

September 2, 2016

Presumption of Fitness Affirmed; Prothonotary Review Reformed

In a rare, unanimous 5-judge decision, *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, the Federal Court of Appeal has held that Prothonotaries are reviewable according to *Housen v. Nikolaisen*, overturning a long line of prior authority. The decision is believed to be the first unanimous 5-judge decision of the Federal Court of Appeal.

The previously leading case, *Canada v. Aqua-Gem Investments*, held that if the issue under appeal was “vital,” it was reviewed *de novo* as if the underlying decision had never been made. Determining vitality required case-by-case dissection of the matter at issue and was often unpredictable. Harmonizing the standard of review recognizes that Prothonotaries are presumed to be fit to decide matters assigned to them and will lead to greater simplicity and certainty.

The standard of review issue arose in the context of a discovery appeal in ongoing patent litigation between Hospira/Celltrion and Janssen/The Kennedy Trust for Rheumatology Research, involving the biologic drug Remicade. The appellants, Hospira/Celltrion, sought an additional half-day of inventor discovery to be conducted in-person as opposed to teleconference as ordered by the Prothonotary at first instance. The Court dismissed the appeal. The bulk of the Court’s reasons, however, concerned the standard of review.