Court File No.: T-171-21

**FEDERAL COURT**

B E T W E E N :

**MICHEL DENIS ETHIER**

Plaintiff
(Moving Party)

and

**HER MAJESTY THE QUEEN**

Defendant
(Responding Party)

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# RESPONDING MOTION RECORD OF THE DEFENDANT

(Plaintiff's Motion to Appeal the April 8, 2021, Stay Order)

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# WRITTEN REPRESENTATIONS OF THE DEFENDANT

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# OVERVIEW

1. The Court did not err when it stayed the plaintiff's claim pending the final determination of a substantially similar claim. In particular, it was not a palpable and overriding error for the Court to conclude that the plaintiff's concerns about receiving updates on the lead claim did not amount to prejudice, nor did the Court err in declining to require that Canada serve the plaintiff with documents filed in the lead claim.

2. Canada therefore requests that this appeal be dismissed with costs.

# PART I – STATEMENT OF FACTS

3. This claim is one of more than 60 actions in which the self-represented plaintiffs seek various forms of relief related to the federal Government's COVID-19 mitigation measures.[1] The statements of claim in each action are almost identical and are based on a "kit" made available on the internet by John Turmel, the plaintiff in *John Turmel v HMQ*, T-130-21 (the "John Turmel Claim").[2]

4. The COVID-19 Kit Claims are being case managed by Prothonotary Aylen. During a case management conference with the plaintiffs in the first ten COVID-19 Kit Claims, the Court proposed that the John Turmel Claim move forward as the lead claim,

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[1] Stay Order at para 1, **Respondent' Motion Record [RMR], Tab 4**.

[2] Stay Order at para 2, **RMR, Tab 4**.

and that the balance of the actions (hereinafter referred to as the "Subsequent COVID-19 Kit Claims") be held in abeyance, pursuant to section 50(1)(b) of the *Federal Courts Act*[3], pending a final determination in the John Turmel Claim.

5. During the case management conference, Canada agreed with the Court's proposal. The plaintiffs in the Subsequent COVID-19 Kit Claims were also largely prepared to agree to a stay provided that they were served with all of the materials filed in the John Turmel Claim.[4] However, after Canada indicated that it would not provide this information, and the Court noted that Canada did not have an obligation to do so under the *Federal Courts Rules*, some of the plaintiffs, including the plaintiff in the present claim, expressed disagreement with having their claims stayed.[5]

6. After the case management conference, the Court directed that plaintiffs who did not consent to the Court's proposal provide written submissions as to why their action should not be stayed.[6]

7. The plaintiff in the present claim did not file written submissions as to why his action should not be stayed.[7] However, other plaintiffs filed submissions disagreeing

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[3] RSC 1985, c F-7.

[4] Stay Order at paras 5, 18, **RMR, Tab 4**.

[5] Stay Order at paras 5, 18, **RMR, Tab 4**.

[6] Stay Order at para 6, **RMR, Tab 4**.

[7] Stay Order at para 8, **RMR, Tab 4**.

with the proposal.[8] Their submissions largely centred on their concerns about being kept informed regarding the status of the John Turmel Claim while their claims were stayed.

8. After considering the parties' submissions and reviewing the principles underlying the interests of justice test that governed its discretion under paragraph 50(1)(b) of the *Federal Courts Act*, the Court concluded that the interests of justice favoured its proposal.

9. The Court noted that the Subsequent COVID-19 Kit Claims significantly overlapped with the John Turmel Claim and that none of the plaintiffs disputed the John Turmel Claim's suitability as a lead claim.[9] The Court noted that in such circumstances, "considerations of judicial resources, efficiency, and the orderly conduct of multiple proceedings all support the Court's proposal."[10]

10. The Court also found that there would be no prejudice or harm to the plaintiffs if their proceedings were stayed pending the determination in the John Turmel Claim. It noted that the plaintiffs were initially prepared to agree to a stay of proceedings, and that none of the plaintiffs suggested any specific harm or prejudice in their submissions.[11]

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[8] Stay Order at paras 7, 9-11, **RMR, Tab 4**.

[9] Stay Order at para 21, **RMR, Tab 4**.

[10] Stay Order at para 21, **RMR, Tab 4**.

[11] Stay Order at para 19, **RMR, Tab 4**.

11. To the extent that the plaintiffs were concerned about being kept informed regarding the status of the John Turmel Claim, the Court also observed that the plaintiffs could obtain updates through the Court's online recorded entries in the John Turmel Claim as well as John Turmel's website.[12] Moreover, the Court ordered the Registry to provide a copy of any final Court decision in the John Turmel Claim to each of the plaintiffs.[13] The Court also noted that not only was there no obligation on Canada to provide the plaintiffs with all of the materials filed in the John Turmel Claim, these options made imposing such an obligation unnecessary:

> While the Plaintiffs and Mr. Turmel would prefer that their access to information regarding T-130-21 be rendered more convenient for them by requiring the Defendant to serve them with all of their materials, I am not prepared to impose such a burden on the Defendant. If the Plaintiffs are interested in T-130-21, they can put in the effort to follow its progress."[14]

12. The Court therefore issued an order:

- staying the Subsequent COVID-19 Kit Claims (including the present claim) pending the final determination in the John Turmel Claim and any appeal therefrom;
- for the Federal Court Registry to provide a copy of any final Court decision in the John Turmel Claim to each of the plaintiffs in the Subsequent COVID-19 Kit claims;
- giving each plaintiff in the Subsequent COVID-19 Kit Claims 30 days from the final determination of the John Turmel Claim to request a case management conference to schedule a motion to determine whether their claim should move forward; and

[12] Stay Order at para 19, **RMR, Tab 4**.

[13] Stay Order at 20, **RMR, Tab 4**.

[14] Stay Order at para 19, **RMR, Tab 4**.

- applying this procedure to any substantially identical claims filed from the date of the order.

## PART II – POINTS IN ISSUE

13. The issues in this motion are:

    (a) What is the appellate standard of review?

    (b) Did the case-management judge err in staying the plaintiff's claim or in declining to require that Canada serve the plaintiff with its materials in the John Turmel Claim?

## PART III – SUBMISSIONS

### A. APPELLATE STANDARD OF REVIEW

14. The standard of review applicable to discretionary orders made by prothonotaries is palpable and overriding error with respect to findings of fact and mixed fact and law, and correctness with respect to extricable questions of law.[15]

15. The courts have also held that it is always necessary 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."[16]

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[15] *Hospira Healthcare Corp v Kennedy Institute of Rheumatology*, 2016 FCA 215 at para 2 [*Hospira*], **RMR, Tab 2**.

[16] *Hospira* at para 103, **RMR, Tab 2**.

## B. THE CASE-MANAGEMENT JUDGE DID NOT ERR IN STAYING THE PLAINTIFF'S CLAIM

16. The Court did not commit a palpable and overriding error when it determined that the plaintiffs failed to identify the existence of any specific harm of prejudice if their claims were stayed pending the determination of the John Turmel Claim.

17. The plaintiff does not dispute that the Court correctly identified the interests of justice test that governs its discretion to stay proceedings pursuant to paragraph 50(1)(b) of the *Federal Courts Act*:

1) securing the just, most expeditious and least determination of every proceeding on its merits;

2) so long as no party is unfairly prejudiced and it is in the interests of justice, the Court should exercise its discretion against the wasteful use of judicial resources; and

3) the public interest in moving a proceeding forward fairly and with due dispatch.[17]

18. The plaintiff alleges that the absence of a requirement for Canada to serve him with the materials filed in the John Turmel Claims created unfair prejudice that militates against a stay. However, the Court did not err when it determined that 1) Canada did not have an obligation to serve him with the materials, and that 2) the absence of an obligation did not create the level of harm or prejudice contemplated in the interests of justice test.

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[17] Stay Order at paras 16-17, **RMR, Tab 4**.; *Jensen v Samsung Electronics Co Ltd*, 2019 FC 373 at para 10, **RMR, Tab 3**.

19. Contrary to the plaintiff's assertion that Canada was "moving to be granted dispensation from serving each of us personally," the Court correctly found that there was no legal requirement under the *Federal Courts Rules* that Canada serve the plaintiff with the materials filed in the John Turmel Claim.[18]

20. The Court then considered the options available for the plaintiffs' to receive updates on the status of the John Turmel Claim.[19] Not only could the plaintiffs obtain updates through the Court's online recorded entries in the John Turmel Claim as well as John Turmel's website, the Court also ordered that the plaintiffs would receive a copy of any final Court decision in the John Turmel Claim.

21. Although the plaintiff alleges that these options are inadequate because he requires all materials filed in the John Turmel Claim to make a decision on whether to pursue his claim, he has not explained why information beyond the Court's findings in the John Turmel Claim are necessary.

22. However, to the extent that this information is necessary, the plaintiff is able to obtain copies of all documents that will be filed in the John Turmel Claim through Federal Court Registry. The Court did not commit a palpable and overriding error when it found that while the plaintiff would prefer that his access to information be rendered

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[18] Stay Order at paras 5, 19, **RMR, Tab 4**.

[19] Stay Order at paras 19-20, **RMR, Tab 4**.

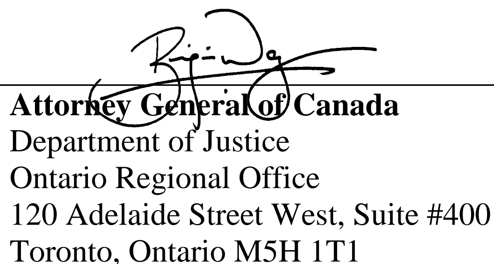
more convenient for him, this did not amount to prejudice, and if the plaintiff was interested in the John Turmel Claim, he "can put in the effort to follow its progress."[20]

## PART IV – ORDER SOUGHT

23. For these reasons, Canada asks that the plaintiff's motion appealing the Stay Order be dismissed, with costs fixed at $500.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Dated at Toronto this April 28, 2021.



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[20] Stay Order at para 19, **RMR, Tab 4**.

## AUTHORITIES CITED

1 *Hospira Healthcare Corp v Kennedy Institute of Rheumatology*, 2016 FCA 215

2 *Jensen v Samsung Electronics Co Ltd*, 2019 FC 373

3 Order dated April 8, 2021, in T-130-21, T-138-21, T-171-21, T-208-21, T-219-21, T-212-21, T-220-21, T-221-21, T-230-21, and T-242-21

# APPENDIX A – LEGISLATION

***Federal Courts Act*, RSC 1985 c F-7, s 50(1)**

| **Stay of proceedings authorized** | **Suspension d'instance** |
| --- | --- |
| **50 (1)** The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter<br><br>**(a)** on the ground that the claim is being proceeded with in another court or jurisdiction; or<br><br>**(b)** where for any other reason it is in the interest of justice that the proceedings be stayed. | **50 (1)** La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire :<br><br>**a)** au motif que la demande est en instance devant un autre tribunal;<br><br>**b)** lorsque, pour quelque autre raison, l'intérêt de la justice l'exige. |

2016 CAF 215, 2016 FCA 215
Federal Court of Appeal

Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology

2016 CarswellNat 4040, 2016 CarswellNat 9945, 2016 CAF 215, 2016 FCA 215, [2016] F.C.J. No. 943, 142 C.P.R. (4th) 187, 270 A.C.W.S. (3d) 50, 402 D.L.R. (4th) 497, 487 N.R. 208

# HOSPIRA HEALTHCARE CORPORATION (Appellant / Plaintiff) and THE KENNEDY INSTITUTE OF RHEUMATOLOGY (Respondent / Defendant)

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)

M. Nadon, J.D. Denis Pelletier, Donald J. Rennie, Yves de Montingny, Mary J.L. Gleason JJ.A.

Heard: April 15, 2016
Judgment: August 31, 2016
Docket: A-303-15

Proceedings: affirming *Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology* (2015), 2016 CF 436, 2016 FC 436, 2015 CarswellNat 10851, 2015 CarswellNat 10850, Keith M. Boswell J. (F.C.)

Counsel: Warren Sprigings, Mary McMillan, for Appellants
Marguerite Ethier, Melanie Baird, James Holtom, for Respondents

Subject: Civil Practice and Procedure; Intellectual Property; Property; Public

**Headnote**

Administrative law --- Standard of review — Miscellaneous

Discretionary orders made by prothonotaries — Prothonotary, who was case managing patent litigation, made order relating to oral discovery — Motion judge dismissed appeal by competitors H Corp., C Ltd. and C Inc. — Judge, applying standard of review in A-G case, stated that continued examination was not vital to final issue of case, and that prothonotary's order was not clearly wrong — Competitors appealed — Appeal dismissed — Standard of review in A-G case should be abandoned in favour of standard of review set out in H case for discretionary decisions of prothonotaries — A-G case concluded that only decisions that decided questions vital to final issue of case should be reviewed de novo — There was continuing confusion in Federal Court as to what constituted order that raised questions vital to final issue of case — Standard of review in A-G case had been overtaken by evolution and rationalization of standards of review in Canadian jurisprudence — It was open to court to do away with de novo review of discretionary orders made by prothonotaries in regard to questions vital to final issue of case — Supreme Court of Canada, in H case, concluded that, with respect to factual conclusions reached by trial judge, applicable standard was that of palpable and overriding error, and with respect to questions of law and questions of mixed fact and law, where there was extricable legal principle at issue, applicable standard was that of correctness — A-G standard and H standard used different language but were in effect same standards — There was no reason to apply different standards of review to discretionary decisions of prothonotaries and decisions of judges.

Judges and courts --- Court officers — Prothonotary

Standard of review applicable to discretionary orders made by prothonotaries — Prothonotary, who was case managing patent litigation, made order relating to oral discovery — Motion judge dismissed appeal by competitors H Corp., C Ltd. and C Inc. — Judge, applying standard of review in A-G case, stated that continued examination was not vital to final issue of case, and that prothonotary's order was not clearly wrong — Competitors appealed — Appeal dismissed — Standard of review in A-G

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case should be abandoned in favour of standard of review set out in H case for discretionary decisions of prothonotaries — A-G case concluded that only decisions that decided questions vital to final issue of case should be reviewed de novo — There was continuing confusion in Federal Court as to what constituted order that raised questions vital to final issue of case — Standard of review in A-G case had been overtaken by evolution and rationalization of standards of review in Canadian jurisprudence — It was open to court to do away with de novo review of discretionary orders made by prothonotaries in regard to questions vital to final issue of case — Supreme Court of Canada, in H case, concluded that, with respect to factual conclusions reached by trial judge, applicable standard was that of palpable and overriding error, and with respect to questions of law and questions of mixed fact and law, where there was extricable legal principle at issue, applicable standard was that of correctness — A-G standard and H standard used different language but were in effect same standards — There was no reason to apply different standards of review to discretionary decisions of prothonotaries and decisions of judges.
Intellectual property --- Patents — Action to impeach — Practice and procedure — Discovery
Plaintiff competitor H Corp. brought action alleging that defendant patent owner K's patent was invalid — Patent owner and others counterclaimed against competitors H Corp., C Ltd., and C Inc. that competitors had infringed patent — Competitors sought two-day examination of each inventor, who lived in United Kingdom, but patent owner terminated examinations after one day — Prothonotary, who was case managing litigation, granted, among other orders, that additional examination of two inventors would be limited to one half-day per inventor by teleconference — Motion judge dismissed competitors' appeal — Competitors appealed — Appeal dismissed — Since parties disagreed on duration of examinations, only court could make that determination — Prothonotary agreed that continued examination was not vexatious or oppressive — Prothonotary had full knowledge of facts and issues and was satisfied that additional one-half day per inventor would be sufficient to complete examination — Prothonotary did not err in ordering continuation of examination for one-half day by teleconference — Motion judge did not err in law or make overriding and palpable error.
Civil practice and procedure --- Pre-trial procedures — Case management and status hearing — Case management — Appeals

APPEAL by competitors from judgment reported at *Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology* (2015), 2016 FC 436, 2016 CF 436, 2015 CarswellNat 10850, 2015 CarswellNat 10851 (F.C.), dismissing competitors' appeal from order of prothonotary, ordering, inter alia, that additional examination of two witnesses by competitors would be limited to one half-day per witness by teleconference.

***M. 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 *R. v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425, 149 N.R. 273 (Fed. C.A.) [*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 (S.C.C.) [*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.

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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. Appellant's Submissions***

*(1) Standard of Review*

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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 (S.C.C.), 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. R.*, 2006 FCA 228, [2006] F.C.J. No. 956 (F.C.A.) (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

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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 Inc.*, 2015 FCA 100, [2016] 1 F.C.R. 246 (F.C.A.) [*Imperial Manufacturing*], to which I will return later). Needless to say, the issue of the standard of review applicable to orders of both

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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 *"Jala Godavari" (The) v. Canada* (1991), 135 N.R. 316, 40 C.P.R. (3d) 127 (Fed. C.A.) [*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 *Casement v. Stoicevski* (1983), 43 O.R. (2d) 436 (Ont. C.A.) [*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.

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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] <u>before</u> 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

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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 (F.C.A.) [*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 Group*, 2009 ONCA 415, 96 O.R. (3d) 639 (Ont. C.A.) [*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

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issue of the case. In *Fieldturf Inc. v. Winnipeg Enterprises Corp.*, 2007 FCA 95, 360 N.R. 355 (F.C.A.), 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* (2007), 158 A.C.W.S. (3d) 696, 2007 FC 686 (F.C.), at paragraph 2 (Huguessen J.). Also see *Scheuer v. Canada Revenue Agency*, 2015 FC 74, 248 A.C.W.S. (3d) 802 (F.C.), at paragraph 12 (Diner J.), *Teva Canada Ltd. v. Pfizer Canada Inc.*, 2013 FC 1066, 441 F.T.R. 130 (Eng.) (F.C.), at paragraph 10 (Campbell J.), *Gordon v. R.*, 2013 FC 597, 2013 D.T.C. 5112 (Eng.) (F.C.), at paragraph 11 (Hughes J.), *Chrysler Canada Inc. v. Canada*, 2008 FC 1049, [2009] 1 C.T.C. 145 (F.C.) at paragraph 4 (Hughes J.)).

48 I note that in his recent judgment in *Alcon Canada Inc. v. Actavis Pharma Co.*, 2015 FC 1323, [2015] F.C.J. No. 1540 (F.C.), 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. v. Apotex Inc.*, [2004] 2 F.C.R. 459, 2003 FCA 488 (F.C.A.) (Richard C.J. dissenting, Décary and Létourneau JJ.A.), *Merck & Co. v. Apotex Inc.*, 2012 FC 454, 106 C.P.R. (4th) 325 (F.C.) 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

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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, *Teva Canada Ltd. v. Pfizer Canada Inc.*, 2014 FCA 244, 466 N.R. 55 (F.C.A.) at paragraph 3; *Bayer Inc. v. Fresenius Kabi Canada Ltd.*, 2016 FCA 13, [2016] F.C.J. No. 43 (F.C.A.) at paragraph 7 [*Bayer*] and *Bristol-Myers Squibb Co. v. Apotex Inc.*, 2011 FCA 34, 414 N.R. 162 (F.C.A.) 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 (Fed. C.A.) [*Miller*], and of the Supreme Court's decision in *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 (S.C.C.) [*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 <u>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</u>...
>
> Emphasis added

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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 (S.C.C.) [*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 (S.C.C.), 1994

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CanLII 91, at page 404 [*Reza*] and in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, [1997] S.C.J. No. 52 (S.C.C.), 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 *Pharmacia Inc. v. Canada (Minister of National Health & Welfare)*, [1995] 1 F.C. 588 (Fed. C.A.) at page 594, (1994), 58 C.P.R. (3d) 209 (Fed. C.A.) 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

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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. R.*, 2016 FCA 9, 481 N.R. 139 (F.C.A.) (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 (F.C.A.) at paragraph 21; *Mancuso v. Canada (Minister of National Health and Welfare)*, 2015 FCA 227, 476 N.R. 219 (F.C.A.) at paragraph 8; *Fio Corp. v. R.*, 2015 FCA 236, 478 N.R. 194 (F.C.A.) at paragraph 10; *Agracity Ltd. v. R.*, 2015 FCA 288, 262 A.C.W.S. (3d) 259 (F.C.A.) at paragraph 16; *Horseman v. Twinn*, 2015 FCA 122, [2015] F.C.J. No. 637 (F.C.A.) at paragraph 7; *ABB Technology AG v. Hyundai Heavy Industries Co.*, 2015 FCA 181, 475 N.R. 341 (F.C.A.) at paragraph 84; *Cameco Corp. v. R.*, 2015 FCA 143, [2015] F.C.J. No. 774 (F.C.A.) at paragraph 39; *Superior Plus Corp. v. R.*, 2015 FCA 241, 477 N.R. 385 (F.C.A.) at paragraph 5; *Kinglon Investments Inc. v. R.*, 2015 FCA 134, 472 N.R. 192 (F.C.A.) at paragraph 5; *Fong v. R.*, 2015 FCA 102, 2015 D.T.C. 5053 (Eng.) (F.C.A.) at paragraph 5; *Administration de pilotage des Laurentides v. Corp. des pilotes du Saint-Laurent central inc.*, 2015 CAF 295, [2015] A.C.F. No. 1495 (F.C.A.) at paragraph 5; *Sin v. R.*, 2016 FCA 16, 263 A.C.W.S. (3d) 184 (F.C.A.) at paragraph 6.

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

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> [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.

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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

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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 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.

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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.

***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.*:**

I agree.

*Appeal dismissed.*

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2019 FC 373, 2019 CF 373
Federal Court

Jensen v. Samsung Electronics Co., Ltd.

2019 CarswellNat 5517, 2019 CarswellNat 5518, 2019 FC 373, 2019 CF 373, 311 A.C.W.S. (3d) 251

# CHELSEA JENSEN AND LAURENT ABESDRIS (Plaintiffs) and SAMSUNG ELECTRONICS CO. LTD., SAMSUNG SEMICONDUCTOR INC., SAMSUNG ELECTRONICS CANADA, INC., SK HYNIX INC., SK HYNIS AMERICA, INC., MICRON TECHNOLOGY, INC., AND MICRON SEMICONDUCTOR PRODUCTS, INC. (Defendants)

Denis Gascon J.

Heard: March 11, 2019
Judgment: March 26, 2019
Docket: T-809-18

Counsel: Kyle R. Taylor, Annie (Qurrat-ul-ain) Tayyab, for Plaintiff, Chelsea Jensen
James Sayce, for Plaintiff, Laurent Abesdris
Caitlin R. Sainsbury, Pierre N. Gemson, for Defendants, Samsung Electronics Co. Ltd., Samsung Semiconductor Inc., Samsung Electrics Canada, Inc.
David W. Kent, for Defendant, Micron Technology Inc.
Sandra A. Forbes, Chantelle Cseh, for Defendant, Sk Hynix

Subject: Civil Practice and Procedure; Corporate and Commercial

**Headnote**

Civil practice and procedure --- Class and representative proceedings — Representative or class proceedings under class proceedings legislation — Conduct of class proceeding — Application of rules of practice and procedure

Plaintiffs alleged defendants conspired to increase price of type of computer memory chip used in various consumer electronic products and industrial products — Plaintiffs brought proposed class proceeding against defendants for relief under Competition Act — Comparable competition law class action relating to optical disc drives had been subject of appeal before Supreme Court of Canada (SCC), whose decision was pending — Defendants brought motion for order temporarily suspending proceeding pending release of SCC's decision and directing that case management conference be convened forthwith after release of SCC's decision — Motion granted in part — Case management conference was to be held within two weeks after release of SCC's decision, but proceeding was not suspended in meantime — Section 50(1)(b) of Federal Courts Act and related authorities dealing with stay of proceedings in "interest of justice" were not subordinate to discretion afforded to case management judges to grant stay of proceedings pursuant to R. 385(1) of Federal Courts Rules, 1998 — Principles in s. 50(1)(b) of Act and R. 385(1)(a) should both guide decision to grant or deny stay — Facts of present case did not justify exercise of discretion in favour of suspension sought, which was premature — Nexus between present case and SCC decision was limited and uncertain and defendants had not adduced evidence of prejudice — Certification motion hearing would not begin for some 13 months whereas SCC's decision was expected some 10 months before then — SCC decision could have impact on future steps and deadlines, so purpose of case management conference would be to assess whether adjustments needed to be made to current schedule.

MOTION by defendants for order temporarily suspending proposed class proceeding pending release of Supreme Court of Canada decision and directing that case management conference be convened forthwith after release of that decision.

***Denis Gascon J.*:**

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1 The Defendants collectively seek an order from this Court temporarily suspending this proposed competition class action pending the release by the Supreme Court of Canada [SCC] of its judgment in *Pioneer Corp. v. Godfrey* [2019 CarswellBC 2746 (S.C.C.)], SCC File No. 37810 and *Pioneer Corp. v. Godfrey*, SCC File No. 37809 [together, *Godfrey*]. *Godfrey* was heard by the SCC on December 11, 2018 and is under reserve.

2 The Plaintiffs' proposed class action alleges that the Defendants conspired to increase the price of a type of computer memory chip called dynamic random-access memory, more commonly known as "DRAM". According to the Plaintiffs, DRAM is used in various consumer electronic products such as personal computers and mobile phones, as well as in industrial products such as automotive and military devices. In their action, the Plaintiffs submit that the Defendants' participation in the alleged conspiracy caused class members to suffer loss and damage, and they assert claims under section 36 of the *Competition Act*, RSC 1985, c C-34 [Act] for purported breaches of the conspiracy provisions of the Act (sections 45 and 46). They seek some $500 million in damages on behalf of a national class composed of all persons in Canada who purchased DRAM or products containing DRAM between June 1, 2016 and February 1, 2018. The proposed class thus includes both direct and indirect DRAM purchasers.

3 The *Godfrey* matter relates to an appeal from a certification decision in a comparable competition law class action filed in British Columbia and involving an alleged global price-fixing conspiracy concerning optical disc drives. The proposed class in that case also contains both direct and indirect purchasers, as well as so-called "umbrella" purchasers, namely persons who purchased the cartelized product at issue in the alleged price-fixing conspiracy from parties other than the alleged conspirators. Among the central issues to be decided by the SCC in *Godfrey* is the standard of proof that must be met by plaintiffs, and the economic methodology to be pursued by their experts in fixing that standard, in order to establish harm as a common issue for the class. The *Godfrey* decision will notably consider the standard applicable in identifying loss to indirect purchasers, and whether lower courts have correctly applied the principles set forth by the SCC in its 2013 trilogy of class action decisions, including *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.) [*Microsoft*]. Another important issue at play in the *Godfrey* matter is whether "umbrella" purchasers have a cause of action or are too remote and represent too indefinite a class to advance any claim at all.

4 In their motion, the Defendants ask me to exercise my discretion pursuant to paragraph 50(1)(b) of the *Federal Courts Act*, RSC 1985, c F-7 [FC Act] and Rule 385(1) of the *Federal Courts Rules*, SOR/98-106 [FC Rules] and to issue: 1) an order temporarily suspending all future deadlines and dates currently set out for this proceeding further to my Scheduling Order of November 29, 2018 [Scheduling Order]; and 2) a direction that a case management conference be convened forthwith after the release of the SCC decision in *Godfrey*.

5 The Defendants contend that, in the circumstances of this case, a temporary suspension is in the interest of justice and aligns with the just, most expeditious and least expensive determination of this proceeding. In support of their motion, the Defendants submit that a stay of the certification schedule will allow the parties to compile the evidentiary record, brief the legal issues and present their arguments on certification with the benefit of the SCC's guidance on issues that bear directly on the certification of this price-fixing class action. The Defendants plead that the requested suspension will avoid the risk of parties expending potentially significant and unnecessary resources and costs on preparing certification materials that could need to be redone, that a stay will not result in any prejudice to the Plaintiffs and that, based on the published average time for the SCC to render a decision, the suspension sought will likely be short. They point to several other courts having stayed similar competition class action proceedings pending the SCC decision in *Godfrey*.

6 The Plaintiffs object to the stay, saying that the Defendants have presented no evidence of harm and that *Godfrey* is not expected to have any bearing on their certification record. They are indeed ready to file their certification materials in accordance with the Scheduling Order and submit that the certification process should proceed as scheduled.

7 For the reasons that follow, the Defendants' motion will only be granted in part. Further to my review of the evidence and of the particular circumstances and timing surrounding the Defendants' motion, I am not persuaded that, at this juncture, the facts of this case justify the exercise of my discretion in favour of the suspension sought by the Defendants. For all intents and purposes, the Defendants' motion is premature. In my opinion, it is not in the interest of justice to suspend all procedural

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steps at this point in time, and a stay would not represent an efficient and practical solution for the just, most expeditious, least expensive and fair determination of this class action proceeding. However, I acknowledge that, depending on its contents and the timing of its release, the SCC decision in *Godfrey* could have an impact on future steps and deadlines in this proposed class action, and that a case management conference therefore needs to be convened immediately after the release of that decision. The purpose of this case management conference will be to assess whether, at that point in time, adjustments need to be made to the schedule leading up to the certification motion hearing.

**A. The test to be applied**

8 The Court's discretionary jurisdiction to temporarily suspend its own proceeding emanates from paragraph 50(1)(b) of the FC Act. This provision empowers me to stay proceedings where "it is in the interest of justice" to do so.

9 This "interest of justice" test was first described by Justice Stratas in *Astrazeneca Canada Inc. v. Mylan Pharmaceuticals ULC*, 2011 FCA 312 (F.C.A.) [*Mylan*] and was approved by the Federal Court of Appeal [FCA] in *Coote v. Lawyers' Professional Indemnity Co.*, 2013 FCA 143 (F.C.A.) [*Coote*] and *Clayton v. Canada (Attorney General)*, 2018 FCA 1 (F.C.A.) [*Clayton*]. In *Mylan*, the FCA distinguished between situations where the FCA was enjoining another body from exercising its jurisdiction and others where the court was deciding not to exercise its own jurisdiction until later. The FCA held that, when it is deciding whether to delay its own hearings pending another appeal, the "interest of justice" test governs. In *Mylan*, as in the current case, the FCA was asked to adjourn its own proceedings pending the result of an appeal before the SCC in another case involving different parties but similar issues.

10 The "interest of justice" test is a wide-ranging test that can embrace many elements, and I have to consider "all the circumstances" in exercising my judicial discretion to grant or to deny a stay pursuant to it (*Coote* at para 12; *Mylan* at paras 5, 14; *The Commissioner of Competition v. HarperCollins Publishers LLC and HarperCollins Canada Limited*, 2017 Comp. Trib. 14 (Competition Trib.) [*HarperCollins*] at para 127). In *Mylan*, the FCA pointed to the "broad discretionary considerations" involved by the test, one of those being the public interest consideration in proceedings moving "fairly and with due dispatch". The FCA further noted that the courts will not "lightly delay a matter" and that it "all depends on the factual circumstances presented to the Court" (*Mylan* at para 5). Moreover, in considering the interest of justice, the courts should be guided by certain principles including securing "the just, most expeditious and least expensive determination of every proceeding on its merits" as expressly provided by FC Rule 3, and the fact that "[a]s long as no party is unfairly prejudiced and it is in the interests of justice — vital considerations always to be kept front of mind — [the] Court should exercise its discretion against the wasteful use of judicial resources" (*Coote* at paras 12-13; see also *Korea Data Systems (USA), Inc. v. Aamazing Technologies Inc.*, 2012 ONCA 756 (Ont. C.A. [In Chambers]) at para 19).

11 More recently, in *Clayton*, the FCA reminded that, in determining whether to stay its own proceedings, the "responsibility of the Court to ensure that proceedings move in an expeditious, timely, and fair manner is a critical consideration" (*Clayton* at para 28).

12 The "interest of justice" test thus acknowledges that extensive discretionary considerations regarding the administration of justice are at play in the exercise of the Court's power to impose a stay or suspension of its own proceedings. I agree with the Defendants that *Mylan* and its progeny have clearly established that the usual requirements of the tripartite test for the issuance of interlocutory injunctions or stays, as they were established by the SCC in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) [*RJR-MacDonald*], do not apply here. A moving party requesting the Court to temporarily suspend its own process is not required to prove that irreparable harm will occur if the order sought is not granted, or that the balance of convenience tilts in its favour.

13 However, the FCA has nonetheless held in *Clayton* that, in assessing the interest of justice, "courts may take into account some of the same considerations as in *RJR-MacDonald* — whether there is a serious issue to be tried, the existence or not of irreparable harm and the overall balance of convenience or interests" (*Clayton* at para 26). Indeed, prejudice or harm to the moving party is not irrelevant in assessing the interest of justice. On the contrary, far from being divorced from the interest of justice, the notions of harm and prejudice are a central element of the considerations to be taken into account by the Court

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when deciding whether to suspend its proceedings or not. Indeed, when the applicable test is the interest of justice, a moving party still has the burden "to prove that carrying out the action would cause [him or her] prejudice or injustice and not simply inconvenience" (*Barkley c. Canada*, 2018 FC 228 (F.C.) at para 5). In fact, in *Clayton*, the failure to demonstrate prejudice was a factor retained and singled out by the FCA to justify the denial of a stay (*Clayton* at paras 26, 28).

14 In my view, the case law thus establishes that the "interest of justice" test that I need to apply is anchored in three overarching principles: 1) a flexible approach aimed at protecting the interest of a just, fair and efficient resolution of a proceeding; 2) the existence of some form of prejudice, harm or injustice, as opposed to simple inconvenience, to be suffered by the moving party in the absence of a stay; and 3) the determinative place of the particular factual circumstances presented to the Court.

15 The Defendants submit that, in this case, I should also be guided by the large discretion afforded to case management judges under FC Rule 385(1) to grant a stay of proceedings. This rule allows a case management judge to make "any orders that are necessary for the just, most expeditious and least expensive determination of the proceedings on its merits". In their written submissions, the Defendants had simply argued that FC Rule 385(1) complemented the Court's power under subsection 50(1) of the FC Act. At the hearing before this Court, however, counsel for the Defendants insisted on FC Rule 385 and went much further, suggesting that, in the particular context of class action proceedings, FC Rule 385 should be read and interpreted as superseding paragraph 50(1)(b) of the FC Act and the case law on the "interest of justice" test.

16 I am not ready to accept the Defendants' invitation to adopt such an expansive view of FC Rule 385.

17 I agree with the Defendants that, in the specific context of class proceedings, no cases dealing with the "interest of justice" test have specifically considered the interface between FC Rule 385 and paragraph 50(1)(b) of the FC Act. I also accept that FC Rule 385 is meant to provide latitude to the case management judges. But I do not agree with the Defendants' proposition that, because I am seized of a class action proceeding, FC Rule 385 would somehow trump or override paragraph 50(1)(b) and the case law on stays of the Court's own proceedings.

18 In fact, I am instead of the view that paragraph 50(1)(b) of the FC Act and FC Rule 385(1) are animated and governed by the same underlying principles and objectives. Outside the context of class action proceedings but in the context of case-managed proceedings more generally, this Court has established that the elements contemplated in FC Rule 385 are already encompassed in the "interest of justice" test of paragraph 50(1)(b) of the FC Act, as the test includes the principles set out in FC Rule 3 (*Power To Change Ministries v. Canada (Minister of Employment, Workforce and Labour)* [(February 22, 2019), Doc. T-1488-18 (F.C.)], 2019 CanLII 13579 at paras 16-19; *1395804 Ontario Ltd. v. Canada (Attorney General)*, 2016 FC 719 (F.C.) [*Blacklock*] at paras 32-33). I point out that, in *Coote*, the FCA had specifically referred to FC Rule 3, which provides that the FC Rules shall generally be interpreted and applied, in all actions or applications before the Court, "so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits". The FCA went on to state that this forms part of the factors to be taken into consideration in the assessment of the interest of justice (*Coote* at para 12). In other words, FC Rule 3 is one of the principles guiding the "interest of justice" test and is embodied in paragraph 50(1)(b). FC Rule 385 simply echoes and repeats the wording used in FC Rule 3.

19 In *Blacklock*, I had held that the principles set out in paragraph 50(1)(b) of the FC Act and FC Rule 385(1)(a), namely that a stay must be in the interest of justice and allow for the just, most expeditious and least expensive determination of the issues, should both guide a decision to grant or deny a stay (*Blacklock* at paras 32-33). The same remains true here.

20 In his oral submissions, counsel for the Defendants relied heavily on the SCC decision in *Endean v. British Columbia*, 2016 SCC 42 (S.C.C.) [*Endean*]. In *Endean*, the SCC endorsed an interpretation of two provincial class proceedings legislations which vested courts with "broad discretion", finding that this entitled a case management judge in class action proceedings to impose creative solutions for the efficient determination of issues, in order to ensure a fair and expeditious determination of the matter (*Endean* at paras 37-38). The Defendants argue that FC Rule 385 would be of similar effect and that these broad discretionary considerations should also guide the Court in this matter. They submit that, as case management judge, I have the flexibility to make any order that I see fit in the interest of the just and efficient resolution of a proceeding, irrespective of any particular harm being established and of the specificities of the interest of justice test developed by the courts.

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21 I am not convinced that the SCC conclusions in *Endean* can be extended to the current situation or that this decision can be used to read FC Rule 385 as superseding paragraph 50(1)(b) of the FC Act in class action matters brought before this Court. In *Endean*, the SCC was considering specific provincial class action proceedings and referred to the interpretation of particular provisions contained in the applicable provincial class action legislations. This is a situation far different from what is contemplated in FC Rule 385, which does not relate specifically to class actions and applies to all specially managed proceedings before this Court. In addition, I note that, pursuant to FC Rule 1.1, the FC Rules apply to all proceedings in this Court "unless otherwise provided by or under an Act of Parliament". Therefore, FC Rule 385 could not override paragraph 50(1)(b) of the FC Act, if doing so meant that case management judges could ignore and get around the attributes of the "interest of justice" test established by the FC Act and the jurisprudence.

22 I do not dispute the fact that case management judges have a wide margin of discretion in the management of the court process and in making orders respecting the conduct of their proceedings. FC Rule 385 grants broad powers to the judge and lets him or her regulate the conduct of the parties or exempt them from applying certain rules, bearing in mind that the powers conferred under that rule must be exercised in accordance with procedural fairness (*Mazhero v. Fox*, 2014 FCA 219 (F.C.A.) at para 5). Of course, the interest of justice and the sound administration of justice always involve concerns for a fair, efficient and timely adjudication, as well as an adequate balance between the goals of judicial economy and access to justice. But, paragraph 50(1)(b) of the FC Act and the "interest of justice" test still continue to apply, even in the case management context.

**B. The facts of this case do not support a stay at this time**

23 Further to my analysis, I am unable to conclude that, in light of the factual circumstances presented to me, the limited and uncertain nexus between this case and *Godfrey*, and the absence of evidence of prejudice adduced by the Defendants, it would be in the interest of justice to grant the requested stay or that the temporary pause sought by the Defendants would align with the just, most expeditious and least expensive determination of this class action proceeding.

***(1) The factual circumstances of this case***

24 In their submissions, the Defendants insisted heavily on other putative class proceedings that have recently been "paused" by courts in British Columbia and Ontario to await the SCC decision in *Godfrey*. They referred to *Asquith v. George Weston Limited*, 2018 BCSC 1557 (B.C. S.C.) [*Asquith*], *Cygnus Electronics Corporation v. Panasonic Corporation*, 2018 ONSC 6761 (Ont. S.C.J.) [*Cygnus*], and *David v. Loblaw*, 2018 ONSC 7519 (Ont. S.C.J.) [*David*]. In a letter sent to the Court on March 19, 2019, after the hearing, the Defendants also mentioned a fourth case, *Mancinelli et al v Royal Bank of Canada et al*, Court File No. CV-15-536174-CP [*Mancinelli*], where the Ontario Superior of Justice issued a direction adjourning the class certification hearing *sine die* pending the SCC decision in *Godfrey*.

25 The Defendants submit that, in all those cases, concerns over the waste of the parties' resources and of judicial resources led the courts to grant a pause or suspension, and that I should do likewise. I disagree. A temporary stay may have been a justified outcome in those cases, but I find that they involved factual circumstances and timelines vastly different from the present case. A review of those cases reflects that they are more dissimilar than analogous to the case before me, and are easily distinguishable. In essence, each of these stayed actions required the defendants to submit certification materials or to attend a certification hearing in short order, before *Godfrey* was likely to be decided by the SCC, whereas the current motion is far from being brought at the same late stages leading up to an imminent certification motion hearing. In addition, the potential impact of the *Godfrey* decision on those cases was much larger and extended than is the case here.

26 I should preface my remarks by saying that courts cannot be expected to grant an automatic stay of a pending class action proceeding simply because it happens to be a competition class action whose timing happens to overlap with *Godfrey*. Courts do not look at requests for a stay or suspension in a vacuum or from a principled basis. It all depends on the factual context of each case.

27 In *Mancinelli*, the certification hearing had been scheduled for mid-June 2019, which would be very close to the timing expected for the issuance of the *Godfrey* decision by the SCC. In *David*, the proceedings were suspended after the plaintiffs had

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delivered their certification record but prior to the defendants delivering their responding record, and the certification hearing was scheduled for July 2019, again within a short time frame (*David* at paras 3-4, 25). The decision to pause was made in December 2018, as the defendants' expert reports were due early January 2019. Had there been no pause, it was clear that expert reports would have needed to be amended and redone. In *Cygnus Electronics Corp. v. Panasonic Corp.*, the certification hearing was scheduled for March 2019 and the parties had already exchanged certification motion materials when a suspension was ordered (*Cygnus Electronics Corp. v. Panasonic Corp.* at para 11). In *Asquith*, the proceedings were suspended prior to the plaintiff submitting her certification materials, which was scheduled for October 2018 (*Asquith* at para 87), and this case followed the pace of the *David* matter.

28 I should also mention that these cases relied on *Airia Brands Inc. v. Air Canada*, 2012 ONSC 4773 (Ont. S.C.J.) [*Airia*], where a class action proceeding was adjourned pending the outcome of the SCC decisions in the 2013 trilogy of class action decisions. But, once again, when the *Airia* case was suspended, it was ready to proceed, the certification hearing was scheduled to take place even before the SCC hearings at stake, and there was even a strong possibility that the court might issue its decision before the release of the pending SCC decisions. These were, as the judge said, "very unique" circumstances, with "inevitable duplication" and a "process that would unquestionably have to be redone to some extent" (*Airia* at para 15).

29 Unlike those cases where the imminence of a potential depletion of resources or the prospect of the certification hearing actually taking place before or at the time of the release of the SCC decision were reasons supporting the conclusion to grant a stay, the present case operates under a totally different timeline.

30 In the Scheduling Order, I set out a timetable for all of the steps leading up to the hearing of the certification motion in this proceeding. These steps include the filing of the Plaintiffs' certification record by April 19, 2019; the filing of the Defendants' responding certification record by September 27, 2019; and the filing of the Plaintiffs' reply certification record by October 25, 2019. The hearing of the certification motion is set to begin on April 27, 2020, some 13 months from now, for a duration of five days. Between the end of October and the certification motion hearing, several months are provided for examinations on affidavits and the preparation and filing of the parties' certification memoranda of fact and law.

31 According to the evidence submitted by the Defendants, the SCC's average reserve time between hearing and decision was 4.6 months in 2017, 4.8 months in 2016, and 5.8 months in 2015. As admitted by the Defendants, the SCC is thus likely to render its decision in *Godfrey* by the end of June 2019, if not earlier. Given the existing Scheduling Order and this evidence on the expected time for the SCC decision, the steps that would be effectively suspended if the Defendants' motion is granted are limited to the filing of the Plaintiffs' certification record, which is due on April 19, 2019, and the early stages of the preparation of the Defendants' responding certification record, which is due on September 27, 2019.

32 If the *Godfrey* decision is issued within the SCC's average timeframe, the Defendants would therefore still have more than 3 months to prepare their responding certification record, even if they elected not to start doing anything until after the release of the SCC decision. And there is evidently no risk that the certification motion hearing scheduled for late April 2020 could take place before or even closely after the issuance of the *Godfrey* decision. In fact, there is a large margin of manoeuvre in the current schedule if ever adjustments need to be made after the SCC releases its decision in *Godfrey*, given the ten-month period that would remain between its expected release by late June 2019 and the certification motion hearing scheduled for late April 2020. In sum, the situation in the present case simply does not compare with those other cases where a suspension was granted pending the SCC decision in *Godfrey*.

33 I further observe that in *Cygnus Electronics Corp. v. Panasonic Corp.*, the presiding judge had stated that, if the SCC would have issued its decision in *Godfrey* in December 2018, he was not ready to vacate the March 2019 dates already scheduled for the certification motion hearing in that case. That is, the judge considered that a period of three months between the issuance of the *Godfrey* decision and the certification motion hearing would have been sufficient for the parties to prepare their case. Similarly, in the *Mancinelli* matter brought to the Court's attention by the Defendants, the presiding judge indicated that alternative dates in mid-October 2019 were tentatively set aside to replace the mid-June dates being adjourned. Again, the presiding judge considered that a postponement of the certification motion hearing by about four months would likely be enough to allow the parties to take into account the impact of the SCC decision in *Godfrey* and adjust their certification materials.

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34 The timetable faced by the Defendants in the current case is already far more generous and completely different from those cases where the courts have agreed to "pause" parallel competition class actions pending the release of the *Godfrey* decision. I am thus not convinced, on the evidence before me and at this stage of the proceedings, that it is a situation where the parties' resources are about to be wasted, where there is an inevitable duplication of work or where scarce public and judicial resources would not be effectively used if this class action proceeding continues.

***(2) The more limited nexus with* Godfrey**

35 Moreover, I do not find that the alleged nexus between the current case and the *Godfrey* matter is as extensive and as compelling as it was in these other matters cited by the Defendants. Contrary to the situation here, all of these cases involved "umbrella purchasers", and expert materials had to be prepared to address the economic impact of the alleged conspiracy on this class of purchasers. In each of these other competition class actions, this was a core reason retained by the presiding judge to wait for the SCC decision in *Godfrey* and to justify the suspension (*Asquith* at paras 67, 80; *Cygnus Electronics Corp. v. Panasonic Corp.* at para 5; *David* at paras 8-15). While the Defendants contend that the class defined in the Plaintiffs' claim is broad enough to include umbrella purchasers, the Plaintiffs have confirmed at the hearing before this Court that they are not advancing any "umbrella purchasers" claims (and are ready to amend their claim accordingly). There is therefore no nexus between this case and the "umbrella purchasers" issue expected to be directly addressed by the SCC in *Godfrey*.

36 That said, I do not dispute that the SCC decision in *Godfrey* could have an impact on this case, since the SCC will also consider the type of expert methodology that is required to certify harm as a common issue, and more specifically the standard to be met at certification to show commonality of harm suffered by indirect purchasers. This will be a central issue for certification of the Plaintiffs' action. Depending on whether the SCC retains a stricter or softer reading of the *Microsoft* decision, the extent of the work to be conducted and of the data to be produced by the experts to establish commonality of harm to indirect purchasers may vary greatly (*David* at paras 19-20). However, the potential impact of the *Godfrey* decision on this issue appears to be more limited and more uncertain in the present case. The Plaintiffs submit that they will meet or exceed whatever threshold will be established by the SCC in *Godfrey*, whether it is a higher or lower onus placed on plaintiffs. The Plaintiffs are indeed ready to file their certification record on schedule, on April 19, 2019, prior to the release of the decision in *Godfrey*, as they are of the view that the SCC decision will not have an impact on their certification materials.

37 While the SCC decision in *Godfrey* could have some nexus with this case, it is thus difficult, at this stage, to assess how strong and direct such nexus is likely to be.

***(3) The absence of evidence of prejudice***

38 In addition to the different factual circumstances and timing of this case and the more limited nexus with *Godfrey*, I further observe that the Defendants have not demonstrated how they would suffer prejudice or injustice in the absence of a suspension.

39 The Defendants plead that, absent a stay, the parties and the Court would waste significant resources, because they would have to devote substantial time and expend considerable resources to compile the evidentiary record and otherwise prepare for certification during a time when the decision in *Godfrey* will remain under reserve by the SCC. In particular, they say that they would have to prepare expert reports without the benefit of the decision in *Godfrey* and could have to revise and redo these reports after the decision is released. They submit that they would suffer harm if they have to start preparing their responding certification materials prior to knowing the contents of the decision in *Godfrey*. At the hearing before this Court, the Defendants specified that they would be unable to complete the preparation of their responding certification record if the five-month timeframe currently contemplated for that step in the Scheduling Order is truncated.

40 However, the Defendants have provided no affidavit evidence to support their claim that they would suffer prejudice should no pause be granted. FC Rule 363 provides that facts relied on in a motion and which do not appear on the Court file must be set out in an affidavit. True, this rule does not make it necessary to always file an affidavit in support of a motion, as there is an exception when facts relied on already are on the Court file. But when prejudice or injustice is not supported by facts on the record, it needs to be proven by affidavit evidence. In *Frame v. Riddle*, 2018 FCA 204 (F.C.A.) [*Frame*], the FCA

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recently reminded that principle in very clear words: "[i]t is fundamental that, with very limited exceptions, a motion must be supported by evidence", which evidence must be provided in accordance with FC Rule 363 (*Frame* at para 30; see also *Pfeiffer & Pfeiffer Inc. v. Canada (Deputy Superintendent - Programs Standards & Regulatory Affairs)*, 2003 FCA 391 (F.C.A.) at para 5; *Laliberté c. R.*, 2004 FC 208 (F.C.) at paras 4-5). This is particularly true in the context of exceptional remedies like an injunction or a stay: "[s]omeone who wishes to benefit from an equitable remedy like a stay must at least establish the facts supporting the application" (*Trabelsi c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2016 FC 585 (F.C.) at para 6). Simple assertions, unsupported by evidence, are insufficient to prove prejudice in the context of a stay (*HarperCollins* at paras 68, 97-98).

41 I accept that the Defendants do not need to meet the more demanding "irreparable harm" requirement set out in *RJR-MacDonald* but, in my opinion, a stay cannot be issued in the "interest of justice" without evidence of prejudice to be suffered by the moving party, unless it would be apparent from the Court file. And it is not sufficient to simply argue the prejudice. Quite the contrary, there needs to be evidence at a convincing level of particularity that shows a real probability that prejudice will result unless a stay is granted. The prejudice must be more than arguable possibilities, speculations or hypotheticals. It needs to be demonstrated.

42 In this case, there is simply no evidence that, without a suspension of the proceedings at this point in time, unnecessary and wasted expenditures of resources will follow. As indicated above, based on the evidence on the expected release of the *Godfrey* decision by the SCC and the current schedule, the Defendants would still have at least three months to prepare their responding certification record, including their expert reports, even if they were to wait for the SCC decision. There is no evidence supporting the Defendants' assertions that they would be unable to prepare their expert reports and complete their responding certification record in such a time frame. This is purely speculative. In fact, even the cases cited by the Defendants suggest that a period of about three months after the release of the SCC decision in *Godfrey* is expected to be sufficient for the parties to consider the impact of *Godfrey* and be ready for the certification hearing.

43 The Court will not lightly delay a matter (*Mylan* at para 5). Conversely, a litigant seeking a stay from the courts should not lightly ask for one. It is a pre-requisite for any litigant seeking to benefit from an exceptional equitable remedy like a stay to establish the facts supporting his or her request. More specifically, a litigant must attest to the prejudice or injustice claimed to be suffered. No matter how eloquent arguments from counsel may be, they cannot replace the need for the litigant to provide clear, convincing and non-speculative evidence supporting any allegations of harm or prejudice. The absence of proper affidavit evidence on this front is kryptonite to a party seeking an extraordinary and exceptional remedy like a stay. In the circumstances of this case, the lack of an affidavit from the Defendants allowing me to find sufficient, reliable evidence in support of their allegations of prejudice is fatal to their request.

44 The Defendants say that they could not file affidavit evidence at this stage because they do not know what will be the impact of *Godfrey* on the present case. There is indeed uncertainty with respect to both the timing of the *Godfrey* decision and its scope. But this just further illustrates that the Defendants' request is premature considering the particular circumstances and timeline of this proceeding.

**C. The proper course of action to take**

45 A stay is an exceptional remedy, and I can only decide the Defendants' motion on the basis of the factual circumstances presented to the Court and of the evidence before me. Under both the "interest of justice" test and the broad case management powers conferred upon me by FC Rule 385, granting a suspension is a matter of discretion. In this case, I do not see how, at this juncture, the interest of justice could be served by the suspension of all steps in this class action proceeding pending the release of a SCC decision with uncertain and limited impact on this case, in a factual context where the Defendants have ample time at their disposal to prepare their responding certification record. In other words, the pause requested by the Defendants would not represent, at this stage and in the circumstances of this case, a fair, timely, efficient and expeditious way to proceed.

46 In my view, it is simply premature to invoke the spectre of wasted public and judicial resources if the stay sought by the Defendants is not granted. The schedule in this matter does not contemplate immediate steps that will inevitably have to be

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redone, nor have the Defendants shown how they would suffer a prejudice — as opposed to simple inconvenience — in the event that the proceedings continue according to the timeline set out in the Scheduling Order. There is no indication, let alone any evidence, that the Defendants would be forced, because of the pending SCC decision in *Godfrey*, to expend time and resources to prepare materials and expert evidence that will likely have to be revised, amended or supplemented. On the facts before me, I just cannot find that the benefit of economizing resources outweighs the delay that a suspension would inevitably engender.

47 What I need to find is the most efficient and practical solution at this point in time (*Airia* at para 19). In this case, it is not to freeze all steps leading to the certification motion hearing, as such an option would be counterproductive and could only have the perverse effect of potentially lengthening the fair, expeditious and efficient resolution of this matter. It would automatically create delays of several months as the Plaintiffs' certification record would not be filed on April 19, and no steps would be taken by the Defendants to start the process of preparing their responding certification record.

48 When all relevant considerations and the particular context of this motion are factored in, what makes more sense is to allow the process to continue in accordance with the Scheduling Order, to let the parties take the steps to continue to move this matter forward pending the issuance of the SCC decision in *Godfrey*, to set up a case management conference shortly after the release of the SCC decision in *Godfrey*, and to assess whether the interest of justice and a just, most expeditious and least expensive determination of this class action would then call for the schedule to be partially or totally revisited.

49 By refusing to suspend this class action proceeding now, I am not saying that there may not be grounds to suspend it at a later point, depending on the circumstances, the timing and the contents of the *Godfrey* decision. But agreeing to suspend it now would only serve to increase the risk that the whole schedule, including the certification hearing scheduled for late April 2020, may be put in jeopardy for no good reason as whatever steps that could be reasonably accomplished in the interim period leading up to the *Godfrey* decision would be halted and put on hold.

50 Given the existing Scheduling Order, a temporary suspension of all future deadlines and dates currently set out for this proceeding would boil down to two things: a suspension of the filing of the Plaintiffs' certification record and a suspension of the initial time period for the preparation of the Defendants' responding certification record. Neither is justified. The Plaintiffs have indicated that they are ready to file their certification record on April 19 and that they do not need to have the benefit of the SCC decision in *Godfrey* for their certification materials and their expert reports. There is no reason to delay this step. In the same vein, I am not persuaded that the Defendants cannot undertake steps to advance this matter and work on useful elements of their responding certification record after having received the Plaintiffs' certification record on April 19, even without the benefit of the SCC decision in *Godfrey*. No evidence has been provided that no useful steps can be accomplished in the interim period between the date on which the Defendants will receive the Plaintiffs' certification record and the expected date of the release of the SCC decision in *Godfrey*. In my view, nothing would prevent the Defendants from reviewing and analyzing the Plaintiffs' certification record, from starting preparatory groundwork for their certification materials, from securing their experts and having them do background work for their reports, and from ensuring that they set time aside to be ready to do the bulk of the analyses required for their reports in the three months or so that would remain between the expected release of the *Godfrey* decision by late June 2019 and the end of September 2019, when the responding certification record is currently due. There is no reason to postpone this either.

51 In the particular context of this case and at this point in time, what is in the interest of justice is for the parties to use the time at their disposal. What currently favours both the "just, most expeditious and least expensive" disposition of this proceeding and the "effective use of scarce public resources" is for the proceedings to progress along the path set out in the Scheduling Order. However broad the metrics to measure the interest of justice can be, they do not dictate that I exercise my discretion to grant a temporary suspension of this proceeding now.

52 That said, I am mindful of the importance of not wasting the parties' resources as well as judicial resources, of avoiding unnecessary spending and duplication of work, and of the general principles established by FC Rules 3 and 385. I agree that the preparation of expert reports in a price-fixing class action proceeding like this one can be an expensive and time-consuming step in the preparation of a certification record, and that avoiding parties having to redo or supplement their expert reports is a valid objective in scheduling the roadmap to a certification hearing. As such, I do not expect that, until the SCC releases its

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decision in *Godfrey*, the Defendants will be undertaking work that could reasonably run the risk of having to be redone once the SCC decision is issued. The Defendants could thus decide to postpone to a later date the work most likely to be impacted by *Godfrey*, so that these elements of their responding certification record only be prepared when the parties will know about the *Godfrey* decision and its real impact on this case. In other words, I do not expect that the Defendants will immediately start preparing those portions of their expert reports that could reasonably have to be modified by the SCC decision in *Godfrey*. But I certainly expect that the Defendants will diligently start working on the preparation of other aspects of their responding certification record and take concrete steps to advance matters and issues less likely to be impacted by the *Godfrey* decision and by the legal and evidentiary standard expected to be clarified.

53 If the Defendants are of the view, once the SCC decision on *Godfrey* is released, that whatever time left is insufficient to allow them to complete their experts reports and their responding certification record, this could be addressed at the case management conference to be convened by the Court or through another motion for stay. It will, of course, be up to the Defendants to demonstrate, when the *Godfrey* decision will have been released and in light of whatever guidance will have been provided by the SCC, why and how the remaining time frame would then be insufficient or unfair to adequately prepare their case, and to convince the Court that the schedule needs to be revisited, if at all. Should the issue of a temporary suspension resurface at a later point in these proceedings (as nothing in this Order prevents the Defendants from bringing another stay motion should the circumstances change), how the Defendants will have used the time currently contemplated in the Scheduling Order will undoubtedly be among the factors considered by the Court in the exercise of its discretion.

54 I should specify that, if ever the SCC decision in *Godfrey* was not released within the SCC's average reserve time, it will be open to the Defendants to ask the Court to convene a case management conference in order to discuss the impact that such an unexpected development might have on the schedule of this class action proceeding.

**ORDER in T-809-18**

*THIS COURT ORDERS that*:

1. The Defendants' motion is granted in part.

2. The Defendants' request to suspend all future deadlines and dates currently set out in the Scheduling Order issued on November 29, 2018 is denied, without prejudice to the Defendants coming back with a new motion for stay or an informal request to pause once the SCC will have released its decision in *Godfrey*.

3. The Defendants' request for a post-*Godfrey* case management conference is granted, and such case management conference shall be held within two weeks after the release of the SCC decision in *Godfrey*, to determine whether, at that point in time, adjustments need to be made to the Scheduling Order.

4. There is no order of costs.

*Motion granted in part.*

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Federal Court Cour fédérale

**Date: 20210408**

**Docket: T-130-21**

**Ottawa, Ontario, April 8, 2021**

**PRESENT: Case Management Judge Mandy Aylen**

**BETWEEN:**

**JOHN TURMEL**

**Plaintiff**

**and**

**HER MAJESTY THE QUEEN**

**Defendant**

**Docket: T-138-21**

**AND BETWEEN:**

**RAYMOND TURMEL**

**Plaintiff**

**and**

**HER MAJESTY THE QUEEN**

**Defendant**

**Docket: T-171-21**

**AND BETWEEN:**

**MICHEL DENIS ETHIER**

**Plaintiff**

**and**

**HER MAJESTY THE QUEEN**

**Defendant**

**Docket: T-208-21**

**AND BETWEEN:**

**BIAFIA INNISS**

**Plaintiff**

**and**

**HER MAJESTY THE QUEEN**

**Defendant**

**Docket: T-219-21**

**AND BETWEEN:**

**RAYMOND BRUNET**

**Plaintiff**

**and**

**HER MAJESTY THE QUEEN**

**Defendant**

**Docket: T-212-21**

**AND BETWEEN:**

**NATHANAEL INNISS**

**Plaintiff**

**and**

**HER MAJESTY THE QUEEN**

**Defendant**

**Docket: T-220-21**

**AND BETWEEN:**

**WILLIAM ERNEST WAYNE ROBINSON-RITCHIE**

**Plaintiff**

**and**

**HER MAJESTY THE QUEEN**

**Defendant**

**Docket: T-221-21**

**AND BETWEEN:**

**WAYNE BRIAN ROBINSON**

**Plaintiff**

**and**

**HER MAJESTY THE QUEEN**

**Defendant**

**Docket: T-230-21**

**AND BETWEEN:**

**TREVOR J. LEADLEY**

**Plaintiff**

**and**

**HER MAJESTY THE QUEEN**

**Defendan**

**Docket: T-242-21**

**AND BETWEEN:**

**JASON BRAUN**

**Plaintiff**

**and**

**HER MAJESTY THE QUEEN**

**Defendant**

**ORDER**

[1] The Court is case managing a group of more than 60 actions in which the self-represented Plaintiffs seek various forms of relief related to the federal Government's COVID-19 mitigation

measures, including: (a) a declaration that the measures violate their *Charter* rights and are not saved by section 1 of the *Charter*; (b) an order prohibiting any measures that are not imposed on the flu; (c) a permanent constitutional exemption from any such measures; and (d) damages for pain and losses incurred by the Plaintiffs as a result of such measures.

[2] The Statements of Claim in each action are almost identical and based on a "kit claim" made available on the internet by John Turmel, the Plaintiff in T-130-21.

[3] The Defendant has indicated that the Defendant intends to bring a motion to strike the Statements of Claim, without leave to amend, as well as motions for security for costs in relation to certain Plaintiffs who the Defendant asserts have unpaid cost awards.

[4] A case management conference was held on March 11, 2021 among the parties in the initial group of actions assigned into case management - namely, T-130-21, T-138-21, T-171-21, T-208-21, T-219-21, T-212-21, T-220-21, T-221-21, T-230-21 and T-242-21 [Initial Group of Actions]. During that case management conference, the Court proposed that Mr. Turmel's claim in T-130-21 move forward as the lead claim and that the balance of the actions be held in abeyance, pursuant to section 50(1)(b) of the *Federal Courts Act* [*Act*], pending a final determination in T-130-21 and any appeal therefrom. Following that final determination, it would then be open to the Plaintiffs in the stayed actions to seek to have their actions move forward upon establishing that they are differently situated than T-130-21 and thus should not be bound by the outcome of that action.

[5] A number of the Plaintiffs expressed a willingness to proceed in this manner. However, they took issue with the information that would be provided to them by the Defendant regarding T-130-21 and requested that if their action was stayed, that they still be provided with all filings made in relation to T-130-21, including, for example, the Defendant's motion to strike. The Defendant indicated that they would not agree to voluntarily serve all Plaintiffs with the materials in T-130-21, as there was no obligation to do so under the *Federal Courts Rules*. Moreover, the Defendant indicated that they would not agree to periodically provide Mr. Turmel with a list of the email addresses of all Plaintiffs who commenced actions using the kit claim.

[6] In order to permit the Plaintiffs an opportunity to consider the Court's proposal, the Court directed that any Plaintiff in the Initial Group of Actions who does not consent to a stay of their action based on the Court's proposal was to so advise the Court by March 18, 2021 and provide, by that date, any submissions as to why their action should not be stayed. The Defendant was given until March 24, 2021 to serve and file any responding submissions and the objecting Plaintiffs were then given until March 29, 2021 to serve and file any reply submissions.

[7] The Court received the following submissions from the Plaintiffs:

A. The Plaintiff in T-138-21 advised that, while on the case management conference he agreed to the stay, he has changed his decision and wants to "participate in any procedures even if only to watch and listen". No further submissions were provided in support of this position.

B. The Plaintiffs in T-208-21, T-212-21 and T-219-21 advised that they do not consent to having their actions stayed and want to receive updates and documentation from T-130-21. No further submissions were provided in support of this position.

C. The Plaintiff in T-221-21 advised that he does not want his action stayed pending the final determination in T-130-21. No submissions were provided in support of this position.

[8] No submissions were received from the Plaintiffs in T-171-21, T-220-21, T-230-21 or T-242-21. At the case management conference, the Plaintiffs in T-171-21 and T-220-21 had indicated that they opposed the stay, the Plaintiff in T-230-21 had indicated that they consented to the stay and the Plaintiff in T-242-21 had indicated that they were undecided.

[9] Mr. Turmel filed submissions in which he drew to the Court's attention the approach taken by Justice Phelan in his case management of over 300 proceedings involving Canada's medical marijuana regulations, noting that Justice Phelan's determination applied to all plaintiffs and applicants without designating a lead plaintiff/applicant. He suggested that the Court could proceed in a similar manner and designate the style of cause as "In the matter of numerous APPLE ORANGE RESISTANCE filings seeking a declaration pursuant to s.52(1) of the Canadian Charter of Rights and Freedoms".

[10] Mr. Turmel noted that in a different group of case managed proceedings involving claims for damages due to long delays in processing medicinal marijuana grow applications, Justice Brown designated a lead claim and did not require that the other plaintiffs be kept informed, which Mr. Turmel felt was an error that should not be repeated in this case.

[11] Mr. Turmel proposes that the Court should proceed as per Justice Phelan's approach and keep all Plaintiffs on the style of cause, as this would keep them fully apprised of the status of the legal proceeding.

[12] By way of their responding submission, the Defendant advised that the Defendant supports the Court's proposal to designate a lead claim and to stay the remaining claims pursuant to section 50(1)(b) of the *Act*. The Defendant submits that interests of justice favour a stay of proceedings as the actions raise similar issues, a stay will conserve judicial and party resources and the stay will not result in any injustice to the parties. Specifically:

A. Allowing a lead claim to proceed has the potential to significantly narrow the issues in dispute in the other files and to conserve resources that would otherwise be spent on those issues.

B. Since the Initial Group of Actions was filed, more than 50 additional actions have been commenced and there is a significant likelihood of more such claims, which, if not stayed, would consume further resources while also creating a moving target for the Defendant's forthcoming motion to strike.

C. A temporary stay will not result in any injustice to the Plaintiffs as they will have the opportunity to make submission on the merits of their claim following the final determination of the lead claim. Moreover, the Plaintiffs wishing to monitor the status of the lead claim may do so through the Court's website or through a public website set up by Mr. Turmel that appears to be providing comprehensive updates on the status of the claims.

[13] By way of reply, Mr. Turmel confirmed that the Court's proposal "would have been fine had Canada agreed to cc the other plaintiffs but no longer now that it has refused". Mr Turmel made numerous additional submissions in response to those made by the Defendant, the majority of which related to the other Plaintiffs. As I already advised Mr. Turmel at the case management conference, he does not represent the other Plaintiffs and cannot speak for them. That said, I have nonetheless taken into consideration his additional submissions in this regard.

[14] None of the other Plaintiffs made any submissions in reply to the Defendant's submissions.

[15] Pursuant to section 50(1)(b) of the *Act*, the Court may, in its discretion, stay its own proceedings where it is in the interests of justice to do so. In considering a request for a stay under section 50(1)(b), the tri-partite test set out in *RJR Macdonald Inc v Canada (Attorney General)*, [1994] 1 SCR 110 does not apply. Rather, the question is whether it would be in the interests of justice for a stay to be granted [see *Clayton v Canada (Attorney General)*, 2018 FCA 1].

[16] The interests of justice test is a wide-ranging test that can embrace many elements and the Court must consider the totality of the circumstances of a particular case when considering whether to exercise its discretion to stay its proceedings. The Court should be guided by certain principles, including securing the just, most expeditious and least expensive determination of every proceeding on its merits, as expressly provided in Rule 3 of the *Federal Courts Rules*, and the fact that as long as no party is unfairly prejudiced and it is in the interests of justice, the Court should exercise its discretion against the wasteful use of judicial resources. The Court should also take into consideration the public interest in moving a proceeding forward fairly and with due dispatch [see *Jensen v Samsung Electronics Co Ltd.*, 2019 FC 373; *Coote v Lawyers' Professional Indemnity Co*, 2013 FCA 143; *Clayton, supra*].

[17] As was stated by the Court in *Jensen*, the case law establishes that the interests of justice test is anchored in three overarching principles: (1) a flexible approach aimed at protecting the interest of a just, fair and efficient resolution of a proceeding; (2) the existence of some form of prejudice, harm or injustice, as opposed to simple inconvenience, to be suffered by the moving party in the absence of a stay; and (3) the determinative place of the particular factual circumstances presented to the Court.

[18] It is evident to the Court, from the comments made at the case management conference and the minimal submissions made in response to the Court's proposal, that the Plaintiffs were largely prepared to agree to a stay of the proceedings provided that they were served with all of the materials filed in T-130-21. It was only when I noted at the case management conference that, under the *Rules*, there would be no obligation on the part of the Defendant to serve the

Plaintiffs with the materials filed in T-130-21 and the Defendant advised that they were not prepared to provide Mr. Turmel with weekly or periodic contact information for any new kit claim proceedings that the majority of the Plaintiffs, led by Mr Turmel, then changed their position on the Court's proposal.

[19] I am satisfied that there will be no prejudice or harm to the Plaintiffs if their proceedings are stayed pending the determination in T-130-21. Indeed, there has been no suggestion from any of the Plaintiffs of any specific harm or prejudice. To the extent that the Plaintiffs are concerned about being kept informed regarding the status of T-130-21, I agree with the Defendant that the recorded entries in T-130-21 are available for viewing on the Court's website and, as acknowledged by Mr. Turmel in his reply submissions, the Plaintiffs can obtain updates on the status of T-130-21 on Mr. Turmel's website. While the Plaintiffs and Mr. Turmel would prefer that their access to information regarding T-130-21 be rendered more convenient for them by requiring the Defendant to serve them with all of their materials, I am not prepared to impose such a burden on the Defendant. If the Plaintiffs are interested in T-130-21, they can put in the effort to follow its progress.

[20] Moreover, I will require that the Registry provide a copy of any final determination in T-130-21 to each of the Plaintiffs.

[21] As the Statements of Claim are based on Mr. Turmel's kit claim, they are substantially similar, with only minor variations regarding the basis for the damages sought by some of the Plaintiffs. The claims in the actions therefore significantly overlap. I note that none of the

Plaintiffs have disputed T-130-21's suitability as a lead claim by suggesting they are differently situated. In such circumstances, considerations of judicial resources, efficiency and the orderly conduct of multiple proceedings all support the Court's proposal.

[22] In light of the above, I am satisfied that it is in the interests of justice to stay these proceedings pending a final determination of the lead claim and any appeal therefrom. Proceeding in this manner will ensure the just, most expeditious and least expensive determination of the issues raised in the Statements of Claim. It will remain open to the Plaintiffs to request that the Court permit their claims to proceed following the final determination of T-130-21 if they can demonstrate that they are differently situated than T-130-21 such that they should not be bound by any final determination made therein.

**THIS COURT ORDERS that:**

1. The actions bearing Court File Nos. T-138-21, T-171-21, T-208-21, T-219-21, T-212-21, T-220-21, T-221-21, T-230-21 and T-242-21 are hereby stayed pending the final determination (by judgment or order) in T-130-21 and any appeal therefrom.

2. The Registry shall provide a copy of any final determination in T-130-21 to each of the Plaintiffs in T-138-21, T-171-21, T-208-21, T-219-21, T-212-21, T-220-21, T-221-21, T-230-21 and T-242-21.

3. In the event that any party in T-138-21, T-171-21, T-208-21, T-219-21, T-212-21, T-220-21, T-221-21, T-230-21 or T-242-21 takes the position that their action is differently situated than T-130-21 such that the final determination in T-130-21

(and any appeal therefrom) should not apply to their action, that party shall, within 30 days of the final determination in T-130-21 and any appeal therefrom, requisition a case management conference to establish a schedule for a motion to determine whether their action should move forward.

4. The terms of this Order shall apply to any new Statement of Claim filed subsequent to the date of this Order which is substantially identical to those filed in T-130-21, T-138-21, T-171-21, T-208-21, T-219-21, T-212-21, T-220-21, T-221-21, T-230-21 or T-242-21.

5. The terms of this Order may be varied or amended as the Court determines necessary.

6. There shall be no costs associated with this Order.

"Mandy Aylen"

Case Management Judge