BREAKING CASE LAW

***Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology,* 2016 FCA 215**

This Issue

Doing Away with De Novo Appeals in Federal Court

Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology
2016 FCA 215

In Canada, Prothonotaries are judicial officers of Federal Court appointed by the Governor in Council under section 12 of the *Federal Courts Act*, RSC 1985, c F-7 http://canlii.ca/t/52hd5. Prothonotaries hold judicial office pursuant to the meaning of that term in s. 42(4) of the *Judges Act*, RSC 1985, c J-1 http://canlii.ca/t/52f1d. Federal Court is a statutory Court, and the specific powers of Prothonotaries of that Court are defined in the Federal Courts Rules, SOR/98-106 http://canlii.ca/t/52dm6. Appeals from decisions of Prothonotaries in Federal Court are taken to a Justice of the Federal Court pursuant to Rule 51.

For many years the standard of review applied to appeals from the decisions of Prothonotaries was that described by the Federal Court of Appeal in *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425, 149 N.R. 273, as reformulated by the Federal Court of Appeal in *Merck & Co. v. Apotex Inc.*, 2003 FCA 488, 30 C.P.R. (4th) 40. Practically, this meant that the first step which Federal Court would take when determining the appropriate standard of review to apply in any appeal from an Order of a Prothonotary was to determine whether the Order was determinative of the outcome of the case. If it was, then Federal Court would consider the case *de novo*. If the Order being appealed was not determinative of the outcome, and involved discretionary decisions of the Prothonotary, then Federal Court would consider the case deferentially and would overturn the result only where the Order under appeal was 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.

On August 31, 2016, in a case cited as *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology,* 2016 FCA 215, the Federal Court of Appeal abandoned the *Aqua-Gem* standard of review in favour of a more general the standard of review enunciated by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. The *Housen* case had reviewed the standards of review relevant to questions of law, questions of fact, inferences of fact, and questions of mixed fact and law. The gist of this, as applied in subsequent jurisprudence, was that questions of law are reviewed on a standard of correctness; while all questions of fact, inferences of fact, and questions of mixed fact and law in respect of which there was no extricable question

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of law, are reviewed on a standard of palpable and overriding error. 'Palpable' was construed as an error that is obvious. 'Overriding' was construed as an error that went to the very core of the outcome of the case. The basic difference between these is that, under *Housen*, an appeal Court would be deferential to factually based decisions made by the Court below, but not deferential to extricable questions of law.

Housen did not anticipate *de novo* appeal hearings unless these were specifically provided for by statute. *Aqua-Gem* did anticipate *de novo* appeal hearings, provided that the Order under appeal was determinative of the outcome. In *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology* the Federal Court of Appeal, sitting in a Panel of five Justices, was invited to revisit the standard of review applicable to discretionary orders made by Prothonotaries. The driving arguments on appeal was that there was "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" and also 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."

The Federal Court of Appeal found that "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." The Court noted that "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." The Court then concluded 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." In this respect, the Federal Court of Appeal followed the lead of the Ontario Court of Appeal in *Zeitoun v. Economical Insurance*, 2009 ONCA 415, 96 O.R. (3d) 639, where the Ontario Court of Appeal addressed the standard of review applicable in appeals from decisions of a Master (the Ontario equivalent of a Prothonotary).

The fundamental feature which persuaded the Federal Court of Appeal to change the standard was its recognition of evolution in the law of standard of review and also in the understanding of the role of Prothonotaries. The Court states at paragraph 53 of its Reasons: "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."

The practical result is that Justices of Federal Court, when exercising appellate jurisdiction in relation to Orders of Prothonotaries, will no longer conduct *de novo* reviews.

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