



Federal Court applies Vavilov Standard of Review for the first time in an Opposition Decision Appeal

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On March 12, 2020, Justice Kane of the Federal Court broke new ground, applying the new *Vavilov* standard of review approach to a Trademark Opposition Board decision appeal for the first time in [Pentastar Transportation Ltd v FCA US LLC](#). Read [here](#) for a prior comment on the *Vavilov* decision.

The applicant argued before the Federal Court that the Registrar of Trademarks (the Trademark Opposition Board) had failed to properly consider crucial opposition evidence thereby rendering the opposition decision findings illogical, and that the Registrar failed to explain in the reasons why findings were made. The Registrar had held, *inter alia*, that the applicant had not met its evidential burden to show the respondent did not have a genuine intention to use the mark at issue.

Of the standard of review, the Court noted that the Supreme Court of Canada has established in *Vavilov* that reasonableness is the presumptive standard of review for administrative decisions, but that presumption is rebutted when the enabling statute provides for a statutory right of appeal, in which case the appellate standard of review applies. Section 56 of the *Trademarks Act* provides a statutory right of appeal of opposition decisions to the Federal Court. The Court held that to give effect to Parliament's expressed intention in the *Act*, and in view of *Vavilov*, the Registrar's decisions should be reviewed on the appellate standard of review.

Justice Kane observed that the appellate standard of review is as established in *Housen v Nikolaisen*, which requires that for questions of fact and questions of mixed fact and law where the legal principle or question of law is not extricable, the applicable standard is palpable and overriding error, which also applies to inferences of fact. Questions of law (including statutory interpretation and the scope of a decision-maker's authority) are subject to the standard of correctness. The Court noted that it must pay respectful attention to the Registrar's reasons and consider the decision as a whole, beginning with a consideration of the reasons, including the record before the decision-maker, to determine whether the alleged errors exist.

Justice Kane noted that the Federal Court of Appeal has held palpable and overriding error is a highly deferential standard of review, where "palpable" means an obvious error, and "overriding" means it affects the outcome of the case. A palpable and overriding error must, therefore, obviously and fundamentally affect the outcome of the case.

In view of the high degree of deference applicable to a palpable and overriding standard of review, the applicant argued a high degree of scrutiny of the Registrar's reasons and the record before the Registrar was also called for. Justice Kane did not agree, observing that the Federal Court of Appeal has affirmed that the appellate court's role is not to second-guess the weight to be assigned to the evidence. The Court further noted that in this case, the applicant appeared to be seeking a different result based on arguing that the evidence should have been weighed differently.

The Court also observed that the Federal Court of Appeal has held that first-instance courts benefit from a rebuttable presumption that they considered and assessed all of the material placed before them. In addition, while an appellate court considering a submission of palpable and overriding error often focuses on the reasons of the first-instance court, the reasons are to be viewed in context and construed in light of both the evidentiary record before the first-instance court and the submissions made to it. Even if the reasons may not mention something specific, the evidentiary record and context may shed light on why the first-instance court did what it did, or confirm that a matter not mentioned in the reasons was within the court's contemplation and therefore properly considered.



The Court concluded that the Registrar had not erred in finding the respondent had an intent to use the mark in compliance with the *Act*. The Registrar's decision was upheld, and the appeal dismissed.

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