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Federal Court of Appeal Changes Test on Interlocutory / Discretionary Appeals

In the recent decision of *Imperial Manufacturing Group Inc. v. Decor Grates Incorporated*, 2015 FCA 100, the Federal Court of Appeal used an appeal of a particulars motion in an industrial designs case to eliminate the prior distinction between the standard of review of discretionary or interlocutory orders and all other appeals from the Federal Court.

Writing for a unanimous court, Justice David Stratas reviewed the standard of review issue in detail. He began by noting that a line of cases existed in the Federal Court of Appeal that had held that the standard of review of discretionary and interlocutory orders of a Federal Court judge was as follows: deference was to be accorded to the decision unless the judge proceeded "on a wrong principle, gave insufficient weight to relevant factors, misapprehended the facts or where an obvious injustice would result." Justice Stratas referred to this as the "*David Bull* line of authority", as it arose out of the decision in *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc*., [1995] 1 F.C. 588 at page 594, 58 C.P.R. (3d) 209 at page 213 (C.A.).

As Justice Stratas noted, the *David Bull* standard of review is not used for other appeals from the Federal Court or in any other court in Canada. Rather, the well-known principles in *Housen v. Nikolaisen*, 2002 SCC 33, are used in all other jurisdictions, "across the board".

Justice Stratas justified the decision to scrap the *David Bull* standard by pointing out that (i) *Housen v. Nikolaisen* is binding and should be applied, (ii) *David Bull* is difficult to apply in practice, (iii) it is redundant, (iv) it "poses a trap for the unwary" by encouraging appellants to ask the Court of Appeal to reweigh the evidence, which the Court does not do, (v) there is no rational basis for having two standards, and (vi) *David Bull* itself was not well-supported by policy or authority.

At paragraph 29, Justice Stratas concludes his analysis of the standard of review by definitively stating that the *David Bull* standard of review should be eliminated and only the *Housen v. Nikolaisen* standard should be applied from this point forward.

This decision appears to be the new authority for standard of review in the Federal Court of Appeal. If so, it is a welcome

development, as the basis for not using *Housen v. Nikolaisen* was hard to understand.

Of interest is whether the Court will next turn its attention to the standard of review of decisions of prothonotaries. The Court (Justice Stratas, again) considered the issue several years ago in *Apotex Inc. v. Bristol-Myers Squibb Company*, 2011 FCA 34, but declined to decide the issue.

Also of interest is that the case contains a helpful discussion of particulars and the distinction between pleadings and discovery. In a paragraph that Federal Court practitioners should note as words to live by (in the context of particulars, anyway), the Court explains the purpose of particulars succinctly:

> "32. Courts grant motions for particulars of allegations in a Statement of Claim when defendants need them in order to plead. In short, the purpose of particulars is to facilitate the ability to plea. Put another way, without the particulars on an important point, the party cannot plead in response.

The *Imperial Manufacturing* decision is likely to be cited many times in the future both on the issue of standard of review and on particulars. In directly addressing both of those areas, the Court has brought helpful clarity to two areas of Federal Court practice.