CITATION: Bruder v. Malka, 2026 ONSC 1667
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2026 ONSC 1667 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO (ST. THOMAS)

RE: Darrell Bruder, Appellant

AND:

Dr. Ashley Malka, Respondent

BEFORE: Justice E. ten Cate

COUNSEL: Ikenna Aniekwe for the Appellant

Julie A. Zamprogna Balles for the Respondent

HEARD: March 11, 2026

ENDORSEMENT

[1] This is an appeal under s. 80 of the *Health Care Consent Act, 1996*[1] from a decision of the Consent and Capacity Board dated November 20, 2025, confirming a health practitioner's finding that Mr. Bruder is incapable with respect to proposed treatment in the classes of antipsychotic medications, mood stabilizers, and anxiolytics.

[2] For the reasons that follow, the appeal is dismissed, and the Board's decision is confirmed.

Procedural history and Board decision

[3] Mr. Bruder is a 64-year-old single man. He was initially admitted to the Southwest Centre for Forensic Mental Healthcare under Dr. Malka's care on August 11, 2025, pursuant to a court-ordered assessment of fitness to stand trial. He was not prescribed medication during the assessment period and required seclusion on multiple occasions. He was found unfit to stand trial on August 15, 2025, and began treatment under court order commencing on September 4, 2025, until November 5, 2025, when the treatment order expired. Since then, he has refused treatment and has not been treated since. On October 30, 2025, Dr. Malka made the finding of incapacity at

[1] *Health Care Consent Act, 1996,* S.O. 1996, c. 2, Sch. A.

issue in this appeal because in her opinion, he was unable to appreciate the reasonably foreseeable consequences of his treatment decisions.

[4] The Board heard the matter by videoconference on November 20, 2025, and, the same day, issued a decision confirming incapacity with respect to the specified treatment classes. Written reasons followed on November 24, 2025. The Board found that while Mr. Bruder understood the information relevant to the treatment decision, he could not appreciate the reasonably foreseeable consequences of a decision, or lack of decision, and therefore failed the second branch of the capacity test. The Board expressly recognized the presumption of capacity in s. 4(2), the onus on the health practitioner, and the need to weigh hearsay carefully.

[5] In reaching its conclusion, the Board relied on the oral evidence of the attending psychiatrist, Dr. Malka, her contemporaneous charting, and recent nursing/clinical notes indicating persistent lack of insight and deterioration after medication refusal in the two weeks leading up to the hearing (including seclusion on November 12 and a nursing entry on November 13). The Board noted Dr. Malka's evidence of modest improvement from October 27, 2025, until November 5, 2025, with the addition of another medication (Ziprasidone) but despite this improvement, his insight did not fluctuate.

[6] The Board also considered a November 18 clinical note of a social worker that Mr. Bruder continued to assert he did not suffer from a mental illness, and a nursing note from November 19 that he continued to express his usual delusional content. The Board acknowledged that Dr. Malka's last direct capacity assessment occurred on November 13, 2025, seven days pre-hearing, but found he lacked capacity at the time of the hearing based on the totality of the evidence and Mr. Bruder's consistent lack of insight since he came under Dr. Malka's care in August of 2025.

Positions of the parties on appeal

[7] The appellant submits the Board committed errors of law and made palpable and overriding factual errors by: (i) accepting a seven-day gap between the psychiatrist's last capacity assessment and the hearing, despite the principle that capacity may fluctuate; (ii) misapprehending or placing undue weight on a social worker's note (November 18) as if it were a clinical assessment, contrary to the *HCCA*'s assignment of the assessment task to a health practitioner; and (iii) failing to carefully weigh hearsay and to require material corroboration under applicable evidentiary principles. He relies on the Supreme Court's decision in *Starson*[2] for the two-part capacity test and the caution that disagreement with diagnosis is not incapacity, and on the need for contemporaneous assessment "at the time of the hearing." He further invokes *Canada (Minister of*

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[2] *Starson v. Swayze*, [2003] S.C.R. 722.

2026 ONSC 1667 (CanLII)

Citizenship and Immigration) v. Vavilov[3] on review standards and reasonableness. Remedially, he asks that the Court set aside the Board's decision and restore his capacity.

[8] The respondent supports the Board's decision, emphasizing that the statute asks whether the person is capable "at the time of the hearing," not necessarily on the day of or in the hours before the hearing. She submits the seven-day interval was reasonable in context, given the longstanding and consistent absence of insight across months and corroborative nursing entries (including November 13) and a clinical entry on November 18. She argues that the Board applied the correct legal test, recognized fluctuation in principle, and made a reasoned, deferentially reviewable determination grounded in the evidence; any misstatements in a note are minor and immaterial to the outcome. She relies on *Starson* (recognition of the manifestations of one's condition) and *Vavilov* (reasonableness/justification). She asks that the appeal be dismissed or, alternatively, that the matter be remitted only if the Court finds a material error.

2026 ONSC 1667 (CanLII)

Issues

[9] The appeal raises two issues:

(a) What is the standard of review on this statutory appeal under s. 80 of the *HCCA*?

(b) Did the Board commit an error of law and/or a palpable and overriding error in confirming the finding of incapacity?

(a) The standard of review

[10] Section 80 provides a statutory appeal from the Board to this Court. Both counsel addressed the matter using the *Vavilov* framework. On a statutory appeal, the appellate standards apply: questions of law are reviewed for correctness; findings of fact and mixed fact and law are reviewed for palpable and overriding error; and, where reasonableness is engaged, the Court considers whether the decision is justified, intelligible, and transparent in light of the record and the legal constraints. The parties were *ad idem* on this approach.

(b) The Board committed no error of law nor a palpable and overriding error in confirming the finding of incapacity

[11] Under s. 4(1) of the *HCCA,* a person is capable with respect to treatment if they are able to understand the information relevant to making the decision, and able to appreciate the reasonably

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[3] *Canada (Minister of Citizenship and Immigration) v. Vavilov,* [2019] 4 S.C.R. 653.

foreseeable consequences of a decision or lack of decision. Section 4(2) presumes capacity; the onus to prove incapacity is on the health practitioner, on a balance of probabilities, supported by cogent and compelling evidence. Hearsay may be admitted but must be carefully weighed.

[12] As summarized by the Board (relying on *Starson*), disagreement with a diagnosis is not, by itself, incapacity; however, where a mental condition is established, the patient must be able to recognize the possibility that they are affected by its manifestations, so as to apply the information to their own circumstances and appreciate the consequences.

[13] In *Starson* the Supreme Court reviewed the law of capacity to consent to treatment. The Court indicated that the right to make one's own treatment decisions is a fundamental one which can only be displaced where it is established that a person lacks mental capacity to do so. The person's "best interests" are not a consideration in determining the question of capacity to consent to treatment. Capable people have the right to take risks, to make decisions which others consider unwise, and to make mistakes. The presence of mental disorder should never be equated with a lack of capacity.

(i) The "seven-day gap" and contemporaneity

[14] The appellant contends that because capacity can fluctuate, the psychiatrist's last assessment a week before the hearing was too remote to ground a finding "at the time of the hearing." The Board expressly acknowledged fluctuation and the need to decide as of the hearing date. It accepted that Dr. Malka had not reassessed capacity after November 13, but relied on her oral evidence of consistent lack of insight since August of 2025, on deterioration after cessation of medication in early November, one occasion where he started to test the boundaries but was still holding on to his delusions, and on corroborative entries two days before the hearing (November 18) and a nursing note on November 13 that recorded "no insight into psychiatric illness or need for medication," together supporting persistence through the hearing date. On that basis, the Board found it "more likely than not" that incapacity continued as of the hearing.

[15] In my view, the Board's treatment of contemporaneity falls within a range of acceptable outcomes, and their findings are entitled to deference. The statute speaks to capacity at the time of the hearing; it does not mandate a reassessment that day in every case. Where the record shows enduring lack of insight over months and very recent corroboration consistent with that trajectory, a seven-day interval is not, without more, a legal error. The Board recognized the risk of fluctuation and explained why, on this record, it concluded the onus was discharged as of the hearing.

(ii) Use of clinical/hearsay notes and alleged misapprehension

[16] In the main, the Board relied on Dr. Malka's evidence that Mr. Bruder's mental status had deteriorated since he stopped accepting treatment following the expiry of the court's treatment

2026 ONSC 1667 (CanLII)

order on October 30, 2025, and had likely continued to deteriorate since her last assessment of him, which was the normal course for untreated psychosis. In her opinion, other than showing modest improvement, he very likely continued to lack any appreciation that he suffered from any form of mental disorder requiring treatment as of the date of the hearing given his longstanding inability to do so, including shortly before the hearing date on November 18, 2025.

2026 ONSC 1667 (CanLII)

[17] The appellant argues the Board misapprehended a social worker's note (November 18) and improperly treated it as a clinical capacity assessment. Read fairly and in context, the Board did not treat the note as a capacity assessment; it treated it — together with a nursing entry on November 13 and the psychiatrist's oral evidence — as corroborative of persistent lack of insight proximate to the hearing. The Board expressly recognized that hearsay may be admitted but must be weighed carefully; it did so by anchoring its finding primarily in the psychiatrist's evidence and using the notes for consistency and recency. This approach is consistent with the Board's mandate and the record.

[18] The respondent concedes that a particular phrasing ("he denied he required treatment") may not be perfectly precise but submits that nothing turns on it in light of the overwhelming record of persistent denial of mental illness and lack of insight. I agree. Based upon the evidence before it, even without the note, it was reasonable for the Board to infer that Mr. Bruder's lack of insight and lack of capacity to consent to treatment had not improved in the days between Dr. Malka's most recent assessment and the hearing. Even if one isolates that line, the reasons as a whole remain justified and intelligible; the note was not the linchpin of the decision, and the evidentiary foundation for incapacity did not depend on it.

(iii) The Application of the Starson test

[19] The Board's decision includes the test for capacity in *Starson*:

> While a patient need not agree with a particular diagnosis, if it is demonstrated that he has a mental "condition", the patient must be able to recognize the possibility that he is affected by that condition…a patient is not required to describe his mental condition as an "illness," or to otherwise characterize the condition in negative terms. Nor is a patient required to agree with the attending physician's opinion regarding the cause of that condition. ***Nonetheless, if the patient's condition results in him being unable to recognize that he is affected by its manifestations, he will be unable to apply***

> ***the relevant information to his circumstances, and unable to appreciate the consequences of his decision***.[4] [Emphasis added in Board's decision.]

[20] The Board found that Mr. Bruder understood the information relevant to treatment. It focused on appreciation, finding he was unable to recognize that he was affected by the manifestations of his condition and therefore could not apply the information to his own circumstances, or weigh the consequences. The Board grounded this conclusion in the psychiatrist's evidence and multiple charted examples of fixed grandiose/persecutory beliefs, denial of any need for treatment, and deterioration after his treatment refusal in early November (including seclusion on November 12). That reasoning tracks the *Starson* framework as summarized by the Board.

[21] The appellant urges that psychiatry is "not an exact science," that capable patients may be dissident, and that the Board impermissibly equated wisdom/best interests with capacity. Respectfully, that submission is not borne out by the reasons, which repeatedly emphasize the presumption of capacity, the two-part test, the patient's right to make unwise choices, and the prohibition on deciding by perceived best interests. The Board did not displace capacity because of disagreement with diagnosis; it found a sustained inability to recognize the possibility of being affected by the condition's manifestations, which is a permissible route to finding lack of appreciation under *Starson*.

(iv) Overall reasonableness/correctness

[22] Standing back, the Board's decision displays the hallmarks of a reasonable outcome under the applicable standards. It identifies the correct legal test, acknowledges the presumption and onus, recognizes fluctuation, and ties its conclusions to contemporaneous record evidence and oral testimony. Any minor misstatement in a collateral note does not undermine the justification, intelligibility, and transparency of the reasons or demonstrate a palpable and overriding factual error.

Disposition

[23] The appeal is dismissed. The Board's decision dated November 20, 2025, is confirmed.

Costs

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[4] *Starson, supra*, at para. 79.

2026 ONSC 1667 (CanLII)

[24] If costs are sought and cannot be agreed, the parties may deliver brief written submissions (maximum 3 pages exclusive of bills of costs) within 14 days (appellant first, respondent within 7 days thereafter). If I do not receive cost submissions within that timeframe, I will assume the issue is resolved.

"Justice E. ten Cate"

Justice E. ten Cate

Date: March 18, 2026

2026 ONSC 1667 (CanLII)