned by Tribunal order dated October 27, 2023.

[17] Dr. Lightfoot subsequently provided an opinion letter dated November 20, 2023, indicating that Connor was capable of appointing a Power of Attorney for Property but was incapable of managing his property or instructing counsel and required the assistance of a litigation guardian in the proceedings.

[18] By motion order dated December 19, 2023, the Tribunal refused Connor's request to add Dr. Lightfoot to his witness list for the hearing (which was scheduled to start on January 8, 2024) or to issue a summons to witness for Dr. Lightfoot. In the motion reasons, the adjudicator (Vice-Chair Lindsay Lake) said that the motion was untimely and that no explanation was provided for the delay in bringing the motion. The adjudicator declined Connor's request to be able to rely on as evidence at the hearing Dr. Lightfoot's report dated December 1, 2023 relating to Connor's capacity at the time he entered into the settlement agreement. It was left to the hearing adjudicator to decide the admissibility of Dr. Lightfoot's report following submissions from the parties.

[19] By Tribunal order dated January 4, 2024, Annika Sistermans (Connor's sister) was recognized as his litigation guardian for the purposes of the Tribunal application. In the motion reasons, the adjudicator (Vice-Chair Theresa McGee) accepted for this purpose the opinion letter of Dr. Lightfoot dated November 20, 2023, relating to Connor's capacity to instruct counsel in the proceedings. The adjudicator also stated that Dr. Lightfoot's opinion does not automatically form part of the application hearing record and it remained open to the parties to make submissions to the hearing adjudicator as to its admissibility.

[20] The hearing of the Tribunal application proceeded by video conference from January 8 to 11, 2024, before adjudicator Sandra Driesel. During the hearing, the adjudicator excluded from evidence Dr. Lightfoot's capacity report dated December 1, 2023: see Decision, at para. 28; Reconsideration Decision, at para. 8. She provided brief oral reasons, stating that "I find it very hard to be able to link a report eight years after the fact as to whether or not the, the applicant was capable back in 2016."

[21] In February 2024, Adjudicator Driesel passed away, without having issued a decision with respect to the May 2022 application.

[22] By order dated May 21, 2024, after obtaining the parties' views, the Tribunal ordered that a new adjudicator render a decision based on "the existing record (i.e., the recording and/or transcript of the hearing, if available, and all records that were made exhibits at the hearing)": Decision, at para. 2. Vice-Chair Craig Mazerolle was assigned to adjudicate the application on that basis.

III. Tribunal's application decisions

A. The Decision

[23] On October 25, 2024, the Tribunal issued the Decision, dismissing Connor's application.

[24] On the preliminary issue, the Tribunal found, at para. 5, that the settlement agreement reached in November 2016 was not invalidated due to Connor's alleged incapacity. Therefore, the application was barred from proceeding by s. 9.1(8) of *Automobile Insurance,* R.R.O. 1990, Reg. 664 under the *Insurance Act*.

[25] The Tribunal noted that a person who is 18 years or more is presumed to be capable of entering into a contract: see *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 ("*SDA*"), s. 2(1). The Tribunal found that Connor did not rebut that presumption, since he did not establish that he lacked the capacity to enter into the settlement agreement on November 24, 2016: see Decision, at paras. 6-7, 10.

[26] Under the heading "Academic Records", the Tribunal stated:

> a. A key factor in his conclusion on capacity was Connor's high school academic records for the period around November 2016, which showed he was able to understand and engage with course materials, a strong suggestion that he was able to instruct counsel and understand the consequences of entering into the settlement agreement (paras. 11-12).
>
> b. Connor's ability to complete three university-level courses in 2016/2017 (including achieving an "A" in one class) further supported his capacity to understand and process information in that period (para. 13).
>
> c. The accommodations and family assistance provided to Connor during the relevant time did not challenge the overall findings about his academic performance. Instructor comments and marks showed he was able to understand course material for the purpose of writing examinations and participating in classroom discussions (para. 15).

[27] Under the heading "Cognitive Testing", the Tribunal found that cognitive testing completed by a neuropsychologist (Dr. Benn) in September 2015 and an occupational therapist (Ms. Kadanoff) in July 2016 provided compelling support for the finding that Connor did not establish that he lacked capacity in November 2016: see Decision, at paras. 17-19. In reaching that conclusion, the Tribunal considered the evidence of a psychiatrist (Dr. Thorton) and Connor's treating psychologist (Ms. Whittick) relating to Connor's psychological and emotional state and accepted that the capacity to understand and process information and instruct counsel may be impacted by a person's psychological and emotional state: Decision, at paras. 20-21. However, the Tribunal went on to state that it did not "see any significant, negative results in the test scores that would suggest [Connor's] emotional difficulties and need for assistance impacted his ability to understand and process information" (emphasis added). The Tribunal concluded that it was not satisfied that Connor "has demonstrated that his stress and emotional dysregulation had any significant impact on his ability to perform tasks like information processing and abstract reasoning, such that he lacked capacity in November 2016": Decision, at para. 21

[28] Under the heading "Capacity Assessments", the Tribunal then addressed the reports of the capacity assessors that each party retained for the application. Those assessors were Dr. Kaminska

(retained by Connor, who prepared a report dated September 27, 2021) and Dr. Ferner (retained by CAA, who prepared a report dated June 16, 2023): see Decision, at paras. 8-9. The Tribunal stated, at para. 24:

> Turning to the reports from the parties' capacity assessors, I find that neither report provides significant assistance for my determination. The capacity dispute arose after the settlement agreement was signed. Both parties obtained their assessments years after the event. As such, both assessments are retrospective in nature. In the present case, I have the benefit of contemporaneous accounts of the applicant's cognitive abilities and functional limits during the relevant period. Together, the academic records and test scores paint a comprehensive picture of the applicant's abilities in and around November 2016, so I do not find it is necessary to place significant weight on the capacity reports from 2021 and 2023.

[29] At paras. 25-26, the Tribunal addressed aspects of the report of Dr. Kaminska, the assessor retained by Connor's counsel. The Tribunal stated that while the assessor's finding of incapacity was based in part on the same (historical) contemporaneous records, the Tribunal took issue with the line of reasoning used to reach that conclusion. Among other things, the Tribunal noted the "speculative nature of the opinion" and the "focus on the settlement amount raises questions about the weight I should assign this report": Decision, at para. 25. The adjudicator also stated, at para. 26, that the assessor's line of reasoning "focuses on questions that are not at the heart of the issue before me." The adjudicator continued:

> The issue before me is not whether the agreement was advantageous to the applicant. Rather, I must determine if the applicant had the capacity to instruct counsel and understand the consequences of agreeing to the settlement. Reviewing his academic records and cognitive test scores, I can conclude he has not established a lack of capacity. The value of the settlement may have some limited bearing on this question, but – by finding that the totality of the evidence before me establishes that he understood the consequences of agreeing to this amount and terms – the capacity inquiry is complete. [Emphasis added.]

[30] Under the heading "Applicant's Other Arguments", at para. 28, the Tribunal noted that Connor took issue with several procedural orders made before and during the videoconference hearing before adjudicator Driesel, including the decision to exclude the capacity report of Dr. Lightfoot. With respect to exclusion of Dr. Lightfoot's report, the Tribunal found as follows:

> [W]hile the applicant may claim Dr. Lightfoot's findings from her December 2023 report would have shed light on his capacity in November 2016, I find the retrospective nature of the report raises similar issues to those I identified about the capacity assessments above. I do not find that the admission of this report would have likely impacted my findings.

B. The Reconsideration Decision

[31] Following Connor's request for reconsideration (on November 15, 2024) and further written submissions, the Tribunal (Vice-Chair Mazerolle) released the Reconsideration Decision on February 26, 2025, dismissing the request for reconsideration.

[32] In reaching that conclusion, among other things, the Tribunal rejected Connor's submission that it erred in law and breached procedural fairness by deciding "to consider and discount Dr. Lightfoot's opinion without receiving evidence or submissions on the opinion": Reconsideration Decision, at para. 10. The Tribunal also found that Connor did not establish a ground for reconsideration based on the argument that its understanding of capacity was incorrect: at para. 18.

IV. Appeal and judicial review

A. Jurisdiction and standard of review

[33] Connor appeals and seeks judicial review of the Decision and the Reconsideration Decision (the "Decisions"). The Divisional Court has jurisdiction to hear an appeal from a Tribunal decision under the *SABS*, but only on a question of law: *Licence Appeal Tribunal Act, 1999*, S.O. 1999, c. 12, Sched. G ("*LATA*"), ss. 11(1), 11(6).

[34] Despite any right of appeal, the Divisional Court has jurisdiction to hear Connor's judicial review application: *JRPA*, ss. 2, 6(1). Judicial review is a discretionary and extraordinary remedy, but the existence of a right of appeal limited to questions of law does not in itself amount to a discretionary bar nor preclude a judicial review application for questions of fact or mixed fact and law: *Yatar v. TD Insurance Meloche Monnex*, 2024 SCC 8, 489 D.L.R. (4th) 191, at para. 57.

[35] When a party brings both an appeal and a judicial review application for the same decision, the Divisional Court's practice is for both proceedings to be heard and decided by the same panel: see *Yatar v. TD Insurance Meloche Monnex*, 2022 ONCA 446, 25 C.C.C.L. (6th) 1, at paras. 55-56, rev'd on other grounds, 2024 SCC 8; *Shearer v. Oz*, 2024 ONSC 1723 (Div. Ct.), at para. 30.

[36] On an appeal from an administrative decision, the appellate standards of review apply: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 37. The standard of review is correctness for questions of law: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. In this case, there is no appeal with respect to questions of fact or questions of mixed fact and law except where there is an extricable question of law, which is reviewable on appeal on a correctness standard: see *Housen*, at paras. 26-37; *LATA*, s. 11(6).

[37] Whether there has been a breach of the duty of procedural fairness is a question of law, subject to correctness review on appeal: *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, 470 D.L.R. (4th) 328, at paras. 26-30. The degree of procedural fairness required is determined by reference to all the circumstances of the case, including (i) the nature of the decision being made, and the process followed in making it; (ii) the nature of the statutory scheme; (iii) the importance of the decision to the individual or individuals affected; (iv) the legitimate expectations of the person challenging the decision; and (v) the choices of procedure made by the administrative decision maker itself: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 21-28; *Vavilov*, at para. 77.

[38] With respect to the judicial review application, the Divisional Court will not entertain the application or grant a remedy to the extent that the substance of the application is adequately addressed by another process, that "other process" in this case being the appeal: see *Strickland v. Canada (Attorney General),* 2015 SCC 37, [2015] 2 S.C.R. 713, at paras. 40-45. Therefore, the only issues that this court will entertain for judicial review are questions of fact, mixed fact and law (where there is no extricable question of law) and exercises of discretion: see *Shearer*, at para. 32. Upon judicial review, the presumptive standard of review is reasonableness: *Vavilov*, at paras. 23-25. There is no dispute that the standard of review for those matters is reasonableness in this case.

[39] Reasonableness review "finds its starting point in the principle of judicial restraint" but remains "a robust form of review" rather than "a 'rubber-stamping' process or a means of sheltering administrative decision makers from accountability": *Vavilov,* at para. 13. A reasonable decision is one that is based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires a reviewing court to defer to such a decision: *Vavilov*, at para. 85. The relative expertise of administrative decision makers with respect to the questions before them is a relevant consideration in conducting reasonableness review: *Vavilov*, at paras. 31, 92-93.

[40] Two types of errors (referred to as fundamental flaws) that may render an administrative tribunal's decision unreasonable are (a) a failure of rationality internal to the reasoning process, and (b) the untenability of the decision, in light of the relevant factual and legal constraints that bear on it: *Vavilov*, at para. 101.

[41] A reasonable decision is one that is justified in light of the facts. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it: *Vavilov*, at para. 126. However, absent exceptional circumstances, a reviewing court will not interfere with the decision maker's factual findings. The reviewing court must refrain from reweighing and reassessing the evidence considered by the decision maker: *Vavilov*, at para. 125.

[42] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on that basis, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency": *Vavilov*, at para. 100.

B. Parties' positions

[43] Connor submits that the Tribunal made errors of law in the Decisions by, among other things, failing to articulate and apply the governing legal standard to determine capacity and failing to consider relevant factors in making that determination. He further submits that the Decision was unreasonable because it failed to exhibit the requisite degree of justification, intelligibility and transparency. He also argues that the Tribunal denied him procedural fairness in its evidentiary and procedural rulings, including by refusing to admit a relevant expert report and then proceeding to consider and discount its contents without receiving evidence or submissions. He asks the court to set aside the Decisions and order a new hearing before a different adjudicator.

[44] As explained further below, CAA disputes that the Tribunal made any errors of law or was unreasonable in the reasons it provided. CAA further contests that Tribunal denied Connor procedural fairness.

[45] CAA also calls into question Connor's claim of incapacity relating to the *SABS* settlement, on the basis of (i) the timing of his claim of incapacity to settle the *SABS* claim, and (ii) inconsistent positions about capacity that Connor took in settlement of the tort action arising from the 2014 accident. CCA notes that Connor, while represented by counsel, settled his *SABS* claim in November 2016, after reaching the age of majority. The issue of his capacity to enter into the *SABS* settlement was raised years later in Dr. Kaminska's capacity report dated September 27, 2021. Connor's then counsel provided that report to CAA to support the position that Connor lacked capacity at the relevant time, as advanced in Connor's second Tribunal application in May 2022. A few months later in October 2022, Connor settled his tort claim for a significant amount. That action had previously been continued without a litigation guardian, once Connor was no longer a minor. CAA notes that the issue of Connor's capacity was not raised in the context of the tort settlement in October 2022, calling into question his claim of incapacity relating to *SABS* settlement that was the subject of his Tribunal application brought months earlier in May 2022.

C. Issues to be determined

[46] In this appeal and judicial review, the issues to be determined are:

a. Capacity (legal error): Did the Tribunal err in law in determining that Connor did not establish that he lacked capacity to enter into the settlement agreement?

b. Reasonableness: Was the Decision unreasonable because it failed to exhibit the requisite degree of justification, intelligibility and transparency?

c. Procedural fairness: Did the Tribunal's evidentiary and procedural rulings deny Connor procedural fairness?

[47] As explained below, I have concluded that the Tribunal did not make any reversible errors that would justify setting aside the Decisions. Therefore, I would dismiss the appeal and the judicial review application.

D. Analysis and conclusions

a. The Tribunal did not make errors of law in determining capacity

[48] Connor submits that the Tribunal made errors of law in determining that he did not establish that he lacked the capacity to enter into the settlement agreement.

[49] Connor cites *Housen*, at para. 36, where the Supreme Court stated that a decision maker's finding made by "applying a legal standard to a set of facts … is a question of mixed fact and law": see also *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35. In *Housen*, the court went on to state that where an error "can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or

similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness." The correctness standard applies where the legal principle is "readily extricable": *Housen,* at para. 36.

[50] Connor argues that the Tribunal failed to articulate and apply the governing legal standard to determine capacity and failed to consider relevant factors in making that determination. By doing so, Connor says the Tribunal made extricable errors of law.

[51] Connor submits that the purpose of the law relating to parties under disability is to protect the disabled and the integrity of the courts by requiring, among other things, court approval of settlements: see *Costantino v. Costantino*, 2016 ONSC 7279, at para. 44. He argues, however, that capacity to instruct counsel "is at the higher end of the competency hierarchy": *Carmichael v. GlaxoSmithKline Inc.*, 2020 ONCA 447, 151 O.R. (3d) 609, at para. 87. The law recognizes that capacity varies with the decision at issue: *Carmichael*, at para. 86. The capacity analysis must be "in relation to the issues in the litigation", which includes being able to "appreciate the reasonably foreseeable consequences of a decision", also described as "the capacity to assess risk, which requires consideration of a variety of results, both positive and negative": see *Costantino*, at paras. 41, 43. As stated in *Carmichael*, at para. 110, "a person may display many indicators of cognitive capacity, yet still lack the capacity to commence a proceeding in respect of the claim because of their psychological condition."

[52] In *Bajwa v. Singh*, 2022 ONSC 3720, at para. 14, the court stated that because the question was case specific, there is "no single definitive test to be applied in assessing whether a litigant has the capacity to instruct counsel." The court then listed important factors to consider in assessing the litigant's capacity to instruct counsel, including their ability to "understand and appreciate" based on their circumstances.

[53] Similarly, in *Carmichael*, at para. 94, the Court of Appeal provided a list of factors to consider relating to the capacity to commence a lawsuit. At para. 96, the court described these factors as "helpful indicators of capacity" but went on to caution that they were "neither necessary nor sufficient in themselves to establish incapacity; they are *indicia* that guide a holistic weighing of all the evidence on capacity in the context of the case" (emphasis in original). In *Costantino*, at para. 58, the court stated that "[i]ssues of mental capacity generally are to be decided on medical evidence", but went on to state that courts "have, in some circumstances, considered various types of evidence in determining whether a litigation guardian should be appointed", including: medical or psychological evidence on capacity; evidence from people who know the litigant well; the appearance and demeanour of the litigant; the testimony of the litigant; and the opinion of the litigant's counsel: see also *Carmichael*, at para. 105.

[54] Connor submits that the Tribunal failed to set out the legal test for determining capacity but instead emphasizes that the cognitive tests and the ability to attend to school (albeit with help) equates to the ability to instruct counsel without any help. Connor argues that the reasons exhibit a misunderstanding and misapplication of the law, including:

a. focusing on indicia of cognitive capacity – to the exclusion of Connor's psychological or psychiatric issues at the time of the settlement;

b. finding that psychological/emotional issues are only relevant to the extent they affect cognitive test scores – when psychological impairments (particularly anxiety and depression) on their own can inhibit one's ability to act for themselves, ask relevant questions, and process present and future financial and legal considerations;

c. focusing on Connor's ability to "understand" – to the exclusion of an analysis on Connor's ability to "appreciate" and weigh the potential consequences of his choice;

d. failing to consider the level of insight/appreciation Connor had into his function at the time of settlement;

e. dismissing Dr. Kaminska's report because it focused on settlement including the amount – when the legal test actually requires a specific analysis of all considerations surrounding the issue at hand, which was settlement; and

f. dismissing all expert medical/psychological and lay evidence in favour of focusing on cognitive tests and school records – despite a legal obligation to consider and analyze this evidence.

[55] In summary, Connor submits that the Tribunal made extricable errors of laws by failing to articulate any legal test, or the factors to be considered, in determining Connor's ability to instruct counsel on settlement. Connor says that the Tribunal's failure to consider legally required factors, (including psychological impairments and the ability to appreciate future needs in the context of the settlement offered) point to a failure to conduct the correct legal analysis mandated by the jurisprudence.

[56] I do not agree that the Tribunal made errors of law in its capacity analysis.

[57] As previously noted, the thrust of Connor's error of law submissions is that the Tribunal made reversible errors by failing to articulate and apply the governing legal standard to determine capacity and by failing to consider relevant factors in making that determination.

[58] As Connor acknowledges in his factum, there is no definitive test for assessing capacity, given its case specific nature: *Bajwa*, at para. 14. As Connor also notes, previous caselaw has provided various "helpful indicators of capacity … that guide a holistic weighing of all the evidence on capacity in the context of the case": *Carmichael*, at para. 96. Notwithstanding that acknowledgement, Connor's counsel proceeds to argue that failure to address identify and address various of the "helpful indicators" referred to in previous cases rise to the level of reversible error on appeal. That approach does not assist Connor in identifying extricable errors of law.

[59] Among other things, Connor also suggests that the Tribunal erred in the Decision, at para. 16 (and elsewhere), when it dismissed Connor's position that he "lacked the capacity to understand a settlement agreement and its consequences". At para. 21, the Tribunal also referred to "the capacity to understand and process information". Connor argues that the Tribunal thereby evidenced its misunderstanding of the law by failing to recognize that to have capacity, the litigant

must be able to "*appreciate* the reasonably foreseeable consequences of a decision" (see *Costantino*, at para. 43). He also notes that in *Bajwa*, at para. 14, the court uses both "understand" and "appreciate", indicating that being able to "understand" (or "process") information is not sufficient for this purpose.

[60] I see no merit to that submission. It is the kind of "line-by-line treasure hunt for error" that the Supreme Court warned against in *Vavilov*, at para. 102, in the context of reasonableness review. It is equally unhelpful in the context of correctness review.

[61] The threshold issue before the Tribunal in Connor's May 2022 application was whether settlement of his accident benefit claim over five years earlier in November 2016 should be set aside due to Connor's alleged incapacity. At para. 7 of the Decision, the Tribunal correctly stated that Connor faced a rebuttable presumption of capacity under s. 2(1) of the *SDA*. While the civil standard of proof on a balance of probabilities applies, "compelling evidence" is required to override the presumption of capacity in the *SDA*, given the potential consequences of a finding of incapacity on an individual's personal autonomy: *Koch (Re)* (1997), 33 O.R. (3d) 485 (Gen. Div.), at p. 521. In the Decision, at para. 10, the Tribunal found that Connor did not rebut that presumption. I am not persuaded that the Tribunal made an error of law in doing so.

[62] In reaching the conclusion that Connor did not rebut the presumption of capacity, the Tribunal considered whether Connor understood the consequences of agreeing to the settlement and whether he understood what he was signing. In doing so, the Tribunal weighed the evidence, including the evidence of Connor and family members, the capacity reports of the assessors the parties retained (Dr. Kaminska and Dr. Ferner) and the opinions of mental health providers Dr. Thornton and Ms. Whittick. Contrary to Connor's submissions, the Tribunal did not fail to consider evidence relating to Connor's psychological and emotional issues. The Tribunal also considered evidence relating to Connor's academic performance, as well as cognitive testing by Dr. Benn in 2015 and an occupational therapist in July 2016. To the extent that the Tribunal did not give effect to medical and other evidence, a cogent explanation was provided: for example, see paras. 24-26, relating to the retrospective capacity assessment reports.

[63] In my view, it is evident from the Decision that considering "the totality of the evidence" (Decision, at para. 26), the Tribunal was not satisfied that there was compelling evidence to override the presumption of capacity. I see no error of law in reaching that conclusion.

b. Connor did not establish that the Decision was unreasonable

[64] If this court finds on appeal that there was no reversible error of law relating to the Tribunal's capacity findings, Connor submits that the Decision was unreasonable because it failed to exhibit the requisite degree of justification, intelligibility and transparency, as set out in *Vavilov*. In making that submission, Connor repeats many of the same arguments he previously made to support his submission that the Tribunal erred in law in determining capacity.

[65] Among other things, Connor submits that the Decision was internally incoherent and untenable given the constraints of fact and law: see *Vavilov*, at para. 85. By way of example, he argues that that it was not logical for the Tribunal to conclude that Connor was able to

independently instruct counsel on his financial and legal position, without help or accommodation, based on Connor's passing three university courses, with tutors, accommodations, and his mother's daily input. He also says that the conclusion was not justified when (i) he was too anxious to address his professors or disability officer, without the help of his mother and his psychotherapist, and (ii) his therapist was concerned that he was unable to communicate about or appreciate how his PTSD, anxiety and depression were affecting him.

[66] Connor submits that from the Decision as written, it was clear that the Tribunal fundamentally misunderstood the task at hand. In his submission, the Decision reflects results-selective reasoning that ignores or illogically dismisses evidence related to Connor's capacity understand or appreciate the consequences of closing his accident benefit file for $20,000, 35 days after his eighteenth birthday, rather than leaving it open for a potential of lifetime benefits.

[67] I do not agree that Tribunal was unreasonable in providing its reasons.

[68] It is open to the court upon judicial review to set aside an administrative decision as unreasonable based on insufficiency of reasons, but only if there are serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency: see *Vavilov*, at para. 100. In this case, Connor has not demonstrated the Decision has serious shortcomings that would justify the conclusion that it was unreasonable.

[69] In essence, what Connor is doing is challenging the Tribunal's factual findings that underpin its conclusion that Connor did not overcome the presumption that he had capacity to enter into the settlement. In *Vavilov*, at paras. 125-26, the Supreme Court said the following about the court's role upon judicial review of an administrative tribunal's factual findings:

> It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker"….
>
> The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it….

[70] Connor's submissions on reasonableness amount to an invitation to do what *Vavilov* directs a reviewing court not to do. He urges the court to reweigh and reassess the evidence before the Tribunal and come to a different conclusion. He does so without demonstrating that the Tribunal had "fundamentally misapprehended or failed to account for the evidence before it": see *Vavilov*, at para. 126.

[71] In this case, the Tribunal weighed the evidence, as outlined previously in these reasons. To the extent that the Tribunal did not give effect to medical and other evidence, a cogent explanation was provided: for example, see paras. 24-26, relating to the retrospective capacity assessment reports. Considering the evidence as a whole, the Tribunal was not satisfied there was compelling evidence to override the presumption of capacity. Connor has not demonstrated that the Tribunal was unreasonable in reaching that conclusion.

c. Connor was not denied procedural fairness

[72] Connor submits that the Tribunal denied him procedural fairness in its evidentiary and procedural rulings. The focus of his fairness submissions relates to the Tribunal's refusal to admit a relevant expert report relating to Connor's capacity and then proceeding to consider and discount its contents without receiving evidence or submissions. Connor says that the Tribunal thereby erred in law, which justifies setting aside the Decisions on appeal.

[73] In his factum and oral argument, Connor also refers to other incidents of alleged unfairness. Among other things, he says it was unfair that in a pre-hearing ruling (shortly after he retained his current counsel), he was refused production of CAA's complete file, including claims notes (without redactions) and all previous Tribunal orders.

[74] In the Decision, at para. 28, the Tribunal stated:

> The applicant also took issue with several procedural orders that had been made prior to and during the videoconference hearing, including a denial of the applicant's request for a production order and the decision to exclude a report from Dr. Lynn Lightfoot (dated December 1, 2023). The applicant did not provide a compelling account during the videoconference hearing of how this denied production order impacted his ability to rebut the presumption of capacity. Then, [W]hile the applicant may claim Dr. Lightfoot's findings from her December 2023 report would have shed light on his capacity in November 2016, I find the retrospective nature of the report raises similar issues to those I identified about the capacity assessments [of Dr. Kaminska and Dr. Ferner] above. I do not find that the admission of this report would have likely impacted my findings. [Emphasis added.]

[75] Connor also raised various instances of alleged unfairness with the Tribunal upon reconsideration. With respect to Dr. Lightfoot's report, he challenged "both the exclusion of Dr. Lightfoot's Report, as well as what he describes as my [Vice-Chair Mazerolle's] choice 'to consider and discount Dr. Lightfoot's opinion without receiving evidence or submissions on the opinion'. According to the applicant, this choice was both procedurally unfair and an error of law": Reconsideration Decision, para. 10. The Tribunal found, at para. 8, that Connor did not establish a ground for reconsideration based on the exclusion and subsequent treatment of Dr. Lightfoot's report dated December 1, 2023.

[76] Connor once again raises the issue of Dr. Lightfoot's report before this court, arguing that he was denied procedural fairness by the initial refusal to allow the report to be tendered as evidence of Connor's alleged incapacity as well as the Tribunal's subsequent consideration and discounting of the report without receiving evidence or submissions. He also asks the court to revisit the denial of his request for a production order.

[77] I see no merit in Connor's submissions that he was denied procedural fairness.

[78] By way of recap, the Tribunal evidence before the late Adjudicator Driesel (and subsequently Vice-Chair Mazerolle) in the proceeding below included reports of capacity

assessors retained by each of Connor (Dr. Kaminska) and CAA (Dr. Ferner). At the oral hearing before adjudicator Driesel in January 2024, she declined to accept in evidence an additional capacity report by Dr. Lightfoot, stating in oral reasons that "I find it very hard to be able to link a report eight years after the fact as to whether or not the, the applicant was capable back in 2016."

[79] In the Decision, at para. 24, relating to the capacity reports of Dr. Kaminska and Dr. Ferner, Vice-Chair Mazerolle found that "neither report provides significant assistance" in determining Connor's capacity at the relevant time, noting that "both assessments are retrospective in nature." At para. 28, Vice-Chair Mazerolle declined to revisit the exclusion of Dr. Lightfoot's capacity report, again citing the retrospective nature of the report.

[80] I see no basis for concluding Connor was denied procedural fairness relating to exclusion and subsequent treatment of Dr. Lightfoot's report. Adjudicator Driesel based the report's exclusion on its retrospective nature. In the Decision, Vice-Chair Mazerolle confirmed the exclusion on the same basis when Connor raised the issue again, consistent with the reasons he provided for affording little or no weight to the capacity reports of Dr. Kaminska and Dr. Ferner. Vice-Chair Mazerolle again declined to revisit the issue when it was raised on reconsideration.

[81] I have reached the same conclusion with respect to the other instances of procedural unfairness that Connor alleges, including the denial of his request for a production order. The adjudicator provided cogent reasons for not revisiting a previous procedural order for the hearing, which included directions on the documents that the parties were required to exchange prior to the hearing. As set out in her oral reasons, the adjudicator was not persuaded that the unredacted claims notes should be produced and found that there was no evidence the applicant did not receive the Tribunal orders.

[82] Those findings on both issues were well within the scope of the Tribunal's procedural authority relating to the conduct of its hearings. They are entitled to deference. Connor has not established that the Tribunal denied him procedural fairness in these findings, nor has he established unfairness on other bases.

V. Disposition

[83] For the above reasons, I would dismiss the appeal and the judicial review application, with costs in the agreed amount of $4,000, payable by Connor to CAA. No costs would be payable by or to the Tribunal.

_____

Lococo J.

I agree: _____

D.L. Edwards J.

I agree: _____
Shore J.

Date: July 2, 2025

CITATION: Sistermans v. CAA Insurance Co., 2025 ONSC 3809
DIVISIONAL COURT FILE NO.: 724/24-JR and 728/24
DATE: 20250702

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Lococo, D.L. Edwards and Shore JJ.

BETWEEN:

CONNOR SISTERMANS by his litigation Guardian ANNIKA SISTERMANS

Applicant/Appellant

– **and** –

CAA INSURANCE COMPANY and THE LICENCE APPEAL TRIBUNAL

Respondents

REASONS FOR JUDGMENT

R. A. LOCOCO J.

Date: July 2, 2025