Date: 20070727

Docket: 06-T-76
Docket: T-2140-05

Citation: 2007 FC 789

Ottawa, Ontario, July 27, 2007

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

PARRISH & HEIMBECKER LIMITED

Applicant(s)

and

HER MAJESTY THE QUEEN, in Right of Canada as Represented by the MINISTER OF AGRICULTURE AND AGRI-FOOD, THE ATTORNEY GENERAL OF CANADA and THE CANADIAN FOOD INSPECTION AGENCY

Respondent(s)

BETWEEN:

PARRISH & HEIMBECKER LIMITED

Plaintiff(s)

and

HER MAJESTY THE QUEEN, in Right of Canada as Represented by the MINISTER OF AGRICULTURE AND AGRI-FOOD, THE ATTORNEY GENERAL OF CANADA and THE CANADIAN FOOD INSPECTION AGENCY

Defendant(s)

REASONS FOR ORDER AND ORDER

[1] The Plaintiff in this action argued two motions before the Court at Halifax. The first of these was a motion under Rule 51 of the *Federal Courts Rules* to appeal the Order of Prothonotary Richard Morneau. That Order, made on September 15, 2006, "suspended" this action until the Plaintiff applied for and obtained an extension of time to bring an application for judicial review. Prothonotary Morneau ruled that it was a prerequisite to the prosecution of this action that the Plaintiff quash the administrative decisions which lay at the heart of the Plaintiff's claim to damages as outlined in its Statement of Claim. Until that form of relief was obtained, this action could not be sustained.

[2] The second of the Plaintiff's motions was brought under section 18.1(2) of the *Federal Courts Act* (Act), R.S., 1985, c. F-7 seeking an extension of time to initiate an application for judicial review in the event that the Prothonotary's Order was upheld on appeal.

Background

[3] This proceeding was brought as an action against the Crown for damages allegedly suffered by the Plaintiff in connection with the revocation of permits for the importation to Canada of a shipload of Ukrainian feed wheat.

[4] The Plaintiff's Statement of Claim was issued on December 2, 2005. The primary cause of action was framed in negligence with additional allegations of interference with economic relations,

misfeasance in public office and misrepresentation. At the core of all of the allegations against the Defendants was a challenge to the correctness or lawfulness of the decisions to revoke the import permits previously issued to the Plaintiff along with the subsequent failure or unwillingness to facilitate the importation and offloading of the wheat in Canada.

[5] On January 19, 2006, the Defendants filed a motion to strike out the Statement of Claim and, in the alternative, seeking an Order to stay the action until such time as the Plaintiff had successfully challenged the impugned administrative decisions by way of an application for judicial review. On September 15, 2006, Prothonotary Morneau issued an Order which suspended the Plaintiff's action until such time as the Plaintiff had properly initiated an application for judicial review which first required an Order to extend time to bring that application.

[6] In his reasons, Prothonotary Morneau summed up the allegations in the Plaintiff's Statement of Claim as follows:

> [22] However, this whole series of delicts and the relevant damages that are the basis of the relief ultimately claimed by the plaintiff depend to a large extent on the invalidity or unlawfulness – as suggested by the extracts given hereinabove of paragraphs 13 and 14 of the statement of claim – of the revocation of the permits and of the issuance of the new permit. In my view, it is clear that the alleged invalidity or unlawfulness of these decisions are at the heart of the claimed damages. [citation omitted]
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> [23] It is true, as is argued forcefully by the plaintiff that, to prove the various heads of damages set out at paragraphs 15 to 18 of the statement of claim, the plaintiff will have to do more than show the invalidity or unlawfulness of the decisions in issue. However, it is difficult to imagine that the setting aside of these decisions does not constitute the point of departure or an essential element of the examination of the alleged heads of damages.

Having found that the Plaintiff's claim to damages was founded upon a challenge to the lawfulness of a number of administrative decisions, Prothonotary Morneau held that the action could not proceed until those decisions had been set aside by way of judicial review. His reasons were as follows:

> [27] Now, as was very clearly explained by the Federal Court of Appeal in April 2004 in Canada c. Tremblay, [2004] 4 F.C.R. 165 (leave to appeal to the Supreme Court of Canada denied December 16, 2004 [2004] S.C.C.A. No. 307) (Tremblay), and subsequently in October 2005 in Grenier, whenever the Court is asked to set aside, or declare the unlawfulness of, a decision, this is a challenge that must first be mounted exclusively by way of an application for judicial review before this Court.
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> [28] This step-by-step approach cannot be by-passed in the name of a tangible and pragmatic approach that may have been expressly or implicitly recognized in the past since, as was mentioned by the Federal Court of Appeal in Grenier, at paragraphs 18 and 19, a decision still continues to be effective as long as it has not been set aside. Now, in the light of principles such as that of the proper functioning of the legal system (see Tremblay, at paragraph 22) and that of finality of decisions (see Grenier, at paragraphs 20 et seq.), it is not possible to ignore a decision of a federal board and let expire the statutory time limit and then, often a few years later, as in this case and as in Tremblay and Grenier, challenge it by way of an action claiming damages against the Crown pursuant to section 17 of the Act.
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> [29] As the Federal Court of Appeal has recently observed, such an approach amounts to an application for judicial review in disguise; in other words, the action claiming damages amounts to a collateral or indirect challenge of the decision in issue.
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> [30] In my view, that is exactly what the plaintiff is seeking to do through this action. As can be seen from the statement of claim, it is clear and obvious that it is first and foremost challenging, albeit indirectly, these Decisions.

> [31] The invalidity or unlawfulness (see the wording of paragraph 18.1(3)b) of the Act) of the Decisions will have to be obtained first and foremost by the plaintiff seeking judicial review, after, of course, having been granted an extension of the statutory time limit. Judicial review cannot be by-passed; this is especially true since, as was noted by the Federal Court of Appeal in Grenier, at paragraph 61, not only the invalidity of a decision, in itself, does not necessarily give rise to a finding of fault or negligence but, conversely, the lawfulness of such a decision [TRANSLATION] « excludes any finding of negligence ».

Appeal from the Prothonotary's Order

[7] The Court's jurisdiction under Rule 51 of the *Federal Courts Rules* to hear an appeal from a discretionary order of a Prothonotary was described by the Federal Court of Appeal in *Merck & Co., Inc. v. Apotex Inc.*, [2004] 2 F.C.R. 459, [2003] F.C.J. No. 1925, 2003 FCA 488 at para. 19 as follows:

> 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.

[8] The parties agree that the decision under review here is "vital to the final issue of the case" and that the Court must, therefore, decide this appeal *de novo.* This means that, absent any errors in the underlying decision, it may still be set aside or varied if the Court is disposed to exercise its discretion "differently" on the same record: see *Jazz Air LP v. Toronto Port Authority*, [2007] F.C.J. No. 841, 2007 FC 624.

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[9] Notwithstanding the very broad appellate jurisdiction that is enjoyed by this Court under Rule 51, I can find nothing in Prothonotary Morneau's Reasons which constitute an error of law or a misapprehension of the facts. Indeed, it seems to me that the Prothonotary correctly applied the binding authority of the Federal Court of Appeal in *Grenier v. Canada*, [2005] F.C.J. No. 1778, 2005 FCA 348 to the Statement of Claim and, in doing so, had no basis for disposing of the Crown's motion in any other way.

[10] The *Grenier* decision was clearly dispositive of the Crown's motion to suspend the Plaintiff's action. That case involved an action for damages by a federal inmate alleging that he had been unlawfully placed into administrative segregation. No attempt was made by the inmate to challenge the lawfulness of the segregation decision by way of judicial review and the action for damages was initiated some 3 years after the fact. That action was struck out because it was found to represent a collateral attack on the lawfulness of the decision which could only be challenged by way of judicial review brought under section 18 of the *Federal Courts Act*, R.S., 1985, c. F-7. Such a collateral attack was found to conflict with Parliament's grant of exclusive jurisdiction to the Federal Court for reviewing the lawfulness of decisions by federal agencies. The inherent delays in proceeding by way of an action also gave rise to a concern about the need for certainty and finality around the execution of administrative decisions of this sort.

[11] The Court went on to quote extensively from its earlier decision in *Budisukma Puncak Sendirian Berhad v. Canada*, [2005] F.C.J. No. 1302, 2005 FCA 267 (*Berhad*). The *Berhad* case is particularly instructive because it, too, involved a claim to damages which was founded upon a

challenge to the lawfulness of an administrative decision – in that case, to seize the plaintiff's vessel following a safety inspection. Although the Court's statements in *Berhad* about the need to challenge such decisions by judicial review before seeking damages were obiter, the decision clearly signalled a desire to clarify the law on this issue which the Court later confirmed in *Grenier*, above. The rationale for requiring judicial review as a prerequisite to an action in cases like these was explained in the following passages from *Berhad*:

> 60 In my view, the most important reason why a shipowner who is aggrieved by the result of a ship safety inspection ought to exhaust the statutory remedies before asserting a tort claim is the public interest in the finality of inspection decisions. The importance of that public interest is reflected in the relatively short time limits for the commencement of challenges to administrative decisions -- within 30 days from the date on which the decision is communicated, or such further time as the Court may allow on a motion for an extension of time. That time limit is not whimsical. It exists in the public interest, in order to bring finality to administrative decisions so as to ensure their effective implementation without delay and to provide security to those who comply with the decision or enforce compliance with it, often at considerable expense. In this case, the decision of the Chairman was not challenged until, a year and a half after it was made, the respondents filed their claim for damages.
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> […]
>
> 65 The Supreme Court has clearly indicated that review of all administrative decision-making by a court, whether by way of judicial review or by appeal, requires the determination of the appropriate standard of review by means of a pragmatic and functional analysis. It is the fact that the decision under review originates with an administrative body that is determinative of the approach required, not the procedure by which the decision is attacked and reviewed by the courts. Any doubt on this issue was dispelled by the Supreme Court in its reasons in Dr. Q v. College of Physicians and Surgeons of British Columbia, [2003] 1 S.C.R. 226, where McLachlin C.J., writing for the Court, indicated at paragraphs 21 and 25:

> The term "judicial review" embraces review of administrative decisions by way of both application for judicial review and statutory rights of appeal. In every case where a statute delegates power to an administrative decision-maker, the reviewing judge must begin by determining the standard of review on the pragmatic and functional approach.
>
> [...]
>
> Review of the conclusions of an administrative decision-maker must begin by applying the pragmatic and functional approach.
>
> 66 In my view, the same principle applies when the attack on the decision, as in this instance, takes the form of an action for damages flowing from the decision rather than an application for judicial review of the decision. To suggest otherwise would be to increase the likelihood of attempted collateral attacks as a means of circumventing the deference which often results from a pragmatic and functional analysis. Such a result would run directly counter to Parliament's intent and to the message sent by the Supreme Court in Dr. Q, supra, which was to bring a more nuanced and contextual approach to the issue of curial deference towards administrative decision-making. While the courts must maintain the rule of law, their reviewing power should not be employed unnecessarily: see Dr. Q, supra, at paragraphs 21 and 26. […]

[12] I can find nothing about the pleadings in this case which would justify distinguishing it from the comments above or from the decision in *Grenier*, above. It is obvious that, absent a successful challenge to the decisions to revoke the Plaintiff's import permits and, later, to impose new conditions on the importation of the cargo, no claim to monetary damages can be justified in this case. Indeed, as can be seen from the following passages from the Plaintiff's written submissions to the Court, the importance of those decisions to its claim to damages was acknowledged:

> […] Their complaint against Canada is that the CFIA, when the ship was in or near Canadian waters full of its wheat, revoked the import

> permits without a reasonable basis for doing so. It is expected that the evidence will establish that no new information concerning the existence of the pests in question – dwarf bunt and flag smut – in the Ukraine came to the attention of the CFIA after the original issuance of the import permits. Rather, that was always something to be addressed by Parrish & Heimbecker in the importation documentation, including phytosanitary certificates from the Government of the Ukraine. It is also expected that the discovery process will show nothing material came to the attention of the CFIA concerning the existence of those pests in this particular cargo. The claim then states that, after issuing the original import permits, on which Parrish & Heimbecker relied to put itself into a position of vulnerability, and invoking [sic] them without grounds, Canada and its agents refused to work with Parrish & Heimbecker, to address the problem, and then allowed the discharge of the "Nobility" only after new Ukraine phytosanitary certificates were obtained from the Ukraine, and then on terms requiring the treatment of the grain which were not acceptable to Parrish & Heimbecker's customers. Parrish & Heimbecker's damages arise from the sum total of this behaviour.
>
> […]
>
> Here, it is the subsequent behaviour of the CFIA itself which is stated to belie the representation, that the Import Permit for the wheat on M/V "Nobility" would not be revoked without a reasonable basis. Parrish & Heimbecker must show that this representation was false. However, this is far removed from a judicial review of the revocation of the permit, the refusal to work with Parrish & Heimbecker to address the lack of a pest problem after Parrish & Heimbecker had been put in a position of vulnerability, and the eventual substitution of the Import Permit with one which contained additional and commercially problematic conditions.
>
> [Emphasis Added]

[13] The fact that the Plaintiff has pleaded a variety of causes of action and relies upon somewhat artful nuance to advance its argument does not avoid the essential problem of the claim – if the revocation of the Plaintiff's import permits and the later decision to conditionally admit the cargo to Canada were lawful regulatory decisions, no claim to damages can be sustained.

[14] In the result, I find that the Prothonotary's Order is sound and the Plaintiff's appeal from that decision is dismissed with costs payable to the Defendants in the amount of $1,500.00 inclusive of disbursements.

Motion to Extend Time to File Application for Judicial Review

[15] The Plaintiff also moved, in the alternative, for an order to extend time to bring an application for judicial review under section 18.1(2) of the Act and, if successful in that regard, to essentially merge the proceedings into a common action.

[16] There is no doubt that the Plaintiff was well out of time to commence its application for judicial review when it brought this motion before the Court. Section 18.1(2) of the Act mandates that such applications be initiated within 30 days. When the Plaintiff's action against the Defendants was commenced about 3 years had elapsed from the decisions which are at the root of its cause of action. Furthermore, when the Defendants raised the issue of the need to challenge those underlying decisions by way of judicial review, the Plaintiff did not move immediately for an extension of time. Instead, it elected to challenge the Defendants' contention. It was only after Prothonotary Morneau's decision that the Plaintiff brought this motion as an adjunct to its appeal from that decision. In the ordinary course, delays of the magnitude noted above could not be excused under the discretion conferred by section 18.1(2). The facts of this situation are, however, far from ordinary and, in my view, the circumstances are sufficiently extenuating that relief should be granted to the Plaintiff.

[17] The leading authority dealing with extensions of time under section 18.1(2) of the Act is *Grewal v. Canada, (Minister of Employment and Immigration),* [1985] F.C.J. No. 144 (F.C.A.), [1985] 2 F.C. 263. There the Court noted that the primary consideration in exercising that discretion is "to do justice between the parties". In doing justice, the Court identified five considerations that will usually be relevant, in some measure, to such a motion to extend time. In the later case of *Jakutavicius v. Canada (Attorney Genera),* [2004] F.C.J. No. 1488; 2004 FCA 289, the Court summarized those considerations in the following passages at paras. 15-17:

> 15 In Grewal v. Minister of Employment and Immigration, [1985] 2 F.C. 263, Thurlow C.J. identified considerations that may be relevant in an application to extend time. These considerations include:
>
> 1. whether the applicant intended to bring the judicial review within the period allowed for bringing the application and whether that intention was continuous thereafter;
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> 2. the length of the period of the extension;
>
> 3. prejudice to the opposing party;
>
> 4. the explanation for the delay; and
>
> 5. whether there is an arguable case for quashing the order the applicant wishes to challenge on judicial review.
>
> 16 However, these considerations are not rules that fetter the discretionary power of the Court. At pages 277-278 of Grewal, Thurlow C.J. states:
>
> > But, in the end, whether or not the explanation justifies the necessary extension must depend on the facts of the particular case and it would, in my opinion, be wrong to attempt to lay down rules which

> would fetter a discretionary power which Parliament has not fettered.
>
> 17 Therefore, it is open to a motions judge to determine which factors are to be taken into account based on the facts of a particular case. Also see Council of Canadians v. Canada (Director of Investigation and Research) (1997), 212 N.R. 254 (F.C.A.) per Hugessen J.A. (as he then was) at paragraph 2. Once the relevant considerations are selected, sufficient weight must be given to each of them.

[18] The Defendants contend that the Plaintiff's motion should be dismissed because the Plaintiff has failed to establish that a continuing "intention to pursue an application for judicial review existed within the 30 day" limitation and thereafter. They also assert that the Plaintiff has failed to establish that they would not be prejudiced by the delay and failed, also, to show a justification for that delay.

[19] In a situation where the requirement for bringing an application for judicial review is clear and obvious, I accept that an applicant must establish a continuing intention to seek that relief commencing within the 30-day limit for so doing. In this situation, though, the state of the law concerning the right of a party to commence an action against the Crown in circumstances such as these was not settled until the *Grenier* decision, above, came down. Indeed, in *Grenier* the Court described the prior state of the law as follows:

> 1 LÉTOURNEAU J.A.:— Should an inmate directly challenge an institutional head's decision affecting him by way of judicial review, or may the inmate choose to disregard that procedure and attack it collaterally by means of an action in damages?
>
> 2 As we will see in the course of these reasons, the question is important, albeit not new. It has been posed more than once. The

> replies it has been given were sometimes hesitant, sometimes divergent, sometimes deferred. In Her Majesty The Queen in the Right of Canada, B.S. Warna and D.A. Hall v. Budisukma Puncak Sendirian Berhad, Maritime Consortium Management Sendirian Berhad, [2005] F.C.A. 267, at paragraph 59 (Berhad), this Court stated that the question was not definitively resolved and remained open for determination in a subsequent case. The time has now come to answer it, and positively.
>
> [Emphasis added]

[20] In the circumstances of this case, it was not unreasonable for the Plaintiff to expect that it had the option to prosecute its claim against the Defendants by way of an action at least to the point in time that the decision in *Grenier*, above, was delivered (October 27, 2005). That being the case, so long as the action was commenced within the applicable limitation period, no presumption of prejudice to the Defendants would arise. Although there were some earlier suggestions in cases like *Tremblay v. Canada*, [2004] F.C.J. No. 787, 2004 FCA 172 and *Berhad*, above, that an action may not be sustainable in such circumstances, the Plaintiff should not suffer the loss of a cause of action where the law on the point was in a state of acknowledged uncertainty. Indeed, in *Grewal*, above, the lapse of time owing to a reliance on subsequently overturned jurisprudence was noted to be a mitigating factor favouring relief: see page 10. This is not a situation of ignorance of the law which is rarely, if ever, excused but, rather, one of legal uncertainty and a reliance upon a practice that had some jurisprudential support.

[21] After the *Grenier* decision was delivered, the requirement for a bifurcated approach to claims such as this was clearly confirmed. However, if the Plaintiff had been aware of the *Grenier*

decision and commenced an application for judicial review instead of an action on December 2, 2005, there cannot be much doubt that an extension of time of a few days would have been granted.

[22] After the Plaintiff's action was commenced on December 2, 2005, the Defendants were clearly on notice of the claim and able to take the steps necessary to protect their litigation and strategic interests. While it would undoubtedly have been prudent for the Plaintiff to have moved for an extension of time when the Defendants put that matter in issue in early 2006, I do not think that its cause of action should be defeated simply because of its incorrect choice of process and I do not think that its conduct in that regard can be fairly described as reckless or indifferent as those terms were used in *McGill v. Minister of National Revenue* (1985), unreported F.C.A. A-876-84.

[23] I am satisfied that in the particular and unusual circumstances of this case the Plaintiff has shown the requisite intention to proceed with its claim throughout the time elapsed. Having regard to the state of the law prior to *Grenier*, above, and the initiation of the Plaintiff's action shortly thereafter, I do not believe that the Defendants would be unduly prejudiced by the delay – particularly when weighed against the potential prejudice to the Plaintiff by the loss of its cause of action. I would also note that the Defendants put no evidence before the Court of any actual prejudice but relied, instead, on the presumption of prejudice arising from long delay. While that is an acceptable approach, the presumption can be rebutted and, in these particular circumstances, it loses much of its efficacy.

[24] The Defendants have not seriously challenged this motion on the ground that the Plaintiff's claim lacks arguable merit and, indeed, the Statement of Claim clearly raises justiciable issues.

[25] In the result, the Plaintiff's motion for an extension of time to bring an application for judicial review is allowed and it shall have 20 days from the date of this Order to do so. Given that the decisions challenged here by the Plaintiff appear to form part of a continuing course of conduct and are sufficiently connected, this is an appropriate case under Rule 302 to allow all of those impugned decisions to be reviewed in one application.

[26] I do not accept, however, that the Plaintiff's application for judicial review ought to be merged with or heard concurrently with its action. Such an approach would defeat the underlying rationale for requiring a bifurcated process and would (as counsel for the Crown aptly put it) constitute an "end run" around *Grenier*, above. In the result, the Prothonotary's Order to stay the Plaintiff's action shall continue until such time as the Plaintiff's application for judicial review has run its course.

[27] Notwithstanding the Plaintiff's success on the principal motion, I do not think that this is an appropriate case for an award of costs in its favour. No costs are awarded to either party on that motion. I will award the Defendants' costs of $500.00 inclusive of disbursements in connection with the Plaintiff's failed motion to merge the proposed application with the action.

ORDER

THIS COURT ORDERS that the Plaintiff's appeal from Prothonotary Richard Morneau's Order dated September 15, 2006 is hereby dismissed with costs payable to the Defendants in the amount $1,500.00 inclusive of disbursements.

THIS COURT FURTHER ORDERS that the Plaintiff's motion for an extension of time to commence an application for judicial review herein is allowed. The Plaintiff shall have 20 days from the date of this Order to commence its application for judicial review. No costs are awarded to either party in connection with that motion.

THIS COURT FURTHER ORDERS that all of the decisions which are the subject of the Plaintiff's proposed application for judicial review shall be considered in a single application.

THIS COURT FURTHER ORDERS that the Plaintiff's motion to merge this action against the Defendants with its proposed application for judicial review is dismissed with costs payable to the Defendants in the amount of $500.00 inclusive of disbursements and the Prothonotary's Order to suspend the Plaintiff's action shall continue in full force and effect until the conclusion of the Plaintiff's proposed application for judicial review on the merits.

" R. L. Barnes "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	06-T-76
STYLE OF CAUSE:	PARRISH & HEIMBECKER LIMITED v. HMQ
PLACE OF HEARING:	Halifax, Nova Scotia
DATE OF HEARING:	January 22, 2007
REASONS FOR ORDER:	BARNES J.
DATED:	July 27, 2007

APPEARANCES:

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Ms. Kathleen McManus	FOR THE RESPONDENT

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FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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