Court File No.: T-130-21

FEDERAL COURT

B E T W E E N :

JOHN TURMEL

Plaintiff
(Moving Party)

and

HER MAJESTY THE QUEEN

Defendant
(Responding Party)

RESPONDING MOTION RECORD OF THE DEFENDANT

(Plaintiff's Motion to Appeal the May 6, 2021, Timetable Order)

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Per: Benjamin Wong

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Counsel for the Defendant

TO: The Administrator
Federal Court of Canada

AND TO: John C. Turmel
50 Brant Avenue
Brantford, Ontario N3T 3G7

Plaintiff, self represented

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TAB 1

Court File No.: T-130-21

FEDERAL COURT

B E T W E E N :

JOHN TURMEL

Plaintiff
(Moving Party)

and

HER MAJESTY THE QUEEN

Defendant
(Responding Party)

WRITTEN REPRESENTATIONS OF THE DEFENDANT

(Plaintiff's Motion to Appeal the May 6, 2021, Timetable Order)

Attorney General of Canada
Department of Justice
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Counsel for the Defendant

OVERVIEW

1. The Court did not err when exercising its discretion set the timetable for Canada's motion to strike or for security for costs. Case management judges have wide latitude to set timetables, and the timetable in this case is reasonable because the timelines set out in Rule 369 do not contemplate cross-examinations on affidavits, and would have effectively required Canada to file its written representations before being served with the plaintiff's evidence. Canada therefore requests that this appeal be dismissed with costs.

PART I – STATEMENT OF FACTS

2. This claim seeks 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.[1]

3. This claim is one of more than 60 substantially similar actions being case managed by Prothonotary Aylen. In orders dated April 8, 2021, and April 26, 2021, the

[1] Order of the Court 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 at paras 1-2 [April 8 Order], **Canada's Motion Record [CMR], Tab 7**.

Court ordered that this claim move forward as the lead claim and that the balance of the actions be held in abeyance pending a final determination in this claim.[2]

4. On April 26, 2021, the Court directed that the parties confer and provide the Court with a jointly-proposed timetable for next steps in this proceeding.[3]

5. The parties subsequently conferred. However, they were unable to agree on a timetable for Canada's motion, which will seek an order either striking the claim on the grounds that the claim does not identify the impugned federal measures, disclose a reasonable cause of action, or is frivolous and vexatious, or for security for costs on the basis that Canada has numerous cost awards against the plaintiff than remain unpaid.[4] The parties accordingly made separate submissions to the Court regarding the timeline for Canada's motion.

6. The Court considered the parties' individually-proposed timelines, that it was within its discretion to depart from the timelines for motions in writing prescribed by Rule 369 when warranted, that Canada's motion required affidavit evidence, and might

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[2] April 8 Order at pp 13-14, **CMR, Tab 7**, aff'd in Order of the Court dated May 7, 2021 in T-171-21 [Stay Appeal Order], **CMR, Tab 9**; Order of the Court dated April 26, 2021, in T-263-21 at p 5, **CMR, Tab 8**.

[3] Direction of the Court dated April 26, 2021, in T-130-21, **CMR, Tab 8**.

[4] *Federal Courts Rules*, SOR/98-106, ss 221(1), 416(1)(f) [Rules].

require cross-examination which is not contemplated in the timelines prescribed by Rule 369.[5]

7. The Court concluded that in light of these circumstances, Canada's proposed timetable was reasonable and ordered that:

> 1. The Defendant shall serve their Notice of Motion and supporting affidavit(s) by no later than May 21, 2021.
>
> 2. The Plaintiff shall serve any responding affidavit(s) by no later than June 7, 2021.
>
> 3. Cross-examinations, if any, shall be completed by no later than 10 days following the date the Plaintiff serves his responding affidavit(s).
>
> 4. The Defendant shall serve and file their complete motion record by no later than 15 days from the expiration of the time to conduct cross-examinations, or, if the Plaintiff does not intend to serve an affidavit or conduct cross-examinations, 15 days from the date that the Plaintiff so advises the Defendant.
>
> 5. The Plaintiff shall serve and file his complete motion record within 15 days of service of the Defendant's motion record.
>
> 6. The Defendant shall serve and file their reply motion record within seven days of service of the Plaintiff's responding motion record.[6]

8. On May 21, 2021, Canada served and filed its notice of motion and supporting affidavit. On the same date, the plaintiff advised that he would not be filing supporting affidavits or cross-examining Canada's affiant. Pursuant to the Order, Canada's motion record will be served and filed no later than June 7, 2021.

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[5] Timetable Order at p 1-2, **CMR, Tab 8**.

[6] Timetable Order at p 2-3, **CMR, Tab 8**.

PART II – POINTS IN ISSUE

9. The issues in this motion are:

(a) What is the appellate standard of review?

(b) Did the case management judge make a palpable and overriding error in setting the timeline for Canada's motion to strike or for security for costs?

PART III – SUBMISSIONS

A. APPELLATE STANDARD OF REVIEW

10. 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.[7]

11. The courts have also held that it is always necessary for the judge on a Rule 51 appeal to bear in mind that the case management prothonotary is "intimately familiar with the history, details and complexities" with of a case, and that in case managed proceedings, appellate intervention accordingly "should not come lightly."[8]

---

[7] *Hospira Healthcare Corp v Kennedy Institute of Rheumatology*, 2016 FCA 215 at para 2 [*Hospira*], **CMR, Tab 4**.

[8] Stay Order Appeal at paras 5-6, **CMR, Tab 7**; *Hospira* at para 103, **CMR, Tab 4**.

B. THE CASE MANAGEMENT JUDGE DID NOT ERR IN SETTING THE TIMELINE FOR CANADA'S MOTION

12. The Court did not commit a palpable and overriding error when it set the timeline for Canada's motion to strike or for security for costs.

13. Rule 369 sets out the timetable for motions in writing.[9] A motion in writing can be filed at any time in the course of a proceeding. Once filed, Rule 369 sets out a timeline for service of the respondent's record and reply submissions.[10] The timelines under Rule 369 do not contemplate the exchange of affidavit evidence or cross-examinations.

14. However, case management judges have discretion to depart from the timelines set in the Rules. Rule 385(1) provides case management judges with broad powers to "make any orders that are necessary for the just, most expeditious and least expensive determination of the proceeding on its merits", and "notwithstanding any period provided for in these Rules", fix the period for completion of steps in a proceeding.[11]

15. Rule 385(1) sits alongside Rules 8, 53 and 55, which allow the Court extend or time periods in the Rules, vary them, dispense with compliance with them, make additional orders that are just, and attach terms to any orders.[12]

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[9] Rules, s 369.

[10] Rules, s 369(2) and (3).

[11] Rules, s 385(1); *Mazhero v Fox*, 2014 FCA 219 at para 2 [*Mazhero*], **CMR, Tab 5**.

[12] *Rules*, s 8, 53, 55; *Mazhero* at para 3, **CMR, Tab 5**.

16. In this circumstances of Canada's motion, a departure from the timeline set out in Rule 369 was warranted, because the timeline did not contemplate cross-examinations on affidavits, and would have effectively required Canada to file its written representations before being served with the plaintiff's evidence.

17. The plaintiff asserts that he is unable to prepare his supporting affidavit without Canada's written submissions because he will not know how the facts in Canada's supporting affidavit will apply to Canada's arguments. However, all notices of motion set out the relief being sought by the moving party, the grounds intended to be argued, references to any statutory provision or rule to be relied on, and a list of the evidence to be used at the hearing of the motion.[13] Indeed, the same day that he was served with Canada's notice of motion and supporting affidavit, the plaintiff was able to advise that he would not be filing supporting affidavits or cross-examining Canada's affiant.

18. Requiring parties to serve evidence and conduct cross-examinations before written submissions is an accepted practice and does not give rise to prejudice – for example, oral motions and applications for judicial review at the Federal Court routinely proceed on this basis. On the other hand, requiring Canada to file written representations before the close of evidence would prejudice Canada's ability to respond to the plaintiff.

---

[13] Rules, s 359.

19. The plaintiff also asserts that the Court cannot consider affidavit evidence in Canada's motion to strike and for security for costs. This mischaracterizes the law concerning evidence on motions. While the Rules prohibit evidence on a motion to strike for no reasonable cause of action, Canada does not intend to file evidence in support of argument on that issue,[14] but only in support of its alternative request for security for costs. In particular, Canada intends to file evidence of its previous costs awards against the plaintiff, and that these costs awards remain unpaid. Evidence is clearly permitted for this purpose.[15]

20. Finally, the plaintiff alleges that the Court committed a palpable and overriding error by extending the timelines for Canada's motion in writing because it "wastes time while Canadians are dying from lockdown." However, the plaintiff did not file any evidence below to support these bald allegations of prejudice. Nor can the plaintiff rely on facts that are applicable to other individuals to support his allegations of prejudice.[16]

PART IV – ORDER SOUGHT

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

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[14] Rules, s 221(1)(a), (2).

[15] *Mil Davie Inc v Hibernia Management & Development Co*, [1998] FCJ No 614 at para 8 (CA), **CMR, Tab 6**.

[16] *Harris v Canada (Attorney General)*, 2019 FCA 232 at para 22, **CMR, Tab 3**.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this May 27, 2021.

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Plaintiff, self represented

AUTHORITIES CITED

1 Direction of the Court dated April 26, 2021, in T-130-21

2 *Harris v Canada (Attorney General)*, 2019 FCA 232

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

4 *Mazhero v Fox*, 2014 FCA 219

5 *Mil Davie Inc v Hibernia Management & Development Co*, [1998] FCJ No 614 (CA)

6 Order of the Court 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

7 Order of the Court dated April 26, 2021, in T-263-21

8 Order of the Court dated May 7, 2021, in T-171-21

APPENDIX A – LEGISLATION

Federal Courts Rules (SOR/98-106)

Extension or abridgement **8 (1)** On motion, the Court may extend or abridge a period provided by these Rules or fixed by an order. **When motion may be brought** **(2)** A motion for an extension of time may be brought before or after the end of the period sought to be extended. **Motions for extension in Court of Appeal** **(3)** Unless the Court directs otherwise, a motion to the Federal Court of Appeal for an extension of time shall be brought in accordance with rule 369.	**Délai prorogé ou abrégé** **8 (1)** La Cour peut, sur requête, proroger ou abréger tout délai prévu par les présentes règles ou fixé par ordonnance. **Moment de la présentation de la requête** **(2)** La requête visant la prorogation d'un délai peut être présentée avant ou après l'expiration du délai. **Requête présentée à la Cour d'appel fédérale** **(3)** Sauf directives contraires de la Cour, la requête visant la prorogation d'un délai qui est présentée à la Cour d'appel fédérale doit l'être selon la règle 369.
Orders on terms **53 (1)** In making an order under these Rules, the Court may impose such conditions and give such directions as it considers just. **Other orders** **(2)** Where these Rules provide that the Court may make an order of a specified nature, the Court may make any other order that it considers just.	**Conditions des ordonnances** **53 (1)** La Cour peut assortir toute ordonnance qu'elle rend en vertu des présentes règles des conditions et des directives qu'elle juge équitables. **Ordonnances équitables** **(2)** La Cour peut, dans les cas où les présentes règles lui permettent de rendre une ordonnance particulière, rendre toute autre ordonnance qu'elle juge équitable.
Varying rule and dispensing with compliance **55** In special circumstances, in a proceeding, the Court may vary a rule or dispense with compliance with a rule.	**Modification de règles et exemption d'application** **55** Dans des circonstances spéciales, la Cour peut, dans une instance, modifier une règle ou exempter une partie ou une personne de son application.

Motion to strike	**Requête en radiation**
221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	**221 (1)** À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
(a) discloses no reasonable cause of action or defence, as the case may be,	a) qu'il ne révèle aucune cause d'action ou de défense valable;
(b) is immaterial or redundant,	b) qu'il n'est pas pertinent ou qu'il est redondant;
(c) is scandalous, frivolous or vexatious,	c) qu'il est scandaleux, frivole ou vexatoire;
(d) may prejudice or delay the fair trial of the action,	d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;
(e) constitutes a departure from a previous pleading, or	e) qu'il diverge d'un acte de procédure antérieur;
(f) is otherwise an abuse of the process of the Court,	f) qu'il constitue autrement un abus de procédure.
and may order the action be dismissed or judgment entered accordingly.	Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.
Evidence	**Preuve**
(2) No evidence shall be heard on a motion for an order under paragraph (1)(a).	**(2)** Aucune preuve n'est admissible dans le cadre d'une requête invoquant le motif visé à l'alinéa (1)a).
Notice of motion	**Avis de requête**
359 Except with leave of the Court, a motion shall be initiated by a notice of motion, in Form 359, setting out	**359** Sauf avec l'autorisation de la Cour, toute requête est présentée au moyen d'un avis de requête établi selon la formule 359 et précise :

(a) in respect of a motion other than one made under rule 369, the time, place and estimated duration of the hearing of the motion;	a) sauf s'il s'agit d'une requête présentée selon la règle 369, la date, l'heure, le lieu et la durée prévue de l'audition de la requête;
(b) the relief sought;	b) la réparation recherchée;
(c) the grounds intended to be argued, including a reference to any statutory provision or rule to be relied on; and	c) les motifs qui seront invoqués, avec mention de toute disposition législative ou règle applicable;
(d) a list of the documents or other material to be used at the hearing of the motion.	d) la liste des documents et éléments matériels qui seront utilisés à l'audition de la requête.
Motions in writing **369 (1)** A party may, in a notice of motion, request that the motion be decided on the basis of written representations. **Request for oral hearing** **(2)** A respondent to a motion brought in accordance with subsection (1) shall serve and file a respondent's record within 10 days after being served under rule 364 and, if the respondent objects to disposition of the motion in writing, indicate in its written representations or memorandum of fact and law the reasons why the motion should not be disposed of in writing. **Reply** **(3)** A moving party may serve and file written representations in reply within four days after being served with a respondent's record under subsection (2).	**Procédure de requête écrite** **369 (1)** Le requérant peut, dans l'avis de requête, demander que la décision à l'égard de la requête soit prise uniquement sur la base de ses prétentions écrites. **Demande d'audience** **(2)** L'intimé signifie et dépose son dossier de réponse dans les 10 jours suivant la signification visée à la règle 364 et, s'il demande l'audition de la requête, inclut une mention à cet effet, accompagnée des raisons justifiant l'audition, dans ses prétentions écrites ou son mémoire des faits et du droit. **Réponse du requérant** **(3)** Le requérant peut signifier et déposer des prétentions écrites en réponse au dossier de réponse dans les quatre jours après en avoir reçu signification.

Disposition of motion **(4)** On the filing of a reply under subsection (3) or on the expiration of the period allowed for a reply, the Court may dispose of a motion in writing or fix a time and place for an oral hearing of the motion**.**	**Décision** **(4)** Dès le dépôt de la réponse visée au paragraphe (3) ou dès l'expiration du délai prévu à cette fin, la Cour peut statuer sur la requête par écrit ou fixer les date, heure et lieu de l'audition de la requête.
Powers of case management judge or prothonotary **385 (1)** Unless the Court directs otherwise, a case management judge or a prothonotary assigned under paragraph 383(c) shall deal with all matters that arise prior to the trial or hearing of a specially managed proceeding and may **(a)** give any directions or make any orders that are necessary for the just, most expeditious and least expensive determination of the proceeding on its merits; **(b)** notwithstanding any period provided for in these Rules, fix the period for completion of subsequent steps in the proceeding; **(c)** fix and conduct any dispute resolution or pre-trial conferences that he or she considers necessary; and **(d)** subject to subsection 50(1), hear and determine all motions arising prior to the assignment of a hearing date.	**Pouvoirs du juge ou du protonotaire responsable de la gestion de l'instance** **385 (1)** Sauf directives contraires de la Cour, le juge responsable de la gestion de l'instance ou le protonotaire visé à l'alinéa 383c) tranche toutes les questions qui sont soulevées avant l'instruction de l'instance à gestion spéciale et peut : **a)** donner toute directive ou rendre toute ordonnance nécessaires pour permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible; **b)** sans égard aux délais prévus par les présentes règles, fixer les délais applicables aux mesures à entreprendre subséquemment dans l'instance; **c)** organiser et tenir les conférences de règlement des litiges et les conférences préparatoires à l'instruction qu'il estime nécessaires; **d)** sous réserve du paragraphe 50(1), entendre les requêtes présentées avant que la date d'instruction soit fixée et statuer sur celles-ci.

Where security available	**Cautionnement**
416 (1) Where, on the motion of a defendant, it appears to the Court that	**416 (1)** Lorsque, par suite d'une requête du défendeur, il paraît évident à la Cour que l'une des situations visées aux alinéas a) à h) existe, elle peut ordonner au demandeur de fournir le cautionnement pour les dépens qui pourraient être adjugés au défendeur **:**
(f) the defendant has an order against the plaintiff for costs in the same or another proceeding that remain unpaid in whole or in part,	**f)** le défendeur a obtenu une ordonnance contre le demandeur pour les dépens afférents à la même instance ou à une autre instance et ces dépens demeurent impayés en totalité ou en partie;

TAB 2

Federal Court  Cour fédérale

Ottawa, ON
K1A 0H9

April 26, 2021

Applicants

johnturmel@yahoo.com

Respondent

benjamin.wong2@justice.gc.ca

Court Files

T-130-21- *TURMEL, John v Her Majesty the Queen*

This is to advise of the following Direction of Madam Prothonotary Aylen dated April 26, 2021;

> ***"The parties shall confer regarding the timetable for next steps in this proceeding and shall, by no later than May 5, 2021, provide the Court with a jointly-proposed timetable and the availability of the parties for a case management conference (in the event that the Court determines that one is required)."***

Yours truly,

KC

Kathy Craigie
Registry Officer

TAB 3

2019 FCA 232
Federal Court of Appeal

Harris v. Canada (Attorney General)

2019 CarswellNat 4872, 2019 FCA 232, 310 A.C.W.S. (3d) 272

ALLAN J. HARRIS (Appellant) and ATTORNEY GENERAL OF CANADA (Respondent)

Wyman W. Webb J.A., D.G. Near J.A., Yves de Montigny J.A.

Heard: June 27, 2019
Judgment: September 18, 2019
Docket: A-258-18

Proceedings: reversing in part *Harris v. Canada* (2018), 2018 CarswellNat 4059, 2018 CarswellNat 4073, 2018 FC 765, 2018 CF 765, Henry S. Brown J. (F.C.)

Counsel: Allan J. Harris, for himself
Jon Bricker, for Respondent

Subject: Civil Practice and Procedure; Constitutional
Related Abridgment Classifications
Constitutional law
XIV Procedure in constitutional challenges
XIV.5 Miscellaneous
Table of Authorities
Cases considered by *Wyman W. Webb J.A.*:
Allard v. Canada (2016), 2016 FC 236, 2016 CF 236, 2016 CarswellNat 458, 2016 CarswellNat 459, 394 D.L.R. (4th) 694, [2016] 3 F.C.R. 303, 349 C.R.R. (2d) 86 (F.C.) — considered
Housen v. Nikolaisen (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, 2002 CSC 33 (S.C.C.) — referred to
R. v. Smith (2015), 2015 SCC 34, 2015 CSC 34, 2015 CarswellBC 1587, 2015 CarswellBC 1588, 20 C.R. (7th) 246, 472 N.R. 1, 386 D.L.R. (4th) 583, 323 C.C.C. (3d) 461, [2015] 10 W.W.R. 1, 74 B.C.L.R. (5th) 1, 372 B.C.A.C. 1, 640 W.A.C. 1, [2015] 2 S.C.R. 602, 337 C.R.R. (2d) 202 (S.C.C.) — considered
Statutes considered:
Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
s. 7 — considered
Controlled Drugs and Substances Act, S.C. 1996, c. 19
Generally — referred to
Regulations considered:
Controlled Drugs and Substances Act, S.C. 1996, c. 19
Access to Cannabis for Medical Purposes Regulations, SOR/2016-230

Generally — referred to

Marihuana Medical Access Regulations, SOR/2001-227

Generally — referred to

Marihuana for Medical Purposes Regulations, SOR/2013-119

Generally — referred to

APPEAL by Crown and CROSS-APPEAL by patient from judgment reported at *Harris v. Canada* (2018), 2018 FC 765, 2018 CF 765, 2018 CarswellNat 4059, 2018 CarswellNat 4073 (F.C.), granting in part Crown's motion to strike pleadings.

***Wyman W. Webb J.A.*:**

1 The issue in this appeal is whether the amended statement of claim, as filed by Mr. Harris with the Federal Court, should be struck. Mr. Harris is seeking certain declarations and unspecified damages related to the *Access to Cannabis for Medical Purposes Regulations*, SOR/2016-230 (ACMPR) (which were repealed on October 17, 2018 by SOR/2018-147, s. 33). The Crown had brought a motion to strike his statement of claim. The Federal Court (2018 FC 765 (F.C.)) allowed the motion in part and struck the parts of the statement of claim related to Mr. Harris' allegation that the ACMPR, in effect, shortchanged his right to a permit to grow cannabis but otherwise dismissed the Crown's motion.

2 Mr. Harris filed an appeal in relation to the parts of his statement of claim that were struck. The Crown filed a cross-appeal in relation to the parts of the statement of claim that were not struck.

3 For the reasons that follow, I would allow the Crown's cross-appeal and dismiss Mr. Harris' appeal. As a result, I would strike the amended statement of claim.

I. Background

4 Mr. Harris filed a short amended statement of claim with the Federal Court. It appears to be based on a form that was copied from the Internet and it includes optional paragraphs that do not apply to Mr. Harris. For example, the paragraph identified as number 5 is marked as "optional for renewers". None of the blanks in this paragraph have been filled in by Mr. Harris.

5 In paragraph 1, Mr. Harris indicates that he is seeking:

> A) a declaration that the long processing time for Access to Cannabis for Medical Purposes Regulations ("ACMPR") Production Registrations and Renewals violates the patient's S. 7 Charter Right to Life, Liberty, Security with no principle of fundamental justice such as war or emergency to necessitate and absolve such violations; and claims remedy in unspecified damages under S. 24 of the Charter in the amount of the value of the Applicant's prescription during any delay which this Court may rule inappropriate for a reasonable processing time for Registrations for medication, and
>
> B) a declaration that back-dating the period of Registration and Renewal from the Effective Date for Registration or Expiry Date for Renewals as under the MMAR to the date the doctor signed under the ACMPR violates the patient's S. 7 Charter Rights and claims remedy for the full term of the prescription to take effect on the Effective Date of the Registration and on the Expiry Date of a Renewed Registration like the Health Card, Driver's License and MMAR.

(underlining in the original document)

6 Mr. Harris provides very few facts as support for this claim. The only facts that are identified in his amended statement of claim and that are applicable to him are:

- he had a medical document to use cannabis for medical purposes under the ACMPR;
- he submitted an application under the ACMPR for registration to grow cannabis for medical purposes on June 11, 2017;

• his registration was received with an effective date of October 11, 2017 and an expiry date of March 23, 2018;

• ten data fields (which presumably are from the application form that he submitted under the ACMPR) are identified; and

• under the *Marihuana Medical Access Regulations* (SOR/2001-227 — repealed - SOR/2013-119, s. 267), the time to process an application was shorter and the registration began on the effective date of issuance, while under the ACMPR the time to process an application was longer and the registration was backdated to the date that the doctor signed the medical document.

7 Mr. Harris refers to additional facts that are not applicable to him. For example, he refers to a period of 30 weeks (and over 6 months) to process an application, but his application was processed in four months.

8 He notes that under the ACMPR any renewal was also backdated to the date that the doctor signed the medical document. Mr. Harris also alleges that having to see the doctor more often costs him more money and having to wait for the mail to find out if the registration will be renewed before the expiry date of an existing registration (when the plants would have to be destroyed) causes stress. However, his statement of claim is based on his initial application under the ACMPR for registration, not on any renewal of his registration. There are no alleged facts related to any renewal of any registration by Mr. Harris.

9 Based on this amended statement of claim, the Federal Court judge, in paragraph 33 of his reasons, started with the proposition that Mr. Harris:

> has the right to a permit to grow marijuana for medical purposes if he satisfies the criteria of a *Charter*-compliant permit regime established under the *Controlled Drugs and Substances Act* [S.C. 1996, c. 19] and *Narcotic Control Regulations* [C.R.C., c. 1041]. This right has been confirmed by the Supreme Court of Canada, in addition to the Federal Court and various Superior Courts.
>
> [Citations added]

10 Based on this proposition and his acceptance of the facts as pled by Mr. Harris, the Federal Court judge concluded that the motion to strike this amended statement of claim should be dismissed, except as it relates to Mr. Harris' allegation that the regime shortchanges his right to a permit to grow cannabis for the full period of time covered by his prescription.

II. Issues and Standard of Review

11 The issues are whether the Federal Court judge erred in not striking the other parts of Mr. Harris' statement of claim and whether he erred in striking the parts of the statement of claim related to the shortchanging of the time that Mr. Harris could grow cannabis. Questions of law are reviewed on the standard of correctness. Questions of fact (including questions of mixed fact and law unless there is an extricable question of law) are reviewed on the standard of palpable and overriding error. (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.)).

III. Analysis

12 Although the Federal Court judge stated, in paragraph 33 of his reasons, that Mr. Harris had a right to a permit to grow cannabis for medical purposes in certain situations, there is no case authority cited to support this proposition. It appears that the Federal Court judge is relying on the decision of the Federal Court in *Allard v. Canada*, 2016 FC 236, [2016] 3 F.C.R. 303 (F.C.), to which he referred in paragraph 11 of his reasons. In *Allard*, the Federal Court cited the decision of the Supreme Court of Canada in *R. v. Smith*, 2015 SCC 34, [2015] 2 S.C.R. 602 (S.C.C.). I do not, however, read either *Allard* or *Smith* as support for the proposition as stated by the Federal Court judge.

13 In *Smith*, the issue before the Supreme Court of Canada was whether the regulations under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 unjustifiably violated the guarantee of life, liberty and security of the person contrary to section

7 of the *Canadian Charter of Rights and Freedoms*, *Part 1 of the Constitution Act, 1982*, *being Schedule B to the Canada Act 1982 (UK), 1982, c.11*. The Supreme Court noted that the regulations in issue only permitted the use of dried marihuana for medical treatment. The possession of cannabis products extracted from the active medicinal compounds in the cannabis plant was still prohibited.

14 The Supreme Court of Canada found that "a medical access regime that only permits access to dried marihuana unjustifiably violates the guarantee of life, liberty and security of the person contrary to s. 7 of the *Charter*". However, in this case, the issues are related to the regulations that would allow Mr. Harris to grow his own marihuana. There is nothing in his statement of claim to indicate that there would be any difference between the marihuana that he would grow and the marihuana that he could have purchased from a person authorized to sell marihuana under the ACMPR.

15 The *Allard* case addressed concerns related to the *Marihuana for Medical Purposes Regulations* (SOR/2013-119 — repealed by SOR/2016-230, s. 281) (MMPR) which are not the same regulations that are the subject of Mr. Harris' amended statement of claim. The ACMPR replaced the MMPR following *Allard*. In *Allard*, Phelan, J. noted, in paragraph 14 of his reasons, that "this case does not turn on a right to 'cheap drugs', nor a right 'to grow one's own', nor do the Plaintiffs seek to establish such a positive right from government".

16 Neither party provided any authority that would support the proposition that Mr. Harris has a constitutional right to grow his own cannabis.

17 The amended statement of claim filed by Mr. Harris seeks remedies related to two situations — the initial application for registration under the ACMPR (which would allow him to grow his own marihuana) and the renewal of such registration.

A. Initial Application

18 The facts, as alleged by Mr. Harris in relation to his application for registration under the ACMPR, are simply that he was in possession of a medical document allowing him to use cannabis for medical purposes; it took approximately four months for him to receive his registration; under the previous regulations the processing time was shorter; and the effective date of his registration is different than it was under the previous regulations.

19 However, these facts do not provide any indication of how his "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice", as provided in section 7 of the *Charter*, was engaged. When a person grows his or her own marihuana there will necessarily be a delay for the time that it takes the marihuana plant to mature and produce a useable product. Mr. Harris does not provide any facts as support for his allegation that the additional waiting time of four months for his registration (which would then allow him to grow his own plants) deprived him of his right to "life, liberty and security of the person". There is nothing to indicate that Mr. Harris would not have been otherwise able to obtain marihuana during this waiting period from a person authorized to sell marihuana under the ACMPR.

20 The facts, as alleged by Mr. Harris, are insufficient to support a claim based on section 7 of the *Charter* in relation to his initial application for registration under the ACMPR.

21 In this case, there is also an additional basis for striking that part of Mr. Harris' amended statement of claim related to his requested declarations with respect to the ACMPR. Since these regulations have been repealed, any declaration with respect to these regulations would be meaningless. The Crown, however, did not raise this issue.

B. Renewal of a Registration

22 Mr. Harris did not complete the process for a renewal of his registration prior to submitting his amended statement of claim. Therefore, any alleged facts in his amended statement of claim related to the renewal of a registration (which are summarized in paragraph 8 above), are not facts that are applicable to him. These alleged facts related to the renewal process are only speculation for what experience Mr. Harris may encounter when he applies for a renewal of his registration. Facts that are applicable to another individual (that Mr. Harris is using to speculate about what will happen when he applies for a

renewal of his registration) cannot be used to support his claim, as set out in his amended statement of claim, that his rights under section 7 of the *Charter* have been infringed.

C. Conclusion

23 As a result, Mr. Harris has not pled sufficient facts to support his claims for the declarations (which, as noted above, are also in relation to regulations that have been repealed) and the damages that he is seeking.

24 I would, therefore, allow the Crown's cross-appeal and dismiss Mr. Harris' appeal. Setting aside the Order issued by the Federal Court in this matter and rendering the decision that the Federal Court should have made, I would allow the Crown's motion to strike Mr. Harris' amended statement of claim and I would strike his amended statement of claim without leave to amend. I would not award costs in relation to the motion before the Federal Court but I would award costs to the Crown for the cross-appeal.

***D.G. Near J.A.*:**

I agree

***Yves de Montigny J.A.*:**

I agree

Order accordingly.

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TAB 4

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
Related Abridgment Classifications
Administrative law
III Standard of review
III.3 Miscellaneous
Civil practice and procedure
XIX Pre-trial procedures
XIX.5 Case management and status hearing
XIX.5.a Case management
XIX.5.a.viii Appeals
Intellectual property
II Patents
II.9 Action to impeach
II.9.c Practice and procedure
II.9.c.vi Discovery
Judges and courts
V Court officers
V.3 Prothonotary
Table of Authorities
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Administration de pilotage des Laurentides v. Corp. des pilotes du Saint-Laurent central inc. (2015), 2015 CAF 295, 2015 CarswellNat 7170 (F.C.A.) — referred to

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Bemco Confectionery and Sales Ltd. v. R. (2016), 2016 FCA 21, 2016 CarswellNat 169, [2016] G.S.T.C. 16 (F.C.A.) — referred to

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Cameco Corp. v. R. (2015), 2015 FCA 143, 2015 CarswellNat 2344, 2015 D.T.C. 5076 (Eng.), (sub nom. *Cameco Corp. v. Minister of National Revenue)* 474 N.R. 333, 2015 CAF 143, 2015 CarswellNat 7066 (F.C.A.) — referred to

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Statutes considered:

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Generally — referred to

s. 12(3) — considered

s. 50(1)(b) — considered

Rules considered:

Federal Courts Rules, SOR/98-106

Generally — referred to

R. 3 — considered

R. 50(1) — considered

R. 50(2) — considered

R. 51 — considered

R. 51(1) — considered

R. 237(4) — considered

R. 243 — considered

R. 440 — considered

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.

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

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 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 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.

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

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

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

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

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

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

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

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

41 Thus, in *Aqua-Gem*, our Court made it clear that not all decisions made by prothonotaries were subject to *de novo* review. On the basis of a thorough review of the historical evolution of the role of masters and prothonotaries in the Canadian judicial system, the Court concluded that only decisions that decided questions vital to the final issue of a case should be reviewed *de novo* by a judge of the Federal Court. In the Court's view, that framework recognized the intention expressed by Parliament in the *Federal Court Act* to grant prothonotaries certain powers in order to further the efficient performance of the work of the Court. In coming to this view, the Court traced the origins of the master system to deal with pre-trial matters back to the 19th century in England, and described the evolution of the standard of review in Canada since Confederation. This narrative is suffused with the tension between the need to give effect to the powers granted to judicial officers, and the protection of the powers given to judges to decide cases without interference.

42 To conclude on the standard adopted by our Court in *Aqua-Gem*, I should say that in paragraph 19 of *Merck & Co. v. Apotex Inc.*, 2003 FCA 488, 30 C.P.R. (4th) 40 (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 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 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 previous decision is manifestly wrong, in the sense that the Court overlooked a relevant statutory provision, or a case that ought to have been followed...
>
> Emphasis added

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

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

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

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

64 These circumstances "fundamentally shift the parameters of the debate" regarding the standard applicable to discretionary orders of prothonotaries. In my respectful opinion, the supervisory role of judges over prothonotaries enunciated in Rule 51 no longer requires that discretionary orders of prothonotaries be subject to *de novo* hearings. That approach, as made clear by Low J. in *Zeitoun*, is one that has been overtaken by the evolution and rationalization of standards of review and by the presumption of fitness that both judges and masters are capable of carrying out the mandates which the legislator has assigned to them. In other words, discretionary orders of prothonotaries should only be interfered with when such decisions are incorrect in law or are based on a palpable and overriding error in regard to the facts.

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

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

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

67 I begin by saying that it is clear to me that in enunciating the standard of review which it did in *Housen*, the Supreme Court did not intend to apply that standard to discretionary decisions of motions judges and, obviously, to similar decisions made by prothonotaries. Of that, I am entirely satisfied. Recently, in *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801 (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 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 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*:

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

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

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

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

80 Before turning to the second issue, a few words concerning the standard of review applicable to the Motions Judge's decision are necessary. In *Pompey*, at paragraph 18, the Supreme Court held that our Court could only interfere with a decision of a motions judge reviewing the discretionary order of a prothonotary when the judge had no grounds to interfere with the prothonotary's decision, or where there were such grounds, the judge had decided the matter on a wrong basis or was plainly wrong.

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

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

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

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

85 The facts leading up to the Prothonotary's decision are quite straightforward. On March 19, 2014, counsel for the Appellants wrote to counsel for the Respondents summarizing their discussions regarding the examinations of the inventors. Counsel for the Appellants pointed out that they had requested two days to examine each inventor and that Counsel for the Respondents had taken the position that one day was sufficient. More particularly, counsel for the Appellants wrote that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

98 In answer to the Appellants' argument that the Prothonotary erred by shifting the burden to them, I begin by saying that examinations, including those of assignors/inventors, are not without limits. To say, as the Appellants do, that there is no limitation to their right of examination is, in my respectful view, incorrect. Circumstances and context matter greatly. They form the parameters within which examinations must be conducted. Prothonotaries and judges must therefore, in addressing and determining issues pertaining to discovery and examinations, keep those factors in mind at all times. They must also remember Rule 3 which provides that the rules, including those concerning discovery, are to "be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits". This, it seems to me, is precisely what the Prothonotary did in making the impugned order.

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

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

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

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

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

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

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

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

VII. Conclusion

106 I would therefore dismiss the appeal with costs.

***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.

TAB 5

2014 CAF 219, 2014 FCA 219
Federal Court of Appeal

Mazhero v. Fox

2014 CarswellNat 3741, 2014 CarswellNat 8499, 2014 CAF 219, 2014 FCA 219, 245 A.C.W.S. (3d) 507

Francis Mazhero, Appellant and Andrew Fox, Jacques Roberge and Neil Sharkey, Respondents

David Stratas J.A.

Judgment: October 1, 2014
Docket: A-147-11, A-186-11

Counsel: Francis Mazhero (written), for himself
Ronald D. Lunau (written), for Respondent, Neil Sharkey
Donna Keats (written), for Respondents, Andrew Fox and Jacques Roberge

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
XXIII Practice on appeal
XXIII.19 Miscellaneous
Table of Authorities
Cases considered by *David Stratas J.A.*:
Mazhero v. Fox (2011), 2011 FC 392, 2011 CarswellNat 1060, 2011 CF 392, 2011 CarswellNat 1871, 387 F.T.R. 244 (Eng.) (F.C.) — referred to
Mazhero v. Fox (2014), 2014 FCA 200, 2014 CarswellNat 3680 (F.C.A.) — followed
Minister of National Revenue v. RBC Life Insurance Co. (2013), 2013 CAF 50, [2013] 3 C.T.C. 126, 2013 D.T.C. 5051 (Eng.), 2013 FCA 50, 2013 CarswellNat 324, 443 N.R. 378, 2013 CarswellNat 2242, 18 C.C.L.I. (5th) 263 (F.C.A.) — referred to
UHA Research Society v. Canada (Attorney General) (2014), 2014 FCA 134, 2014 CarswellNat 1888, 2014 CAF 134, 2014 CarswellNat 3170 (F.C.A.) — referred to
Statutes considered:
Federal Courts Act, R.S.C. 1985, c. F-7
s. 40(1) — considered
Rules considered:
Federal Courts Rules, SOR/98-106
Generally — referred to

R. 53 — considered

R. 55 — considered

R. 343 — referred to

R. 344 — considered

R. 365 — considered

R. 369 — considered

R. 385(1) — considered

R. 397 — considered

R. 399 — considered

RULING on case management of appellant's appeals from orders declaring him to be vexatious litigant and refusing him leave to commence proceeding.

***David Stratas J.A.*:**

1 On September 11, 2014, this Court ordered that these consolidated appeals may continue as a specially managed proceeding and designated me to act as the case management judge: *Mazhero v. Fox*, 2014 FCA 200 (F.C.A.).

2 I have very broad powers to progress these consolidated appeals from their currently chaotic state to a prompt hearing on the merits. In particular, Rule 385(1) of the *Federal Courts Rules*, SOR/98-106, gives me two sets of powers useful for this case. First, I may make any directions and orders "that are necessary for the just, most expeditious and least expensive determination of the proceeding on its merits." Second, I may "fix the period for completion of subsequent steps in the proceeding."

3 Rule 385(1) sits alongside Rules 53 and 55. Under those Rules, I can vary any Rules in the *Federal Courts Rules*, dispense with compliance with them, make additional orders that are just, and attach terms to any orders.

4 Rule 385(1) also sits alongside this Court's plenary jurisdiction to regulate its proceedings and restrain any abuses of its procedures: *Minister of National Revenue v. RBC Life Insurance Co.*, 2013 FCA 50 (F.C.A.) at paragraphs 33-36.

5 At all times, these powers are to be exercised in accordance with procedural fairness. Procedural fairness is not what the parties think is fair, nor is it in the eye of the beholder. It is a well-defined concept rooted in the case law. In this case, the requirements of procedural fairness will not obstruct my task of bringing order to chaos.

6 In exercising these powers, I am not restricted to dealing with matters passively, *i.e.*, deciding motions and other matters raised by the parties. Rather, I can take a more active posture, using my broad powers, sometimes on my own initiative, to regulate the parties' conduct fairly with a view to progressing this file to a prompt hearing on the merits. A brief description of these appeals and their current status shows that I must be very active.

7 Before me are two consolidated appeals:

• *File A-147-11.* An appeal from the Order of the Federal Court (*per* Justice Tremblay-Lamer) dated March 30, 2011 [2011 CarswellNat 1060 (F.C.)] declaring the appellant to be a vexatious litigant under subsection 40(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, and related matters. The appellant launched this appeal on March 31, 2011.

• *File A-186-11.* An appeal from the Order of the Federal Court (*per* Justice Noël) dated April 28, 2011 in which the Federal Court refused the appellant leave to commence a proceeding. The appellant launched this appeal on May 5, 2011.

8 The appeals have not progressed beyond the filing of the notice of appeal. In particular, the appellant has not pursued the next step in the appeals — the filing of the appeal books under Rule 343.

9 Normally, that step takes no more than 60 days from the filing of the notice of appeal. But here we are — 1,279 days and 1,244 days respectively into the appeals — and that step remains to be done. The appeals have been frozen by numerous motions and letters requesting relief of various sorts, and also by some earlier orders of the Court.

10 Using my broad powers of case management, I now set some mandatory rules to regulate these consolidated appeals until their completion. My aim is to progress them quickly to a hearing on their merits.

11 First, I shall regulate how the parties are to communicate with the Court. Justice Sharlow has correctly observed that the appellant has been submitting letters and documents to the Court faster than the Court can deal with them: *Mazhero*, *supra* at paragraph 14. A number of these letters and documents do not have any legal merit and a few contain attacks on the *bona fides* and motivations of the Court. Yet, when filed, the Court must still deal with them, a task that fritters the Court's scarce resources away without moving the matter any closer to hearing.

12 In this situation, the words of the Subcommittee on Global Review of the *Federal Courts Rules*, unanimously approved by the Federal Courts' Rules Committee, are apposite:

> The Federal Courts system can no longer be seen just as a tool for parties to litigation to advance their ends with few restraints. We can no longer see the rules only in terms of accommodating and regulating the interests of particular litigants in a case. They must be seen as regulating the rights of litigants across the system. Overuse of scarce judicial resources in one case can potentially deprive other cases of these resources and inflict damage on the public purse.
>
> While the Federal Courts system exists for the benefit of parties to litigation, something broader must not be forgotten: the Federal Courts system belongs to the community, is financed by the community, and must serve the community.

(Subcommittee on Global Review of the *Federal Courts Rules, Report* (2012), at page 24.)

13 The *Federal Courts Rules* require the Court to be addressed by motion and by no other means — and in these circumstances, no relaxation of that requirement shall be permitted. Therefore, I shall order that no party may address the Court by letter or document. The Court may only be addressed by formal motion under Rule 369. Any such motion must explicitly state a specific rule under the *Federal Courts Rules* as the basis for relief, otherwise the Registry shall reject it.

14 To be clear, the Registry is not to accept any letter or other document sent to it by any party by any means, unless it is a compliant motion record, appeal book, memorandum of fact and law, or written submissions ordered by the Court. Under no circumstances will the Court address or react to any letter or other document.

15 Next, I shall regulate how the Registry and the Court will act when a party files a compliant motion record. Upon the filing of a compliant motion record, the Registry shall immediately send the motion record to me. I shall promptly determine whether the motion has any merit on the basis of the evidence and written submissions in the moving party's motion record. If the motion has no merit, I shall dismiss it immediately.

16 This is in accordance with this Court's normal hearing practice. When a party seeks relief, whether that be in a motion, application or appeal, and that party fails to show that relief is possible, the matter ends there — the motion, application, or appeal is dismissed without calling for submissions from the responding party.

17 If a motion has potential merit or calls for response, I shall direct the respondent(s) to the motion to file a responding motion record. The time for filing that record under Rule 365 shall run from the date of the direction.

18 Next, I wish to correct what may be a misunderstanding on the part of the appellant. Currently before the Court are a number of motions brought by the appellant to set aside earlier Orders of the Court. But what the appellant may not realize is that the Rules do not allow him an unqualified right to do that. Far from it.

19 The general rule is that an order, once made, is final and binding. It can only be changed or set aside by appealing it. To that general rule are exceptions — narrow and specific ones — to the general rule. One is where an order does not accord with the reasons given for it, there is a typographical error, or a matter has been accidentally omitted from the order: Rule 397. Another is where the order was fraudulently obtained or a new matter has arisen: Rule 399. The requirement of a new matter is difficult to satisfy: *UHA Research Society v. Canada (Attorney General)*, 2014 FCA 134 (F.C.A.) at paragraph 9.

20 In her reasons in *Mazhero*, *supra* at paragraphs 13(a) and 14, Justice Sharlow helpfully set out the motions filed by the appellant that are currently before the Court. Some of these have been asserted in letters. On this one last occasion, in the interests of efficiency, I shall regard the letters as asserting formal motions.

21 The appellant's letters dated July 18, 2014 and September 4, 2014 and the motion record dated August 13, 2014, broadly challenge the validity of all or part of the Court's Order dated July 9, 2014. They do not raise valid grounds under Rules 397 or 399. The appellant's motions suggest that he is dissatisfied with the Order dated July 9, 2014. His recourse is to try to appeal it, not to bring the motions he has brought. Accordingly, all of these motions shall be dismissed.

22 The appellant's motion to set aside the Orders of this Court dated August 19, 2011 is also dismissed. Contrary to the appellant's submission, the Court had the jurisdiction to make those Orders. As well, there are no grounds to revisit these Orders under Rules 397 and 399. If the appellant is dissatisfied with the Orders, he may try to appeal them. But no recourse exists under Rules 397 and 399.

23 By letter dated September 9, 2014, the appellant seeks an order requiring the Federal Court to produce electronic copies of certain documents in T-1067-10. This Court does not have the jurisdiction to make such an order concerning Federal Court documents. This motion shall be dismissed.

24 The appellant's motion dated July 22, 2014 seeking an order that the respondent Sharkey be charged with a criminal offence, and related relief, is dismissed. This Court lacks the jurisdiction to grant the relief sought. Further, this motion is entirely without legal merit. This motion echoes an earlier motion the appellant brought unsuccessfully in this Court. In that motion, the appellant sought leave to start a private prosecution against a Prothonotary and a lawyer.

25 These particular motions cause concern. Is the appellant truly interested in appealing the merits of the Federal Court's judgments declaring him a vexatious litigant? Or, instead, is he interested in using the consolidated appeals as a forum to pursue improper collateral purposes? I address this concern below.

26 I now turn to the remainder of the procedural steps in the consolidated appeals.

27 Originally, there were two appeals: A-147-11 and A-186-11. On May 26, 2011, this Court set out the contents of the appeal book in A-147-11. On August 19, 2011, this Court ordered that the appeals be consolidated. Now it falls to the appellant to prepare one appeal book for the consolidated appeals (*i.e.*, both A-147-11 and A-186-11) that complies with Rule 344.

28 In preparing his appeal book, the appellant should start with the May 26, 2011 Order that sets out the documents to be included in the A-147-11 appeal. He should consider whether there are additional documents relevant to A-186-11 that were before the Courts below and are necessary for the hearing of the consolidated appeals. Those should be included in the appeal book for the consolidated appeals. At a minimum, the reasons and judgment of the Federal Court under appeal in A-186-11 must be included.

29 The contents of the appeal book for the consolidated appeals will be set by a later order of the Court. To this end, the Court needs submissions from the parties.

30 The appellant shall file written submissions with this Court no later than October 21, 2014 setting out a proposed detailed index for the appeal book in the consolidated appeals. He shall list in the index each document with particularity. The respondents may respond by November 4, 2014, objecting (with reasons) to the appellant's index. If necessary, the respondents may offer their own index, with submissions as to why their index should be adopted. The appellant shall reply by November 12, 2014. The parties will have my decision on the contents of the appeal book by no later than November 24, 2014.

31 Given the delay to date, the remaining procedural steps — the filing of the appeal book, the parties' memoranda and the hearing — must be scheduled by court order. The regrettable history of this matter and the public interest in prompt disposition of appeals require no less.

32 By no later than October 21, 2014, the appellant shall file a three page written submission suggesting a timetable for remaining steps in the consolidated appeals, including availability for possible hearing dates in the February to April 2015 period and the preferred location for the hearing. By November 4, 2014, the respondents may respond in a three page written submission. By November 12, 2014, the appellant may reply in a two page written submission.

33 The parties are on notice that the schedule ultimately set by the Court will be set out in a binding Court order. Absent truly exceptional circumstances, the schedule will be unchangeable. Any later motions will not affect the schedule.

34 Lastly, if the orders I am making today are not obeyed, if a party brings multiple motions seeking relief this Court has no jurisdiction to give, if a party persists in moving to set aside every order without any basis, or if a party brings motions that are frivolous and vexatious, I will take decisive action in accordance with this Court's plenary power to redress an abuse of its processes.

35 For example, if the appellant engages in that sort of conduct, I shall conclude that the consolidated appeals are nothing more than a tool to pursue improper purposes and I shall dismiss the consolidated appeals summarily as an abuse of process. As mentioned above, I do have concerns in this regard, but I hope I am wrong.

36 If the appellant believes his appeals to be well-founded, he must now work in an orderly, diligent and single-minded way to get them ready for hearing soon so that this Court can consider them fairly on their merits.

37 On a number of occasions, the respondents have been awarded costs. To quantify and collect these, the respondents will have to follow the procedures under the Rules. Until the costs are quantified and the appellant has had a reasonable time to pay and has defaulted, I have no basis for staying the consolidated appeals.

38 An Order shall go in accordance with these reasons.

Order accordingly.

End of Document

TAB 6

1998 CarswellNat 814
Federal Court of Canada — Appeal Division

Mil Davie Inc. v. Hibernia Management & Development Co.

1998 CarswellNat 814, 1998 CarswellNat 815, [1998] F.C.J. No. 614, 226 N.R. 369, 79 A.C.W.S. (3d) 936, 85 C.P.R. (3d) 320

Mil Davie Inc., Appellant and Société d'Exploitation et de Développement d'Hibernia Ltée, Respondent

Denault, Létourneau JJ.A., Chevalier D.J.A.

Judgment: May 7, 1998
Heard: March 30, 1998
Docket: A-314-97

Proceedings: reversing (1997), 73 C.P.R. (3d) 442 (Federal Court of Canada — Appeal Division)

Counsel: *Mr. Raymond Gagnon*, for the Appellant.
Mr. Michael Harrington and *Ms. Maureen Ryan*, for the Respondent.

Subject: Intellectual Property; Property; Corporate and Commercial; Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
X Pleadings
X.2 Statement of claim
X.2.f Striking out for absence of reasonable cause of action
X.2.f.iv Lack of jurisdiction
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.f Right to civil action
VI.5.f.ii Constitutional issues
Judges and courts
XVI Jurisdiction
XVI.6 Exchequer and federal courts
XVI.6.a Basis for claim

Table of Authorities

Cases considered by *The Court*:

Banerd v. Deputy Minister of National Revenue (1994), (sub nom. *Banerd v. Canada)* 88 F.T.R. 14 (Fed. T.D.) — referred to
Cairns v. Farm Credit Corp. (1991), 49 F.T.R. 308, 7 Admin. L.R. (2d) 203, (sub nom. *Cairns v. Societe du credit agricole)* [1992] 2 F.C. 115 (Fed. T.D.) — referred to
Concept Omega Corp. v. Logiciels KLM Ltée (1987), 12 F.T.R. 291, 15 C.I.P.R. 312, 21 C.P.R. (3d) 77 (Fed. T.D.) — referred to
Erasmus v. R. (1992), (sub nom. *R. v. Erasmus)* 92 D.T.C. 6301, (sub nom. *Erasmus v. Canada)* [1993] 1 C.N.L.R. 59, (sub nom. *Dene Nation v. Canada)* [1992] 2 F.C. 681, (sub nom. *Erasmus v. Minister of National Revenue)* 145 N.R. 321, (sub nom. *Erasmus v. Canada (No. 2))* [1992] 2 C.T.C. 21 (Fed. C.A.) — referred to
Mobarakizadeh v. Canada (1993), 23 Imm. L.R. (2d) 93, 72 F.T.R. 30 (Fed. T.D.) — referred to
Pacific Western Airlines Ltd. v. R. (1979), [1980] 1 F.C. 86, 14 C.P.C. 165, 105 D.L.R. (3d) 44 at 60 (Fed. C.A.) — referred to

Williams v. Lake Babine Band (1996), (sub nom. *Lake Babine Indian Band v. Williams)* 194 N.R. 44 (Fed. C.A.) — referred to

Statutes considered:

Canada-Newfoundland Atlantic Accord Implementation Act, S.C. 1987, c. 3

Pt. I — referred to

Pt. II, Div. VI — referred to

Pt. III — referred to

Pt. IV — referred to

s. 4 — considered

s. 45 — referred to

ss. 206-217 — referred to

s. 215 — considered

s. 215(1) — referred to

Competition Act, R.S.C. 1985, c. C-34

Pt. VI — referred to

s. 36 [am. R.S.C. 1985, c. 1 (4th Supp.) s. 11] — considered

s. 36(1) [am. R.S.C. 1985, c. 1 (4th Supp.) s. 11(1)] — considered

s. 36(3) — considered

s. 45 — considered

Federal Court Act, R.S.C. 1985, c. F-7

s. 17(6) [rep. & sub. 1990, c. 8, s. 3(4)] — pursuant to

s. 22 — referred to

s. 50 — pursuant to

Rules considered:

Federal Court Rules, C.R.C. 1978, c. 663

R. 401(c) — pursuant to

R. 419(1)(a) — considered

R. 419(2) — considered

APPEAL by plaintiff from judgment reported at (1997), 73 C.P.R. (3d) 442 (Fed. T.D.) granting defendant's motion to dismiss plaintiff's action for failure to allege factual basis of claim and for disclosing no reasonable cause of action.

***Chevalier*:**

1 This is an appeal from an order of a judge of the Trial Division, dated March 21, 1997, which granted the motion of the Respondent alleging that the Trial Division had no jurisdiction to hear the action in damages launched by the Appellant. The motion sought an order staying the proceedings and was made pursuant to Rule 401(c) of the *Federal Court Rules* as well as ss. 50 and 17(6) of the *Federal Court Act*.

Facts and Procedure

2 The Appellant is seeking damages of $17,468,000 as a result of the Respondent's decision to award to St-John Shipbuilding Ltd. (SJSL) a completion contract to allegedly finish the manufacturing of certain topside modules concerning the Hibernia oilfield project.

3 The party which had originally won the tender process for the construction of the topside modules was incapable of fulfilling its obligations and had to be replaced. The Appellant was the only other party to have a bid for the original contract. The Appellant alleges that the Respondent's decision to award the completion contract to SJSL was made without seeking tenders, in bad faith and with malice. It alleges that the Respondent participated in a conspiracy to eliminate or restrict competition amounting to an offence under s. 45 of the *Competition Act* (R.S.C. (1985) ch. C-34) and causing undue prejudice to the Appellant. Hence the action for damages based on s. 36 of the *Competition Act* which gives jurisdiction to the Federal Court to hear such actions [1] .

4 The judge of the Trial Division granted the Respondent's motion on two basis: first that the Appellant's Statement of Claim did not clearly allege the factual basis for the alleged conspiracy contemplated by s. 45 of the *Competition Act* and, second, that the Statement of Claim disclosed no reasonable cause of action in relation to s. 45. For the sake of convenience, we reproduce the exact terms used by the judge at p. 3 of his decision:

> The plaintiff's submissions must fail, in my view, because its Statement of Claim falls far short of clearly alleging the factual basis for the kind of anti-competitive conduct contemplated by section 45 of the *Act*. In none of its 135 paragraphs, does the Statement of Claim disclose specific allegations of fact which come within section 45. Three paragraphs contain general allegations of anti-competitive activity:
>
> > 113. HMDC therefore acted in bad faith and with malice toward MIL, showed favouritism and engaged in restrictive trade practices contrary to the *Competition Act* and the Benefits Plan in awarding the contract to complete the work to SJSL;
> >
> > 124. HMDC therefore acted in bad faith and with malice toward MIL by participating in a conspiracy with SJSL to restrain or injure competition unduly;
> >
> > 126. HMDC acted in bad faith and with malice in the summer of 1994 in commencing secret negotiations with SJSL the only purpose and result of which was to restrain competition. ...
>
> However, these are mere bald assertions without accompanying specific allegations of fact. Accordingly, I have concluded that the Statement of Claim discloses no reasonable cause of action in relation to section 45 of the *Act*, the sole statutory grant of jurisdiction by Parliament upon which the plaintiff relies. Collier J. appears to have reached a similar conclusion in *Pacific Western Airlines Ltd. v. The Queen*, [1979] 2. F.C. 476 confirmed by the Court of Appeal at [1980] I F.C. 86 at 88, when he stated at p. 486:
>
> > One cannot, merely by baldly asserting, in a pleading, breach of certain Regulations said to be Canadian federal law, with nothing more, automatically invoke or attract the jurisdiction of the Court. Put another way, the deemed truth of paragraph 87 cannot support jurisdiction. The plea is deficient. I cannot see how jurisdiction can be bestowed by such a plea — one barren of any facts from which the question of jurisdiction or no can be determined.

5 It appears that the judge's second finding that the Statement of Claim disclosed no reasonable cause of action was made pursuant to Rule 419(1)(a) of the *Federal Court Rules* which relates to the striking of pleadings although the judge made no express reference to that Rule and the motion before him was made under Rule 401(c). His reference to the case of *Pacific Western Airlines Ltd. v. R.*, however, tends to confirm that perception as this case was one where the action was dismissed pursuant to Rule 419(1)(a) on the ground that it did not disclose any reasonable cause of action which would fall within the jurisdiction of the Court.

6 Counsel for the Respondent argued before us that, in any event, it was proper for the judge to apply whichever rule is appropriate in the circumstances.

7 We recognize that there is some confusion in the case law as to the proper rule to resort to in order to raise an objection to the jurisdiction of the Court. In some cases, pleadings in an action and actions have been struck out under Rule 419(1)(a) for want of jurisdiction or for failure to establish a reasonable cause of action falling within the jurisdiction of the Court [2]. In others, the Trial Division of the Court has expressed its preference for a motion to be made pursuant to Rule 401(c) because affidavit evidence can be adduced while no such evidence can be filed on a motion made pursuant to Rule 419(1)(a) [3].

8 Generally speaking, where an objection is taken to its jurisdiction, the Court must be satisfied that there are jurisdictional facts or allegations of such facts supporting an attribution of jurisdiction. The existence of the necessary jurisdictional facts will normally be found in the pleadings and in the affidavits filed in support of or in response to the motion. In this respect, the prohibition contained in Rule 419(2) against the admissibility of evidence does not apply when it is the jurisdiction of the Court which is contested as opposed to a mere objection to the pleadings on the basis that they do not reveal a reasonable cause of action [4]. We mention this to dissipate any doubt as to the admissibility of affidavit evidence in the present instance. In any event, the motion in the present instance, as we have already indicated, was made pursuant to Rule 401(c) and ss. 50 and 17(6) of the *Federal Court Act*.

9 In our view, the judge of the Trial Division misdirected himself when he concluded that there were only three general allegations or bald assertions of anti-competitive activity unsubstantiated with specific facts or a proper factual basis. Indeed paragraphs 62 to 112 and 114 to 120 of the Statement of Claim all refer to specific facts either material to the jurisdictional facts necessary under ss. 36 and 45 of the *Competition Act* to establish the jurisdiction of the Trial Division or tending to show a reasonable cause of action.

10 For example, paragraphs 62 and 68 state that there were constant communications between the Appellant and the Respondent, but that the Respondent never disclosed to the Appellant the on-going and serious difficulties with the realisation of the contract given to the other party pursuant to the tender process. Paragraph 75 alleges an admission by the Respondent's Construction General Manager that the Respondent had been unfair to the Appellant. Paragraphs 81 to 83 assert as a fact that the Respondent, on the one hand, lied to the Canada-Newfoundland Offshore Petroleum Board (Board) in charge of approving the benefits plan when it said that it had communicated with the Appellant and, on the other hand, failed to inform the Board of the discussions that had been taking place between the Respondent and SJSL to whom the Respondent gave the completion contract. Paragraphs 98 and 99 refer to the Board's findings of fact that the Respondent had violated the terms of the benefits plan, had not provided the Appellant "with a full and fair opportunity to participate in the E & I work on a competitive basis as provided for in the Hibernia Benefits Plan" and, by failing to advise the Board of its intentions in a timely manner, had violated his commitment as well as conditions 4 and 5 of the Hibernia Benefits Plan. Finally, these paragraphs also refer to the Board's finding that there is an inextricable linkage between the Respondent's failure to provide full and fair opportunity to the Appellant and the Respondent not informing the Board in a timely manner.

11 We could go on analyzing the other paragraphs of the Statement of Claim, but we believe there is a sufficient factual basis in those that we have reviewed to substantiate the jurisdictional facts as well as the reasonable cause of action under s. 36 of the *Competition Act* alleged by the Appellant. This is not to say, however, that the Appellant could not, in its Statement of Claim, have made a better presentation of those facts and over acts which pertain to the alleged conspiracy so as to better link them to the tortious act and, by the same token, make the jurisdiction of the Federal Court more visible.

12 As an alternative ground in support of its motion to stay the action, namely that the Federal Court lacked jurisdiction to hear the matter and that only the courts of Newfoundland had such jurisdiction, the Respondent relied, in particular, on sections 4 and 215 of the *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c. 3 (the *Implementation Act*) and subsection 17(6) of the *Federal Court Act*. Although the Respondent's motion specifically mentioned these issues, the Trial Judge decided not to deal with them. He stated the following:

> Because of my finding concerning section 45 of the *[Competition] Act*, I need not deal with the defendant's submissions concerning subsection 17(6) of the *Federal Court Act* and section 4 of the *Federal Accord Act*.

13 This Court must now deal with this argument, since the Respondent has raised it again and submits that had the Trial Judge dealt with these issues, he would have had to stay the plaintiff's action on this basis.

14 The provisions on which the Respondent's argument is based read as follows:

> **Canada-Newfoundland Atlantic Accord Implementation Act:**
>
> 4. In case of any inconsistency or conflict between
>
> > (*a*) this Act or any regulations made thereunder, and
> >
> > (*b*) any other Act of Parliament that applies federal laws and provincial laws to offshore areas or any regulations made under that Act,
>
> this Act and the regulations made thereunder take precedence.
>
> 215.
>
> > (1) Every court in the Province has jurisdiction in respect of matters arising in the offshore area under this Part or Division VI of Part II or under any laws made applicable by this Part or that Division to the offshore area, to the same extent as the court has jurisdiction in respect of matters arising within its ordinary territorial division.
> >
> > (2) For the purposes of subsection (1), the offshore area shall be deemed to be within the territorial limits of the judicial centre of St. John's.
> >
> > (3) Nothing in this section limits the jurisdiction that a court may exercise apart from this section.
> >
> > (4) In this section, "court" includes a judge thereof and any provincial court judge or justice.
>
> **Federal Court Act:**
>
> 17. ...
>
> > (6) Where an Act of Parliament confers jurisdiction in respect of a matter on a court constituted or established by or under a law of a province, the Trial Division has no jurisdiction to entertain any proceeding in respect of the same matter unless the Act expressly confers that jurisdiction on the Court.

15 The gist of the Respondent's argument is that according to section 4 of the *Implementation Act*, the said Act prevails in the event of any inconsistency or conflict between itself and any other Act of Parliament that applies federal and provincial laws to offshore areas, and that in so far as the action in the case at bar does not involve an issue of Canadian maritime law (section 22 of the *Federal Court Act*), an issue relating to navigation or shipping, or any other issue coming under any other Act of Parliament other than, in an incidental manner, the *Competition Act*, the Federal Court lacks jurisdiction.

16 We do not agree. First, as shown above, under subsection 36(3) of the *Competition Act*, the Federal Court has jurisdiction over any civil action in which a person claims to have suffered damage as a result of conduct contrary to any provision of Part VI of that Act, that is, an offence in relation to competition. This is in fact such a case. Second, according to the very wording of section 4 of the *Implementation Act*, the *Implementation Act* takes precedence over another Act of Parliament only if the other Act of Parliament applies federal laws to offshore areas and there is an inconsistency or conflict between the *Implementation Act* and the other Act of Parliament. In the case at bar, we cannot see how the *Implementation Act* bars the Federal Court from exercising its jurisdiction to enforce the *Competition Act*. Although the *Implementation Act* clearly does confer jurisdiction on

the courts of Newfoundland in a number of areas, Parliament did not deprive the Federal Court of jurisdiction in any other areas. In the instant case, the *Competition Act* raised in support of the action is not, strictly speaking, an Act of Parliament that applies federal laws to offshore areas, and there is not, in respect of the subject of the action, any inconsistency or conflict between it and the *Implementation Act*.

17 As for the argument relating to subsection 17(6) of the *Federal Court Act*, it must be analysed in connection with section 215 of the *Implementation Act*. According to the Respondent, since Parliament did not expressly confer jurisdiction on the Federal Court when conferring jurisdiction on the courts of Newfoundland, under section 215 of the *Implementation Act*, over the matters referred to therein, the Federal Court no longer has jurisdiction over those matters. The Respondent may be right, but only in respect of the matters referred to in that section. In so far as section 215 of the *Implementation Act*, an Act of Parliament, confers jurisdiction on the courts of Newfoundland in respect of matters arising under Part IV [5] (Revenue Sharing) or Division VI (Royalties) of Part II (Petroleum Resources) without expressly mentioning the Federal Court's jurisdiction, the Federal Court may no longer have jurisdiction in such matters. This nevertheless does not mean that it loses jurisdiction over any other action where, as in the case at bar, Parliament did not see fit to bar it from exercising its jurisdiction over the part concerned (section 45 is in Part I).

18 In our view, the appeal must be allowed with costs.

Appeal allowed.

Footnotes

1 S. 36(1) and (3) reads:
36(1) Any person who has suffered loss or damage as a result of
a) conduct that is contrary to any provision of Part VI, or

b) the failure of any person to comply with an order of the Tribunal or another court under this Act.

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

(3) For the purposes of any action under subsection (1), the Federal Court is a court of competent jurisdiction.

2 *Pacific Western Airlines Ltd. v. R.* (1979), [1980] 1 F.C. 86 (Fed. C.A.); *Williams v. Lake Babine Band* (1996), 194 N.R. 44 (Fed. C.A.); *Mobarakizadeh v. Canada* (1993), 23 Imm. L.R. (2d) 93 (Fed. T.D.)

3 *Concept Omega Corp. v. Logiciels KLM Ltée* (1987), 12 F.T.R. 291 (Fed. T.D.); *Banerd v. Deputy Minister of National Revenue* (1994), 88 F.T.R. 14 (Fed. T.D.); *Cairns v. Farm Credit Corp.* (1991), [1992] 2 F.C. 115 (Fed. T.D.)

4 *Erasmus v. R.* (1992), [1993] 1 C.N.L.R. 59 (Fed. C.A.)

5 Parliament's reference in subsection 215(1) to "this Part" has to mean Part IV, or "Revenue Sharing", which includes sections 206 to 217, not Part III as indicated in the respondent's documents (paragraph 37 of the memorandum and paragraph 10 of the affidavit of Desnes Bajzak).

TAB 7

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

TAB 8

Federal Court Cour fédérale

Date: 20210426

Docket: T-263-21

Ottawa, Ontario, April 26, 2021

PRESENT: Case Management Judge Mandy Aylen

BETWEEN:

DUNCAN PATERSON

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] In order to permit the Plaintiffs an opportunity to consider the Court’s proposal, the Court established a schedule for the delivery of written submissions from the parties to the Initial Group of Actions regarding whether the Court’s proposal should be implemented.

[6] Following the receipt of submissions from the parties, on April 8, 2021, the Court ordered that 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. The Court also ordered that the terms of the Order would apply to any new Statement of Claim filed subsequent to the date of the Order which was substantially identical to those filed in the Initial Group of Actions [the Order].

[7] Subsequent to the filing of the Initial Group of Actions and prior to the issuance of the Order, fifty-two additional actions were commenced based on Mr. Turmel's kit claim – namely, T-263-21, T-265-21, T-269-21, T-280-21, T-282-21, T-283-21, T-287-21, T-291-21, T-292-21, T-293-21, T-295-21, T-296-21, T-297-21, T-298-21, T-299-21, T-300-21, T-308-21, T-311-21, T-312-21, T-313-21, T-314-21, T-315-21, T-316-21, T-317-21, T-318-21, T-321-21, T-322-21, T-323-21, T-324-21, T-327-21, T-331-21, T-332-21, T-333-21, T-344-21, T-345-21, T-352-21, T-364-21, T-365-21, T-370-21, T-382-21, T-404-21, T-418-21, T-419-21, T-423-21, T-467-21, T-471-21, T-486-21, T-491-21, T-512-21, T-523-21, T-524-01 and T-563-21 [the Subsequent Actions].

[8] On April 8, 2021, the Court issued the following Direction in each of the Subsequent Actions:

> The Court has issued the attached Order in T-130-21 and nine other proceedings commenced based on Mr. Turmel's kit claim. As set out in the Order, T-130-21 has been designated as the lead claim and the other nine claims have been stayed pending a final determination in T-130-21 and any appeal therefrom. Following the final determination in T-130-21, it will be open to the Plaintiffs in the other nine actions to request that the Court permit their claims to proceed 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.
>
> The Court proposes to proceed in the same manner in relation to your proceeding. In the event that you oppose a stay of your proceeding on the terms as set out in the attached Order, you must provide the Court, by no later than April 15, 2021, with any submissions as to why your action should not be stayed. The Defendant may file any responding submissions by April 20, 2021.

[9] The Court received correspondence from most of the Plaintiffs in the Subsequent Actions (the majority of which was by way of a group email) indicating that the Plaintiffs did not want their action to be stayed. Minimal submissions were received as to why the Subsequent Actions should not be stayed, but the central concern raised by those Plaintiffs was a desire to be kept informed by the Crown or the Registry regarding the status of T-130-21.

[10] The Crown requests that the Subsequent Actions be stayed on the same terms as the Order.

[11] I am satisfied that, for the reasons given in the Order, that the Subsequent Actions should be similarly stayed on the same terms. In relation to the concerns raised by some of the Plaintiffs regarding being kept apprised of the status and filings in 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, the Plaintiffs can obtain updates on the status of T-130-21 on Mr. Turmel's website and I have ordered that the Plaintiffs be provided with a copy of any final determination in T-130-21. I will not impose on the Defendant or the Registry the burden of serving or forwarding all filings to all of the Plaintiffs in the Subsequent Actions while those proceedings are stayed.

THIS COURT ORDERS that:

1. The actions bearing Court File Nos. T-263-21, T-265-21, T-269-21, T-280-21, T-282-21, T-283-21, T-287-21, T-291-21, T-292-21, T-293-21, T-295-21, T-296-21, T-297-21, T-298-21, T-299-21, T-300-21, T-308-21, T-311-21, T-312-21, T-313-21, T-314-21, T-315-21, T-316-21, T-317-21, T-318-21, T-321-21, T-322-21, T-323-21, T-324-21, T-327-21, T-331-21, T-332-21, T-333-21, T-344-21, T-345-21, T-352-21, T-364-21, T-365-21, T-370-21, T-382-21, T-404-21, T-418-21, T-419-21, T-423-21, T-467-21, T-471-21, T-486-21, T-491-21, T-512-21, T-523-21, T-524-01 and T-563-21 [Stayed Actions] 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 the Stayed Actions.

3. In the event that any party in the Stayed Actions 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 may be varied or amended as the Court determines necessary.

5. A copy of this Order shall be placed in T-130-21 and in the Stayed Actions.

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

"Mandy Aylen"
Case Management Judge

TAB 9

Federal Court Cour fédérale

Date: 20210507

Docket: T-171-21

Ottawa, Ontario, May 7, 2021

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

MICHEL DENIS ETHIER

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

ORDER

[1] This Plaintiff has brought a motion in writing pursuant to Rule 369 seeking an order pursuant to Rule 51 of the *Federal Courts Rules* allowing an appeal of Prothonotary's Aylen's April 8, 2021 Order [the Order]. Prothontary Aylen is case managing this action and several other actions involving essentially the same matter.

[2] The Plaintiff's action is one of more than 60 actions in which self-represented plaintiffs seek relief from the federal Government's COVID-19 mitigation measures. The Statements of Claim in each action are almost identical and are based on a kit made available on the internet by Mr. John Turmel [Mr. Turmel], the Plaintiff in T-130-21.

[3] As case manager, Prothonotary Aylen ordered that, pursuant to Section 50(1)(b) of the *Federal Courts Act*, it was in the interests of justice to stay certain actions before her, including the Plaintiff's claim, in order for Mr. Turmel's action to proceed. The basis of this Order was due, in short, to the almost identical feature of the statements of claims. Prothonotary Aylen also determined that, rather than ordering the Defendant to keep the Plaintiffs updated on the status of Mr. Turmel's action, the Plaintiffs in the case management matters before her could access any updates on Mr. Turmel's action from the Federal Court's website, and from Mr. Turmel's website. Ultimately, all Plaintiffs would be provided a copy of the decision of Mr. Turmel's action and could take the necessary action thereafter.

[4] The Order set out the following:

> 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.

[5] As this motion is made under Rule 51 of the *Federal Courts Rules*, SOR/98-106, and reviews a Prothonotary's Order, the Court will apply the standard of review as given in *Housen v Nikolaisen*, 2002 SCC 33. The Federal Court of Appeal has recently approved of this standard in the context of a prothonotary's decision in *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at para 79 [*Hospira*]. That is, "palpable and overriding error" for questions of fact and questions of mixed fact and law; and "correctness" for questions of law (*Hospira* at para 66). Therefore, I will afford substantial deference to the aspects of Prothonotary Aylen's Order that relate to the facts and the application of the law to the facts. I will afford no deference to Prothonotary Aylen's determinations of the applicable law.

[6] As the case management judge, Prothonotary Aylen is "intimately familiar with the history, details and complexities" of this matter (*C. Steven Sikes, Aquero LLC v Encana Corporation Fccl Ltd.*, 2016 FC 671 at para 13).

[7] I have reviewed the Order and note that Prothonotary Aylen correctly identified the legal authority for issuing a stay pursuant to section 50(1)(b) of the *Federal Courts Act*, namely that it is in the interests of justice to do so [*Clayton v Canada (Attorney General)*, 2018 FCA 1]. Prothonotary Aylen, at paragraphs 16 to 22 then considered the totality of the circumstances and the applicable principles in exercising her discretion.

[8] I find that Prothonotary Aylen did not make a palpable and overriding error in making the Order. I also find that Prothonotary Aylen considered the totality of the circumstances and applied the correct legal principles in exercising her discretion.

[9] The Appeal is therefore dismissed.

THIS COURT ORDERS that:

1. The appeal of Prothonotary Aylen's April 8, 2021 Order is dismissed.
2. The Defendant is granted costs in the amount of $500.00.

"Paul Favel"
Judge