

Federal Court of Appeal simplifies the standard of review of prothonotary decisions

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Authors: Rebecca Stiles, Vincent M. de Grandpré, Geoffrey Langen

A rare five-judge panel of the Federal Court of Appeal has abandoned the so-called *Aqua-Gem* standard of review of the discretionary decisions of prothonotaries, in favour of the standard established by the Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33 (*Housen*). In *Hospira Healthcare Corporation v The Kennedy Institute of Rheumatology*, 2016 FCA 215 (*Hospira*), the Court of Appeal also clarified that the *Housen* standard applies in reviewing the discretionary decisions of motions judges. The *Hospira* decision brings welcome simplicity and coherence to the review of discretionary decisions in the Federal Courts.

Under *Aqua-Gem*, discretionary decisions of prothonotaries were subject to a *de novo* review on appeal if the question to be decided was vital to a final issue in the case. All other prothonotary decisions were subject to reversal only if “clearly wrong,” in the sense of being based upon a wrong principle or upon a misapprehension of the facts.

Hospira simplifies the standard of review of prothonotary decisions by eliminating the dual *Aqua-Gem* standards, and by creating uniformity in the review of discretionary decisions made by prothonotaries and judges. The correctness standard will apply to questions of law, and the palpable and overriding error standard will apply to questions of fact.

Hospira will have the greatest impact on prothonotary decisions that address questions vital to the final issue of a case. These discretionary decisions will now be reviewed on the *Housen* standard, and will only be varied on appeal if the prothonotary made an error of law, or a palpable and overriding error in a finding of fact. *Hospira* will likely result in still greater deference being afforded to prothonotaries charged with the case management of the bulk of intellectual property cases pending in the Federal Court.