Federal Court of Appeal  Cour d'appel fédérale

Date: 20160831

Dockets: A-303-15

Citation: 2016 FCA 215

CORAM: **NADON J.A.**
PELLETIER J.A.
RENNIE J.A.
DE MONTIGNY J.A.
GLEASON J.A.

BETWEEN:

HOSPIRA HEALTHCARE CORPORATION

Appellant
(Plaintiff)

and

THE KENNEDY INSTITUTE OF RHEUMATOLOGY

Respondent
(Defendant)

AND BETWEEN:

THE KENNEDY TRUST FOR RHEUMATOLOGY RESEARCH, JANSSEN BIOTECH, INC., JANSSEN INC. and CILAG Gmbh INTERNATIONAL

Respondents
(Plaintiffs By Counterclaim)

and

**HOSPIRA HEALTHCARE CORPORATION,
CELLTRION HEALTHCARE CO., LTD. and
CELLTRION, INC.**

**Appellants
(Defendants By Counterclaim)**

Heard at Ottawa, Ontario, on April 15, 2016.

Judgment delivered at Ottawa, Ontario, on August 31, 2016.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: PELLETIER J.A.
RENNIE J.A.
DE MONTIGNY J.A.
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REASONS FOR JUDGMENT

NADON J.A.

I. Introduction

[1] Before us is an appeal of an order made by Mr. Justice Boswell of the Federal Court (the Motions Judge) on June 18, 2015 wherein he dismissed the Appellants' appeal from the Order of Madam Prothonotary Milczynski (the Prothonotary) rendered on April 17, 2015 pursuant to which she ordered, *inter alia*, that the additional examination of two witnesses by the Appellants would be limited to one half day per witness by teleconference.

[2] By order of the Chief Justice, this appeal was heard by a panel of five judges. At issue is the question of whether this Court should revisit the standard of review applicable to discretionary orders made by prothonotaries enunciated in *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425, 149 N.R. 273 [*Aqua-Gem*]. The Respondents invite us to abandon the standard of review set out in *Aqua-Gem* and to replace it by the standard enunciated by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*]. For the reasons that follow, it is my view that we should abandon the *Aqua-Gem* standard and adopt the one set out in *Housen*.

II. Facts

[3] The Kennedy Trust for Rheumatology Research (Kennedy), one of the Respondents, is the owner of patent number 2,261,630 (the '630 Patent) entitled "Anti-TNF Antibodies and Methotrexate in the Treatment of Autoimmune Disease". The two named inventors of this patent, Sir Ravinder Nath Maini (Dr. Maini) and Sir Marc Feldman (Dr. Feldman) (the inventors), are retired and live in the United Kingdom. They are respectively 79 and 71 years old.

[4] On March 6, 2013, the Appellant Hospira Healthcare Corporation (Hospira) commenced an action against Kennedy seeking, *inter alia*, declarations that the '630 Patent was invalid and that Hospira's proposed product did not infringe the '630 Patent.

[5] On October 4, 2013, Kennedy and the other Respondents, namely Janssen Biotech, Inc., Janssen Inc. and Cilag GmbH International counterclaimed against Hospira and the other Appellants, namely Celltrion Healthcare Co., Ltd. and Celltrion, Inc. seeking, *inter alia*, declarations that the '630 Patent was valid and that the Appellants had infringed or induced infringement of the '630 Patent.

[6] In May 2014, the Appellants conducted a discovery of each of the two inventors – in London for Dr. Maini and in New York for Dr. Feldmann where he happened to be travelling. However, the Appellants were unable to complete the examinations. Prior to the examinations, counsel for the Appellants had requested two days of discovery for each of the inventors, but that request had been refused by counsel for the Respondents whose view was that one day for each

inventor was sufficient. Consequently, at the end of the first day, the examination of each inventor was terminated by the Respondents.

[7] On July 31, 2014, the Appellants brought a motion seeking, among other things, to continue the examination of the inventors, at their own expense, for one additional day per inventor. The Appellants sought to examine the inventors in Toronto.

III. Decisions Below

A. *Order Of The Prothonotary*

[8] The Appellants' motion was heard in Toronto on March 10, 2015 by the Prothonotary who had been case managing the action from the outset. On April 17, 2015, she ordered that "Hospira and Celltrion shall complete the examination of each of Dr. Feldmann and Dr. Maini in one-half day (each), which examinations shall be conducted by teleconference, unless otherwise agreed to by the parties" (paragraph 6 of her order).

B. *Order Of The Motions Judge*

[9] On June 18, 2015, the Motions Judge dismissed the Appellants' appeal from the Prothonotary's order. Applying the standard of review set out in *Aqua-Gem*, the Motions Judge stated that the re-attendance of the inventors and their continued examination was not vital to the final issue of the case, and that the Prothonotary's order was not clearly wrong. He emphasized that the Federal Court was reluctant to interfere with case-management decisions made by prothonotaries who were to be given "elbow room" in performing "a difficult job" (paragraph 4 of his order).

[10] The Motions Judge concluded that the Prothonotary had properly exercised her discretion and that she had rendered "not only a focused decision but a reasonable one as well" (paragraph 5 of his order). He further held that the motion before him was of "questionable necessity or merit" and that it "undermine[d] the objectives of the case management system" (paragraph 6 of his order).

IV. Issues

[11] The appeal raises the two following questions:

i. Should this Court reconsider the standard of review applicable to discretionary orders made by prothonotaries, as set out in *Aqua-Gem*?

ii. Was the Motions Judge wrong in refusing to interfere with the Prothonotary's order?

V. Parties Submissions

A. *Appellants' Submissions*

(1) Standard of Review

[12] The Appellants say that the standard of review applicable to discretionary decisions made by prothonotaries is the one set out by this Court in *Aqua-Gem,* as reiterated by the Supreme Court in Z*.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450, at paragraph 18 [*Pompey*]. The Appellants further say that the standard of review on appeal to this Court with respect to questions of law is correctness and palpable and overriding error in regard to findings of fact.

(2) Merits Of The Appeal

[13] The Appellants argue that the Motions Judge erred in that he allowed the Respondents to thwart their right to examination for discovery under Rule 237(4) of the *Federal Courts Rules*, SOR/98-106 (the Rules) which provides that "where an assignee is a party to the action, the assignor may also be examined for discovery". There is no dispute between the parties that the inventors, as assignors of the patent at issue, can be examined by the Appellants under the Rule.

[14] Contrary to the Motions Judge's view that "the re-attendance [of the inventors] will only serve to provide historical context", the Appellants point to the other purposes of inventor discovery and say that there is no requirement that the examining party demonstrate, *a priori*, "any necessity in examining the assignor or specifically set out what the assignor's examination will add to the litigation" (paragraph 39 of the Appellants' memorandum). According to the Appellants, since there is no limitation to the right of examination of an assignor, the burden of establishing that the examination is "oppressive, vexatious or unnecessary" falls on the person being examined, i.e. in this case the Respondents. In the Appellants' view, the Prothonotary wrongly shifted the burden in that she required the Appellants to justify the necessity of their examination of the inventors.

[15] The Appellants contend that "[t]he 'elbow room' of case management does not confer on a prothonotary the ability to disregard the Rules" (paragraph 46 of the Appellants' memorandum). Indeed, the deference that ought to be afforded in such a case is not without limits. The Appellants are of the view that the decision relied on by the Motions Judge, namely *Sawridge Band v. Canada*, 2006 FCA 228, [2006] F.C.J. No. 956 (QL) [*Sawridge*], is clearly

distinguishable from the case before us because of factual differences. The Appellants argue that had the Motions Judge performed the same review of the merits of the Prothonotary's order as the Court did in *Sawridge*, he would have concluded that the Prothonotary's order was clearly wrong.

[16] The Appellants further submit that "a case management prothonotary cannot prioritize expedience over a right conferred by the Rules" (paragraph 59 of the Appellants' memorandum), and say that this is what the Prothonotary did by limiting the duration and manner of the discovery sought by them without a determination that the examination was abusive or otherwise improper. The Prothonotary erred, say the Appellants, by permitting the Respondents to arbitrarily end their examination of the inventors and thus the Motions Judge ought to have intervened.

[17] Turning to the manner in which examinations for discovery ought to be conducted, the Appellants insist that the default rule is that examinations are done in person, and that an order that examinations be conducted by video-conference is an exceptional remedy that must be justified by the party seeking it. The Appellants contend that the Prothonotary also prejudged the relevance of questions that had yet to be asked by limiting the examinations of the inventors to one half day each.

[18] The Appellants further say that the Prothonotary misapprehended the facts of the case, because there was no evidence that the examinations were abusive or that the inventors were

unable to attend in person for one day each. In addition, the issues for discovery were too vast, in the Appellant's opinion, to be covered in the timeframe ordered by the Prothonotary.

B. *Respondents' Submissions*

(1) Standard Of Review

[19] The Respondents invite this Court to reconsider the standard of review applicable to discretionary orders made by prothonotaries. They say that such orders should be reviewed according to the *Housen* standard rather than the prevailing *Aqua-Gem/Pompey* standard which, in their view, is manifestly wrong and should be abandoned.

[20] The Respondents argue that the *de novo* review of prothonotaries' decisions that are vital to the final outcome of the case is irreconcilable with the presumption of fitness and that there is "no compelling reason for adopting differing standards of review on appeal depending solely on the place in the judicial hierarchy occupied by the first-instance decision maker" (paragraphs 33 and 34 of the Respondents' memorandum.)

[21] The Respondents also point out that, in *Pompey*, the Supreme Court merely reiterated the standard enunciated by this Court in *Aqua-Gem* without further explanation. According to the Respondents, *Housen* is the Supreme Court's definitive word on the standard of review and is binding on this Court.

[22] Moreover, the Respondents assert that the *Aqua-Gem/Pompey* standard is fraught with uncertainty because the question of whether an issue is vital or not is difficult to answer and

requires a case-by-case assessment. Conversely, the Respondents say that the *Housen* standard is easy to apply. Finally, the Respondents say that decisions made by prothonotaries with respect to the merits of actions of less than $50,000 are already reviewed on the *Housen* standard. In any event, the Respondents say that, other than in respect of the *de novo* review for vital issues, the *Aqua-Gem/Pompey* and the *Housen* standards are, in effect, the same.

(2) Merits Of The Appeal

[23] With respect to the merits of the appeal, the Respondents say that the Appellants are simply re-arguing in this appeal what they have already argued before the Prothonotary and the Motions Judge. As the issue before us is not one that is vital to the outcome of the case, the Respondents say that the Appellants are in error when they argue that the Motions Judge should have substituted his discretion for that of the Prothonotary.

[24] Relying on Rule 3, the Respondents say that discovery "is not a never ending process" and that it should be proportionate. The Respondents further say that the Federal Court properly managed its process according to this principle. In addition, the Respondents assert that a case management judge has the power to make any order that is necessary for the just determination of the proceedings, including by dispensing compliance with a Rule. By granting the Prothonotary some "elbow room", the Motions Judge deferred to her factually-based decision in accordance with *Sawridge*.

[25] The Respondents also say that the purposes of examining an inventor for discovery are limited and that restricting inventor discovery in this case to one-and-a-half day per inventor

does not cause prejudice to the Appellants. Finally, the Respondents emphasize that, absent the issuance of letters rogatory, they do not have the power to compel the two inventors to re-attend because they are residents of the United Kingdom. In this context, they submit that it was appropriate for the Prothonotary to order that they should be examined by way of teleconference.

VI. Analysis

A. *Should This Court Reconsider The Standard Of Review Of Discretionary Decisions Made By Prothonotaries?*

[26] At the outset, I must say that as the order made by the Prothonotary that gives rise to the present appeal is not one that is vital to the final outcome of the case, a determination of whether or not the standard of review should be revisited is in no way determinative of this case. As the Respondents have argued, there does not appear to be, other than in respect of the *de novo* review when the issue is vital, any substantial difference between the *Aqua-Gem/Pompey* standard and the *Housen* standard. Both standards, in my respectful opinion, simply formulate the same principles through the use of different language.

[27] In effect, under the *Aqua-Gem/Pompey* standard, a discretionary decision made by a prothonotary is clearly wrong, and thus reviewable on appeal by a judge, where it is based: (1) upon a wrong principle - which implies that correctness is required for legal principles - and (2) upon a misapprehension of facts - which seems to be the equivalent of the "overriding and palpable error" criterion of the *Housen* standard if it caused the prothonotary's decision to be "clearly wrong".

[28] Notwithstanding, I have no doubt that the question of the standard of review applicable to discretionary decisions of prothonotaries is one that needs to be revisited. It is my opinion that we should now adopt the *Housen* standard with regard to discretionary decisions made by prothonotaries as we have done in respect of similar decisions made by judges of first instance (in *Imperial Manufacturing Group Inc. v. Decor Grates Incorporated*, 2015 FCA 100, [2016] 1 F.C.R. 246 [*Imperial Manufacturing*], to which I will return later). Needless to say, the issue of the standard of review applicable to orders of both judges and prothonotaries has been one of the most contentious issues before our Court and before all courts of appeal, including before the Supreme Court of Canada, in the last 10 to 15 years. It is my respectful view that it is not in the interests of justice to continue with a plurality of standards when one standard, i.e. the *Housen* standard, is sufficient to deal with the review of first instance decisions.

(1) The Aqua-Gem Test And Why It Should Be Changed

[29] In *Aqua-Gem*, decided in 1993, our Court enunciated the standard which, until now, has been applied to review discretionary decisions made by prothonotaries. Until this appeal, *Aqua-Gem* was the last time when a panel of five judges of this Court heard an appeal. It was an important issue then and remains so today.

[30] The matter giving rise to the appeal in *Aqua-Gem* was a motion brought by the Respondent for an order staying the proceedings under paragraph 50(1)(*b*) of the *Federal Court Act*, (1993), R.S.C., 1985, c. F-7 or, in the alternative, dismissing the proceedings for want of prosecution pursuant to then Rule 440. The motion was heard by the Associate Senior Prothonotary (the Senior Prothonotary) who dismissed it. The Senior Prothonotary's decision

was appealed to a motions judge who disagreed with him and, who, as a result, set his Order aside, with costs.

[31] The issue before our Court in *Aqua-Gem* was whether all discretionary decisions made by prothonotaries should be reviewed by way of *de novo* hearings, which our Court's decision in *Canada v. Jala Godavari (The)*, 135 N.R. 316, 40 C.P.R. (3d) 127 [*The Jala Godavari*] seemed to suggest, or whether such decisions should be reviewed for error only in some or all cases.

[32] Three opinions were given in *Aqua-Gem*. Chief Justice Isaac (the Chief Justice) opined both on the standard of review and with regard to the merits of the appeal. Robertson J.A. opined on the merits only and MacGuigan J.A., with whom Mahoney J.A. and Décary J.A. agreed, addressed both the standard of review and the merits of the appeal.

[33] The first opinion, given by the Chief Justice, concluded that the standard of review enunciated in *The Jala Godavari* was incomplete and that, in relying on that decision, the motions judge had erred in interfering with the Senior Prothonotary's decision. In coming to this view, the Chief Justice carefully examined the legislative underpinnings of the role of prothonotaries and the nature of the functions which they were expected to perform. This led him to say, at page 441, that:

> Doubtless, in providing for the office of the Registrar or Master in the Exchequer Court and of the prothonotary in this Court, Parliament was mindful of the pre-trial and post judgment support which the master system provided for superior court judges in the judicial systems of England and Ontario, both of which made extensive use of these judicial officers.

[34] The Chief Justice then proceeded to consider the history and evolution of the law concerning the office of master in Canada and in England. More particularly, he examined both English and Ontario cases with regard to the standard of review pursuant to which decisions made by masters were to be reviewed. That examination led him to conclude that the approach taken by the Ontario Court of Appeal in *Stoicevski v. Casement*, (1983) 43 O.R. (2d) 436 (Div. Ct.) [*Stoicevski*] was the proper approach and the one that this Court should follow. At page 454 of his reasons, the Chief Justice formulated the standard which, in his view, this Court should adopt in reviewing discretionary decisions of prothonotaries. He put it as follows:

> I am in agreement with counsel for the appellant that the proper standard of review of discretionary orders of prothonotaries in this Court should be the same as that which was laid down in Stoicevski for masters in Ontario. I am of the opinion that such orders ought to be disturbed on appeal only where it has been made to appear that
>
> > (a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or
> >
> > (b) in making them, the prothonotary improperly exercised his discretion on a question vital to the final issue of the case.

[35] On the basis of this standard of review, the Chief Justice concluded that there were no grounds justifying the motions judge's interference with the Order of the Senior Prothonotary. Hence, the Chief Justice would have allowed the appeal.

[36] The second opinion, the majority opinion, was that of MacGuigan J.A. who accepted the Chief Justice's recitation of the facts and agreed, in part, with his opinion concerning the standard of review. He reformulated the standard of review which this Court ought to apply to discretionary orders made by prothonotaries in the following way at pages 462 and 463:

> I also agree with the Chief Justice in part as to the standard of review to be applied by a motions judge to a discretionary decision of a prothonotary. Following [page463] in particular Lord Wright in *Evans v. Bartlam*, [1937] A.C. 473 (H.L.) at page 484, and Lacourciere J.A. in *Stoicevski v. Casement* (1983), 43 O.R. (2d) 436 (Div. Ct.), discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless:
>
> > (a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or
> >
> > (b) they raise questions vital to the final issue of the case.
>
> Where such discretionary orders are clearly wrong in that the prothonotary has fallen into error of law (a concept in which I include a discretion based upon a wrong principle or upon a misapprehension of the facts), or where they raise questions vital to the final issue of the case, a judge ought to exercise his own discretion *de novo*.

[37] After explaining that *The Jala Godavari* should not be understood as having decided that judges should never defer to a prothonotary's discretion, but rather that whenever the question at issue was vital to the final issue of the case, the prothonotary's discretion was subject to an overriding discretion on the part of a judge, adding that error of law on the part of a prothonotary was always a ground of intervention, MacGuigan J.A., then addressed the question as to when an order made by a prothonotary was vital to the final issue of a case. At pages 464 and 465, he said:

> The question before the prothonotary in the case at bar can be considered interlocutory only because the prothonotary decided it in favour of the appellant. If he had decided it for the respondent, it would itself have been a final decision of the case: *A-G of Canada v. S.F. Enterprises Inc. et al.* (1990), 90 DTC 6195 (F.C.A.) at pages 6197-6198; *Ainsworth v. Bickersteth et al.*, [1947] O.R. 525 (C.A.). It seems to me that a decision which can thus be either interlocutory or final depending on how it is decided, even if interlocutory because of the result, must nevertheless be considered vital to the final resolution of the case. Another way of putting the matter would be to say that for the test as to relevance to the final issue of the case, the issue to be decided should be looked to [page465] before the question is answered by the prothonotary, whereas that as to whether it is interlocutory or final (which is purely a *pro forma* matter) should be put after

> the prothonotary's decision. Any other approach, it seems to me, would reduce the more substantial question of "vital to the issue of the case" to the merely procedural issue of interlocutory or final, and preserve all interlocutory rulings from attack (except in relation to errors of law).
>
> (emphasis in original)

[38] Thus, in MacGuigan J.A.'s view, whether a question is vital or not to the final issue of the case depends on what was sought by the motion before the prothonotary. A question vital to the final issue of the case does not depend on how the prothonotary determines the issue.

[39] With respect to the merits of the appeal, MacGuigan J.A. was of the view that the motions judge had made no error in setting aside the Senior Prothonotary's Order.

[40] The third opinion was that of Robertson J.A. who shared the Chief Justice's opinion that the appeal should be allowed.

[41] Thus, in *Aqua-Gem*, our Court made it clear that not all decisions made by prothonotaries were subject to *de novo* review. On the basis of a thorough review of the historical evolution of the role of masters and prothonotaries in the Canadian judicial system, the Court concluded that only decisions that decided questions vital to the final issue of a case should be reviewed *de novo* by a judge of the Federal Court. In the Court's view, that framework recognized the intention expressed by Parliament in the *Federal Court Act* to grant prothonotaries certain powers in order to further the efficient performance of the work of the Court. In coming to this view, the Court traced the origins of the master system to deal with pre-trial matters back to the 19th century in England, and described the evolution of the standard of review in Canada since Confederation.

This narrative is suffused with the tension between the need to give effect to the powers granted to judicial officers, and the protection of the powers given to judges to decide cases without interference.

[42] To conclude on the standard adopted by our Court in *Aqua-Gem*, I should say that in paragraph 19 of *Merck & Co. v. Apotex Inc.*, 2003 FCA 488, 30 C.P.R. (4th) 40 [*Merck*], Décary J.A., writing for a unanimous court, after referring to pages 464 and 465 of MacGuigan J.A.'s reasons in *Aqua-Gem*, reformulated the test in the following terms:

> [19] To avoid the confusion which we have seen from time to time arising from the wording used by MacGuigan J.A., I think it is appropriate to slightly reformulate the test for the standard of review. I will use the occasion to reverse the sequence of the propositions as originally set out, for the practical reason that a judge should logically determine first whether the questions are vital to the final issue: it is only when they are not that the judge effectively needs to engage in the process of determining whether the orders are clearly wrong. The test would now read:
>
> Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless:
>
> a) the questions raised in the motion are vital to the final issue of the case, or
>
> b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

[43] To this it is important to add that in 2003, the Supreme Court in *Pompey* approved the *Aqua-Gem* standard and formulated, at paragraph 18 of its reasons, its approval in the following terms:

> 18 Discretionary orders of prothonotaries ought to be disturbed by a motions judge only where (a) they are clearly wrong, in the sense that the exercise of discretion was based upon a wrong principle or a misapprehension of the facts, or (b) in making them, the prothonotary improperly exercised his or her discretion

> on a question vital to the final issue of the case: *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (C.A.), per MacGuigan J.A., at pp. 462-63. An appellate court may interfere with the decision of a motions judge where the motions judge had no grounds to interfere with the prothonotary's decision or, in the event such grounds existed, if the decision of the motions judge was arrived at on a wrong basis or was plainly wrong: *Jian Sheng Co. v. Great Tempo S.A.*, [1998] 3 F.C. 418 (C.A.), per Décary J.A., at pp. 427-28, leave to appeal refused, [1998] 3 S.C.R. vi.

[44] As appears from the above remarks made by Mr. Justice Bastarache, who wrote the Supreme Court's reasons in *Pompey*, the Supreme Court also formulated the standard of review pursuant to which decisions of motions judges in appeal of discretionary decisions of prothonotaries were to be reviewed.

[45] The Respondents argue that discretionary decisions made by prothonotaries, vital or not to the final issue of the case, should not be subject to *de novo* review, but rather to the test adopted by the Supreme Court in *Housen*. The Respondents say that the compromise reached in *Aqua-Gem* to resolve the tension between the powers given to prothonotaries and those given to judges is no longer adequate in the present context and that we should follow the practice now prevailing in Ontario. More particularly, the Respondents submit that we should follow the decision of the Ontario Court of Appeal in *Zeitoun v. Economical Insurance*, 2009 ONCA 415, 96 O.R. (3d) 639 [*Zeitoun*] where the Ontario Court of Appeal abandoned the Ontario equivalent of the *Aqua-Gem* standard and held that the standard to be used in reviewing discretionary orders of masters in Ontario should be the one enunciated by the Supreme Court in *Housen*.

[46] In my view, there are a number of reasons why we should follow the lead given by the Ontario Court of Appeal in *Zeitoun*. First, there is continuing confusion in the Federal Court as to

what constitutes an order that raises questions vital to the final issue of the case. In *Winnipeg Enterprises Corporation v. Fieldturf (IP) Inc.*, 2007 FCA 95, 360 N.R. 355, a panel of this Court held, relying on the majority opinion of MacGuigan J.A. in *Aqua-Gem*, that what rendered a prothonotary's order vital to the final issue of the case was the nature of the question before him or her. Thus, the manner in which a prothonotary deals with the question before him is irrelevant in determining whether his order is one that raises questions vital to the final issue of the case.

[47] Unfortunately, this approach has been clearly misunderstood by a number of judges of the Federal Court where a line of jurisprudence, also relying on *Aqua-Gem*, has taken the view that "it is not what was sought but what was ordered by the Prothonotary which must be determinative of the final issues in order for the Judge to be required to undertake de novo review" (*Peter G. White Management Ltd. v. Canada*, 158 A.C.W.S. (3d) 696, 2007 FC 686, at paragraph 2 (Huguessen J.). Also see *Scheuer v. Canada*, 2015 FC 74, 248 A.C.W.S. (3d) 802, at paragraph 12 (Diner J.), *Teva Canada Limited v. Pfizer Canada Inc.*, 2013 FC 1066, 441 F.T.R. 130, at paragraph 10 (Campbell J.), *Gordon v. Canada*, 2013 FC 597, 2013 D.T.C. 5112, at paragraph 11 (Hughes J.), *Chrysler Canada Inc. v. Canada*, 2008 FC 1049, [2009] 1 C.T.C. 145 at paragraph 4 (Hughes J.)).

[48] I note that in his recent judgment in *Alcon Canada Inc. v. Actabis Pharma Company*, 2015 FC 1323, [2015] F.C.J. No. 1540, at paragraphs 9-19, Mr. Justice Locke of the Federal Court deplored the ongoing confusion prevailing in the Federal Court with regard to this issue.

[49] In my view, the effectiveness of the process of appeals to a Federal Court judge from an order of a prothonotary has been tainted by the language used in *Aqua-Gem*. I am obviously not to be taken as criticizing the panel that decided *Aqua-Gem*, but simply note that confusion has crept in the process and has detracted from the effective review of discretionary orders made by prothonotaries.

[50] Because of the *Aqua-Gem* standard, the question of whether a prothonotary's discretionary order is vital or not to the final issue of the case is one that is recurrent. Thus a high number of appeals taken to motions judges from discretionary orders or prothonotaries require the motions judge to ask himself whether it is appropriate or not to conduct a *de novo* review. The question has proven difficult to answer. Some issues, for example motions for leave to amend pleadings, have given much difficulty to decision makers (see for instance *Merck & Co. Inc. v. Apotex Inc.*, 2004 2 F.C.R. 459, 2003 FCA 488 (Richard C.J. dissenting, Décary and Létourneau JJ.A.), *Merck & Co. Inc. v. Apotex Inc.*, 2012 FC 454, 106 C.P.R. (4th) 325 at paragraphs 8 - 10 (Rennie J. as he then was).

[51] A second reason for moving away from the *Aqua-Gem* standard is the persuasiveness of the reasons of the Divisional Court of the Ontario Superior Court of Justice (the Divisional Court) with regard to the appropriate standard of review that should be applied by a motions judge hearing an appeal from an Ontario master, which a unanimous Ontario Court of Appeal endorsed in *Zeitoun*. More particularly, the Ontario Court of Appeal agreed with the Divisional Court that the prevailing standard, for all intents and purposes identical to the *Aqua-Gem* standard, should be abandoned and replaced by the standard enunciated by the Supreme Court in

Housen. In concluding that there was no principled basis for distinguishing between the decisions of masters and those of judges for the purpose of standard of review, the Ontario Court of Appeal made specific reference to paragraphs 26, 36, 40 and 41 of the reasons given by Low J. of the Divisional Court. The reasons of Low J., as they are expressed in these paragraphs, in my respectful view, go to the heart of the matter and are worth repeating.

[52] First, Low J. made the point that Ontario's prevailing standard in regard to discretionary decision of masters, which allowed for *de novo* hearings in certain situations, was the result of historical notions of hierarchy which merited reconsideration because i) of the evolution and rationalization of standards of review in the case law, ii) the expansion of the role of masters in the Ontario's civil system, iii) the concepts of economy and expediency which pervade the Ontario rules of civil procedure and, finally iv) the difficulties which had arisen in determining whether discretionary orders of masters were vital or not to the final issue of the case.

[53] Second, Low J. took the view that the reviewing court should proceed on the basis of a presumption of fitness that both judges and masters were capable of carrying out the mandates which the legislator had assigned to them. Thus, there was no principled basis justifying, on the sole ground of his place in the hierarchy, interference by a motions judge in regard to a matter assigned by the legislator to a master, other than when it had been shown that the master's decision was incorrect in law or that the master had misapprehended the facts or the evidence.

[54] Third, Low J. opined that the same approach taken in reviewing discretionary decisions made by motions judges should also be taken in reviewing discretionary decisions of masters. In

other words, intervention would be justified only where a master had made an error of law or had exercised his discretion on wrong principles or where he had misapprehended the evidence such that there was a palpable and overriding error. In Low J.'s opinion, the *Housen* standard should be applied to discretionary decisions of masters.

[55] In my view, the arguments which the Ontario Court of Appeal found convincing in *Zeitoun* are as compelling for the Federal Courts.

[56] I wish to point out that the question now before us has already been raised on a number of occasions before our Court, *Pfizer Canada Inc. v. Teva Canada Limited,* 2014 FCA 244, 466 N.R.55 at paragraph 3; *Bayer Inc. v. Fresenius Kabi Canada Ltd*., 2016 FCA 13, [2016] F.C.J. No. 43 at paragraph 7 [*Bayer*] and *Apotex Inc. v. Bristol-Myers Squibb Company*, 2011 FCA 34, 414 NR 162 at paragraph 9 [*Apotex*]. I note, in particular, that in *Apotex*, at paragraph 9, my colleague, Mr. Justice Stratas, referred to the Ontario Court of Appeal's decision in *Zeitoun* and indicated that he was "attracted" to the argument that *Aqua-Gem* should be reassessed. However, he was of the view that it was not necessary in the case before him to determine that issue.

[57] I should also say that I see nothing in the legislation which would prevent us from moving away from the *Aqua-Gem* standard and doing away with *de novo* review of discretionary orders made by prothonotaries in regard to questions vital to the final issue of the case. Pursuant to the enabling power conferred by subsection 12(3) of the *Federal Courts Act,* R.S.C. 1985, c. F-7, Rule 50(1) allows prothonotaries to hear–and make any necessary orders relating to–any motion unless specified otherwise. Rule 51(1) ensures that there is judicial oversight of those

decisions by providing for a right of appeal to a judge of the Federal Court for all orders made by prothonotaries. I also note that Rule 50(2) allows prothonotaries to render decisions with regard to the merits of actions for monetary relief not exceeding $50,000. In such instances, prothonotaries act, for all practical purposes, as trial judges and their decisions are reviewable pursuant to the *Housen* standard. I therefore see no legislative impediment to the abandonment of the *Aqua-Gem* standard of review. There appears to be no principled reason why there should be a different and, in effect, more stringent standard of review for discretionary orders made by prothonotaries.

(2) Can We Abandon The Aqua-Gem/Pompey Standard?

[58] Although I am satisfied that we should abandon the *Aqua-Gem* standard, is it open for us to do so in the present matter? In inviting us to revisit the *Aqua-Gem* standard, the Respondents say that on the basis of this Court's decision in *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149 [*Miller*], and of the Supreme Court's decision in *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 [*Carter*], we can do so.

[59] First, I wish to say that I agree entirely with the Respondents when they say that in *Pompey*, the Supreme Court simply gave effect to the *Aqua-Gem* standard. In other words, other than adopting the standard enunciated by MacGuigan J.A., the Supreme Court was silent. It is quite clear from the Supreme Court's reasons in *Pompey* that the true issue before the Court in that case was the correctness of the legal determinations made below and not the applicable standard of review.

[60] The Respondents say that pursuant to *Miller*, we can reconsider our decisions "if they are manifestly wrong in the sense that they overlook relevant authority" (paragraph 31 of the Respondents' memorandum). In making that assertion, the Respondents rely on paragraph 10 of Rothstein J's (as he then was) reasons in *Miller* where he says:

> [10] The test used for overruling a decision of another panel of this Court is that the previous decision is manifestly wrong, in the sense that the Court overlooked a relevant statutory provision, or a case that ought to have been followed…
>
> Emphasis added

[61] In my respectful view, this is not a situation where *Miller* finds application. It cannot be said that *Aqua-Gem* "is manifestly wrong" in the sense explained by Rothstein J. in *Miller*. In my view, *Miller* is not relevant to the present matter.

[62] However, I am satisfied that the Respondents are correct in invoking the Supreme Court's decision in *Carter* where the Court, at paragraph 44, stated an exception to the principle of *stare decisis* which allows lower courts, in certain circumstances, not to follow the decisions of higher courts and, in particular, decisions rendered by the Supreme Court. At paragraph 44 of its reasons in *Carter*, the Supreme Court said as follows:

> [44] The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate" (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paragraph 42).

[63] Although the issue of the standard of review applicable to discretionary decisions of prothonotaries is not a new legal issue, there has been "a change in the circumstances or evidence that 'fundamentally shifts the parameters of the debate'". In my view, the standard of review set out in *Aqua-Gem* has been overtaken by a significant evolution and rationalization of standards of review in Canadian jurisprudence. In this context it is important to emphasize that the Chief Justice's review in *Aqua-Gem* of the role of masters in England and in Canada showed that their role was one that evolved from assistants to judges to that of independent judicial officers. It is also worthy of note that the role of prothonotaries of the Federal Court has continued to evolve since *Aqua-Gem* was decided in 1993. In particular, their role, as the Respondents submit, includes the task of hearing and determining the merits of actions where the monetary value at issue is less than $50,000. Needless to say, prothonotaries are no longer, if they ever were, viewed by the legal community as inferior or second class judicial officers. Other than in regard to the type of matters assigned to them by Parliament, they are, for all intents and purposes, performing the same task as Federal Court Judges.

[64] These circumstances "fundamentally shift the parameters of the debate" regarding the standard applicable to discretionary orders of prothonotaries. In my respectful opinion, the supervisory role of judges over prothonotaries enunciated in Rule 51 no longer requires that discretionary orders of prothonotaries be subject to *de novo* hearings. That approach, as made clear by Low J. in *Zeitoun*, is one that has been overtaken by the evolution and rationalization of standards of review and by the presumption of fitness that both judges and masters are capable of carrying out the mandates which the legislator has assigned to them. In other words,

discretionary orders of prothonotaries should only be interfered with when such decisions are incorrect in law or are based on a palpable and overriding error in regard to the facts.

[65] I therefore conclude that it is entirely open to us to move away from the *Aqua-Gem* standard. In my respectful opinion, we should replace that standard by the one set out by the Supreme Court in *Housen*.

(3) The Housen Standard And Why It Should Replace The Aqua-Gem Standard

[66] In *Housen*, the Supreme Court enunciated the standard of review applicable to decisions of trial judges. More particularly, it concluded that with respect to factual conclusions reached by a trial judge, the applicable standard was that of palpable and overriding error. It also stated that with respect to questions of law and questions of mixed fact and law, where there was an extricable legal principle at issue, the applicable standard was that of correctness (paragraphs 19 to 37 of *Housen*).

[67] I begin by saying that it is clear to me that in enunciating the standard of review which it did in *Housen*, the Supreme Court did not intend to apply that standard to discretionary decisions of motions judges and, obviously, to similar decisions made by prothonotaries. Of that, I am entirely satisfied. Recently, in *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801 [*Green*], Madame Justice Coté, writing for a unanimous Supreme Court, indicated that the standard which normally applied to a discretionary decision made by a Judge, i.e. in the case before her an order *nunc pro tunc,* were the standards which had been enunciated by the Supreme Court in *Reza v. Canada*, [1994] 2 S.C.R. 394, 1994 CanLII 91, at page 404

[*Reza*] and in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, [1997] S.C.J. No. 52, at paragraph 54 [*Soulos*]. Madam Justice Coté, at paragraph 95 of her reasons, explained the applicable standard as follows:

> 95 I must now decide whether the doctrine applies to the cases at bar. Before doing so, I should briefly outline the applicable standard of review. The standard that ordinarily applies to a judge's discretionary decision on whether to grant an order *nunc pro tunc* is that of deference: if the judge has given sufficient weight to all the relevant considerations, an appellate court must defer to his or her exercise of discretion (*Reza v. Canada*, [1994] 2 S.C.R. 394, at p. 404). However, if the judge's discretion is exercised on the basis of an erroneous principle, an appellate court is entitled to intervene: *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at paragraph 54.

[68] As I indicated earlier, at paragraph 26 of these reasons, it is my view that the *Aqua-Gem/Pompey* standard and the *Housen* standard, notwithstanding the different language used to convey the ideas behind the standards, are, in effect, the same standards. To this, I would add that I see no substantial difference between these standards and those applied by the Supreme Court in *Reza* and *Soulos*. In other words, if the decision-maker has made an error of law, the reviewing court is entitled to intervene and substitute its own discretion or decision. With respect to factual conclusions, the reviewing court must defer unless, in the case of the *Reza* standard, the motions judge has failed to give sufficient weight to the relevant circumstances or, in the case of the *Aqua-Gem/Pompey* standard, the prothonotary has misapprehended the facts. In my respectful opinion, there is, in the end, no substantial difference between these standards.

[69] I am therefore of the view that there is no reason why we should not apply to discretionary orders of prothonotaries the standard applicable to similar orders by motions judges. I am supported in this view by our decision in *Imperial Manufacturing*, where we applied the *Housen* standard in reviewing the discretionary decision of a motions judge, namely her

determination of a motion for particulars regarding certain allegations made in the Plaintiff's statement of claim.

[70] In abandoning the authority of our decision in *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at page 594, 58 C.P.R. (3d) 209 at page 213 [*David Bull*], and those cases which had continued to hold *David Bull* as authority for the standard of review applicable to discretionary orders made by motions judges, i.e. that the Court would not interfere unless the decision was arrived at "on a wrong principle" (in effect, the standard enunciated by the Supreme Court in *Soulos*) or that the decision-maker had given "insufficient weight to relevant factors, misapprehended the facts or where an obvious injustice would result" (in effect, the standards enunciated by the Supreme Court in *Reza* and *Pompey*), our Court explained why the *Housen* standard should be applied.

[71] First, Mr. Justice Stratas, who wrote the Court's reasons, stated that there was a question of *stare decisis* in that *Housen,* a decision of the Supreme Court, was binding. Second, he indicated that the *David Bull* line of authority was now redundant because of *Housen*. Third, he indicated that the *David Bull* line of authority was not easily understood in that it seemed to constitute "an invitation to this Court to reweigh the evidence before the Federal Court and substitute our own opinion for it" (paragraph 26 of *Imperial Manufacturing*). Fourth, he was satisfied that the *David Bull* line of authority, if properly understood, was to the same effect as the *Housen* standard (paragraph 25 of the *Imperial Manufacturing*). Fifth, he indicated that in the interest of simplicity and coherency, all jurisdictions, other than the Federal Court and Federal Court of Appeal, applied the *Housen* standard to review decisions of lower courts "across the

board" and that we should also do so (paragraph 27 of *Imperial Manufacturing*). Mr. Justice Stratas concluded his discussion on the standard of review by saying, at paragraph 29 of his reasons, that:

> [29] To eliminate these problems and in the interests of simplicity and coherency, only the *Housen* articulation of the standard of review – binding upon us – should be used when we review discretionary, interlocutory orders. In accordance with *Housen*, absent error on a question of law or an extricable legal principle, intervention is warranted only in cases of palpable and overriding error.

[72] I am in complete agreement with the remarks made by Mr. Justice Stratas in *Imperial Manufacturing* as to why we should apply the *Housen* standard to discretionary orders of motions judges. Further, his remarks clearly support the view that the *Housen* standard should also be applied to discretionary orders made by prothonotaries. Whether a motion is determined by a prothonotary or a motions judge is, in my view, irrelevant. The same standard should apply to the review of all discretionary orders.

[73] Notwithstanding my view that the Supreme Court did not intend to apply the *Housen* standard to discretionary decisions of motions judges this does not detract from the force of the arguments which my colleague Mr. Justice Stratas makes in *Imperial Manufacturing*. Although my colleague does not, in his remarks in *Imperial Manufacturing*, make reference to *Green*, nor to *Reza* and *Soulos*, his main criticism of the existing standard of review in the case before him was that the *Housen* standard was clearer, simpler and did not differ substantially from the *David Bull* line of authority.

[74] I cannot, however, leave this issue without referring to our Court's decision in *Turmel v. Canada*, 2016 FCA 9, 481 N.R. 139 (at paragraph 12), where, again under the pen of Mr. Justice

Stratas, our Court appears to have moved beyond the *Housen* standard in determining the standard applicable to discretionary orders of motions judges. At paragraph 12 of his reasons for the Court, Mr. Justice Stratas stated that pursuant to *Imperial Manufacturing*, *David Bull*, *Green* and *Housen*, it was not open to appellate courts, in reviewing discretionary decisions of motions judges, to reweigh the evidence and to substitute their conclusions for those of the first judge. Then, after setting out the rationale of his opinion in *Imperial Manufacturing* for the adoption of the *Housen* standard, Mr. Justice Stratas formulated a different standard applicable to the review of discretionary orders of judges:

> [12] Putting aside these subtleties, [by subtleties, Mr. Justice Stratas appears to refer to the various standards enunciated in the cases which he refers to at paragraph 11 of his reasons] what is common to all of these verbal formulations is that in the absence of an error of law or legal principle an appellate court cannot interfere with a discretionary order unless there is an obvious, serious error that undercuts its integrity and viability. This is a high test, one that the case law shows is rarely met. This deferential standard of review has applied in the past to discretionary orders appealed to this Court and it is the test we shall apply to the interlocutory discretionary order made by the Federal Court that is before us in these appeals.

[75] On my count, at least twelve decisions of this Court have followed *Imperial Manufacturing*: *Jamieson Laboratories Ltd. v. Reckitt Benckiser LLC*, 2015 FCA 104, 130 C.P.R. (4th) 414 at paragraph 21; *Mancuso v. Canada (National Health and Welfare*), 2015 FCA 227, 476 N.R. 219 at paragraph 8; *Canada v. Fio Corporation*, 2015 FCA 236, 478 N.R. 194 at paragraph 10; *AgraCity Ltd v. Canada*, 2015 FCA 288, 262 A.C.W.S. (3d) 259 at paragraph 16; *Horseman v. Horse Lake First Nation*, 2015 FCA 122, [2015] F.C.J. No. 637 at paragraph 7; *ABB Technology AG, ABB Inc. v. Hyundai Heavy Industries Co., Ltd.*, 2015 FCA 181, 475 N.R. 341 at paragraph 84; *Cameco Corporation v. Canada*, 2015 FCA 143, [2015] F.C.J. No. 774 at paragraph 39; *Canada v. Superior Plus Corp.*, 2015 FCA 241, 477 N.R. 385 at paragraph 5;

Kinglon Investments Inc. v. Canada, 2015 FCA 134, 472 N.R. 192 at paragraph 5; *Fong v. Canada*, 2015 FCA 102, 2015 D.T.C. 5053 at paragraph 5; *Administration de pilotage des Laurentides c. Corporation des pilotes du Saint-Laurent central inc.*, 2015 CAF 295, [2015] A.C.F. no 1495 at paragraph 5; *Sin v. Canada*, 2016 FCA 16, 263 A.C.W.S. (3d) 184 at paragraph 6.

[76] On the same count, it appears that at least eleven decisions of this Court have followed *Turmel*: *French v. Canada*, 2016 FCA 64, [2016] F.C.J. No. 238 at paragraph 26; *Galati v. Harper*, 2016 FCA 39, 394 D.L.R. (4th) 555 at paragraph 18; *Canada (Citizenship and Immigration) v. Bermudez*, 2016 FCA 131, [2016] F.C.J. No. 468 at paragraph 21; *Canada v. John Doe*, 2016 FCA 191, [2016] F.C.J. No. 695 at paragraph 31; *Teva Canada Limited v. Gilead Sciences Inc.*, 2016 FCA 176, [2016] F.C.J. No. 605 at paragraph 23; *Djelebian v. Canada*, 2016 FCA 26, 2016 D.T.C. 5023 at paragraph 9; *Bemco Confectionery and Sales Ltd. v. Canada*, 2016 FCA 21 at paragraph 3; *Kwan Lam v. Chanel S. de R.L.*, 2016 FCA 111, [2016] F.C.J. No. 95 at paragraph 15; *Zaghbib v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 182, [2016] F.C.J. No. 651 at paragraph 23; *Bayer Inc. v. Fresenius Kabi Canada Ltd.*, 2016 FCA 13, [2016] F.C.J. No. 43 at paragraph 7; *Contrevenant no. 10 c. Canada (Procureur général)*, 2016 CAF 42, [2016] A.C.F. no 176 at paragraph 6.

[77] It seems to me, with the greatest of respect, that if we are going to simplify the standard applicable to decisions of prothonotaries and judges, and thus make the process easier to understand for litigants, it is imperative that we get our own house in order. As Mr. Justice Stratas stated, at paragraph 22 of his reasons in *Imperial Manufacturing*:

> [22] …In those cases, [Mr. Justice Stratas is referring to *Housen*] the Supreme Court provided the definitive word on the standard of review in civil cases. It did not make informal comments of the sort we might be tempted to distinguish. Rather, it analyzed the matter thoroughly – examining precedent, doctrine and legal policy – and it pronounced clearly and broadly on the matter, without any qualifications or reservations….

[78] I am not to be taken as disagreeing with what Mr. Justice Stratas says at paragraph 12 of his reasons in *Turmel*. However, in my respectful view, introducing new language, language that finds no basis in *Housen*, will have the opposite effect of what our Court intended to achieve in *Imperial Manufacturing*, i.e. "in the interests of simplicity and coherency, only the Housen articulation of the standard of review – binding upon us – should be used when we review discretionary, interlocutory orders" (paragraph 29). Introducing new language will detract from simplicity and coherency and will, no doubt, give rise to a fresh line of arguments by counsel which will inevitably detract from the effective review of discretionary orders made by prothonotaries and judges.

[79] I therefore conclude that we should apply the *Housen* standard to discretionary decisions of prothonotaries. I am also of the view that the *Housen* standard should apply in reviewing discretionary decisions of judges.

B. *Did The Motions Judge Err In Refusing To Interfere With The Prothonotary's Decision?*

[80] Before turning to the second issue, a few words concerning the standard of review applicable to the Motions Judge's decision are necessary. In *Pompey*, at paragraph 18, the Supreme Court held that our Court could only interfere with a decision of a motions judge reviewing the discretionary order of a prothonotary when the judge had no grounds to interfere

with the prothonotary's decision, or where there were such grounds, the judge had decided the matter on a wrong basis or was plainly wrong.

[81] In *Bayer*, a case where the appeal to our Court was one from a decision of a motions judge reviewing a discretionary order of a prothonotary pursuant to a Rule 51 appeal, our Court held that but for the *Pompey* standard of review, it would have applied the *Housen* standard in reviewing the judge's decision.

[82] As I understand this branch of the *Pompey* standard, this Court cannot interfere with the Motions Judge's decision unless he made an error of law or made an error of the type that falls within the palpable and overriding error component of the *Housen* standard. Thus, on my understanding of the *Pompey* standard, there is no difference in substance between it and the *Housen* standard.

[83] Consequently, in my view, not only should we apply the *Housen* standard to the decision of the Prothonotary, we should also apply that standard to the decision of the Motions Judge.

[84] Thus the question before us on this appeal is whether the Motions Judge erred in law or made a palpable and overriding error in refusing to interfere with the Prothonotary's decision.

[85] The facts leading up to the Prothonotary's decision are quite straightforward. On March 19, 2014, counsel for the Appellants wrote to counsel for the Respondents summarizing their discussions regarding the examinations of the inventors. Counsel for the Appellants pointed out

that they had requested two days to examine each inventor and that Counsel for the Respondents had taken the position that one day was sufficient. More particularly, counsel for the Appellants wrote that:

> As I mentioned previously, we anticipate that more than one day will be required for the examination of Dr. Feldmann and also the examination of Dr. Maini. We recommend reserving two days for each of these witnesses particularly in view of our joint request for an early trial date, the witnesses' limited availability and the necessity to travel to London and New York to conduct their examinations. If you maintain your refusal to provide additional dates of availability and one day is found (as is expected) to be insufficient to complete their respective examinations, we shall seek a direction that Kennedy pay for all of the costs of the reattendance.

[86] As I indicated earlier, at the end of the first day of the examination of each inventor, counsel for the respondents did not allow the respondents to pursue their examinations.

[87] In her Order of April 17, 2015, at page 4, the Prothonotary dealt with this issue as follows:

> AND UPON the Court taking under reserve its disposition of item #2 in Motion #2 and any issues as to costs thereof, and upon subsequently further considering the submissions of counsel for the Plaintiffs that the examination of each of Dr. Feldmann and Dr. Maini, although conducted for two days, was not completed and that they had requested two days (each) from the outset. The Plaintiffs described generally the topics for discovery yet to be completed with the inventors and requested a further one day with each of the inventors. I am satisfied, however, that a half day with each would be sufficient and that these discoveries should be concluded with some cooperation between the parties so as to permit the litigation to progress. I am also satisfied that, unless the parties agree otherwise, that the examinations of Dr. Feldmann and Dr. Maini should proceed by way of teleconference.
>
> [my emphasis]

[88] As a result, she made the Order which gave rise to the appeal before the Motions Judge and now in appeal before us.

[89] The action commenced by Hospira to impeach the Patent at issue was bifurcated by consent of the parties. Once liability is determined by the Federal Court, the remedy phase, if necessary, will follow. The action has been case managed by the Prothonotary from its commencement and she has presided over 12 case management conferences and nine days of discovery motions. There can thus be no doubt that she had full knowledge of the relevant facts and issues now before the Federal Court when she made her decision.

[90] As it appears from her Order, the issue before us was only one of many which the Prothonotary had to deal with. In making her Order regarding the reattendance of the inventors, the Prothonotary took note of the Appellants' argument that their examination of the inventors was incomplete and that a number of topics had yet to be covered. After consideration of the parties' respective arguments, she declared herself satisfied that an additional one half day per inventor would be sufficient to complete the examinations. She also held that the inventors were to be examined by teleconference unless the parties came to a different agreement.

[91] The appeal from her decision was heard by the Motions Judge on June 16, 2015 and he dismissed the appeal two days later. In deciding as he did, the Motions Judge applied the *Aqua-Gem* standard of review. On the basis of that standard, he held that the Prothonotary's decision was not clearly wrong and that her discretion had not been exercised upon wrong principles or upon a misapprehension of the facts. I pause here to say that in applying the *Aqua-Gem* standard in lieu of the *Housen* standard, the Motions Judge did not make a reviewable error in that, as I have already indicated, there is no substantial difference between the two standards other than in

respect of the *de novo* hearing when the question at issue is vital to the final issue of the case, which is not the situation in the present matter.

[92] I will now address the specific grounds of criticism put forward by the Appellants in support of their submission that we should allow their appeal.

[93] The Appellants' main argument in this appeal is that the Prothonotary erred in shifting the burden in regard to the examination process. They say that if the Respondents were of the view that two days were not justified for each inventor, they ought to have brought a motion under Rule 243 asking the Court to make a determination that the continuance of the examinations was "oppressive, vexatious or unnecessary". Failing such a motion, the Appellants say that their right to examine the inventors was absolute. Consequently, in requiring them to demonstrate why they needed more than one day to examine the inventors, the Prothonotary shifted to them the burden of justifying the length of the examinations.

[94] I am prepared to accept that, in a technical sense only, the Appellants are correct. In other words, once it became apparent that the parties could not agree on the duration of the examinations or before they terminated the examinations at the end of the first day, the Respondents should have brought a motion under Rule 243. However, as we now know, the parties proceeded to London and New York for the examinations and it appears that the Appellants hoped for the best, i.e. that once there, the Respondents would give in. Unfortunately, that scenario did not occur and, at the end of the first day of each examination, the Respondents terminated them.

[95] The Appellants say, and they are correct, that it was not the Respondents' call to terminate the examinations of the inventors. However, contrary to the Appellants' submission, it was not, in my respectful view, entirely their call to determine the duration of their examinations. In the face of a disagreement between the parties only the Federal Court could make that determination.

[96] It goes without saying, in the circumstances, that it would have been advisable for everyone involved in this litigation to have had the matter decided prior to the commencement of the examinations in London and New York. However, in the end, the matter that should have been determined prior to the commencement of the examinations was brought before the Prothonotary and she made the determination in her order of April 17, 2015.

[97] It follows from the Prothonotary's decision that she agreed with the Appellants that their continued examination of the inventors was not vexatious or oppressive and that it was necessary. However, she was satisfied that an additional one half day per inventor was sufficient to allow the Appellants to conclude their examinations. She came to this view after listening to the parties arguments which, *inter alia*, were directed at the topics which the Appellants said needed to be covered during the examinations.

[98] In answer to the Appellants' argument that the Prothonotary erred by shifting the burden to them, I begin by saying that examinations, including those of assignors/inventors, are not without limits. To say, as the Appellants do, that there is no limitation to their right of examination is, in my respectful view, incorrect. Circumstances and context matter greatly. They

form the parameters within which examinations must be conducted. Prothonotaries and judges must therefore, in addressing and determining issues pertaining to discovery and examinations, keep those factors in mind at all times. They must also remember Rule 3 which provides that the rules, including those concerning discovery, are to "be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits". This, it seems to me, is precisely what the Prothonotary did in making the impugned order.

[99] In determining whether the continuance of the examinations of the inventors was justified and whether one day or less was required, there can be no doubt that the Prothonotary considered a number of circumstances relevant to her determination, and in particular the topics which the Appellants intended to cover in light of the issues before the Court. In considering these circumstances, the Prothonotary must have also had in mind the fact that the inventors were not parties to the action, that they would have to make themselves available for the continued examination, the time frame of the action and its scheduling. All of those factors, in my respectful view, were relevant to the determination that the Prothonotary had to make.

[100] Her consideration of all the above factors led the Prothonotary to hold that a continuance of the examinations of the inventors was justified by teleconference and that an additional one half day per inventor would suffice.

[101] I pause here to say that during the course of their arguments before us on this appeal, the Appellants did not make any attempt to apprise us of the topics which they intended to cover during the course of their examinations. This omission, I suspect, stems from their view that it

was entirely up to them to determine the duration of the examinations. In other words, the Appellants' view seemed to be that it was not for the Prothonotary, the Motions Judge and, in effect, for us to tell them how long they should take in examining the inventors. This is why I indicated earlier that the Appellants argued that their right to examine the inventors was absolute. In saying this, I should not be taken in any way as criticizing counsel for the Appellants. However, in deciding whether the Motions Judge ought to have intervened, it seems to me that some details regarding those topics on which the Appellants intended to further examine the inventors should have been provided to us. This, no doubt, would have been helpful in better understanding the Appellants' need for the continued examinations.

[102] With regard to the Appellants' arguments directed at the Motions Judge's comments that "elbow room" should be given to case managing prothonotaries, I agree entirely with the Respondents when they say, at paragraph 67 of their memorandum of fact and law, that:

> The expression "elbow room" is merely a euphemism for deferring to factually-suffused decisions. "Elbow room" does not equate to "immunity from review" and Justice Boswell did not hold that it did.

[103] In other words, it is always relevant for motions judges, on a Rule 51 appeal, to bear in mind that the case managing prothonotary is very familiar with the particular circumstances and issues of a case and that, as a result, intervention should not come lightly. This does not mean, however, that errors, factual or legal, should go undetected. In the end, "elbow room" is simply a term signalling that deference, absent a reviewable error, is owed, or appropriate, to a case managing prothonotary—no more, no less.

[104] Finally, with regard to the Appellants' arguments that the Prothonotary erred in ordering that the examinations were to be conducted by way of teleconference, I agree with the Respondents that since the inventors were both residents of the United Kingdom, they were not compellable absent the issuance of letters rogatory. Consequently, in the circumstances, I can detect no error on the part of the Prothonotary in ordering the continuance of the examinations by way of teleconference.

[105] Therefore, on my understanding of the Record and of the parties' respective submissions, I can see no basis which would allow us to conclude that the Motions Judge ought to have interfered with the Prothonotary's decision. In other words, I have not been persuaded that the Motions Judge either erred in law or made an overriding and palpable error which would have allowed us to intervene.

VII. Conclusion

[106] I would therefore dismiss the appeal with costs.

"M. Nadon"

J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Donald J. Rennie J.A."

"I agree.
Yves de Montigny J.A."

"I agree.

Mary J.L. Gleason J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-303-15

(APPEAL FROM AN ORDER OF MR. JUSTICE BOSWELL OF THE FEDERAL COURT DATED JUNE 18, 2015, DOCKET NUMBER T-396-13).

STYLE OF CAUSE:	HOSPIRA HEALTHCARE CORPORATION v. THE KENNEDY INSTITUTE OF RHEUMATOLOGY AND BETWEEN THE KENNEDY TRUST FOR RHEUMATOLOGY RESEARCH, JANSSEN BIOTECH, INC., JANSSEN INC. and CILAG GmbH INTERNATIONAL v. HOSPIRA HEALTHCARE CORPORATION, CELLTRION HEALTHCARE CO., LTD. and CELLTRION, INC.
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 15, 2016
REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	PELLETIER J.A. RENNIE J.A. DE MONTIGNY J.A. GLEASON J.A.
DATED:	AUGUST 31, 2016

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