Date: 20090424

Docket: T-128-06

Citation: 2009 FC 389

BETWEEN:

INGREDIA SA
PRODUITS LAITIERS ADVIDIA INC. (LES)

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA,
THE CANADA CUSTOMS AND REVENUE AGENCY AND
THE CANADA BORDER SERVICES AGENCY

Defendants

REASONS FOR JUDGMENT
(First issued on a confidential basis on 20 April 2009)

HARRINGTON J.

[1] The plaintiffs, Ingredia, the French exporter to Canada of a milk product known as PROMILK 872B, and its subsidiary, Advidia, the Quebec-based importer thereof, have taken action in tort against Her Majesty the Queen for $27 million and other relief because PROMILK was classified under the wrong tariff item. The duty under the correct tariff was 6.5%, while the duty imposed under the wrong tariff was a prohibitive 270%. Until matters were put right by the Canadian International Trade Tribunal (CITT) and affirmed by the Federal Court of Appeal, the plaintiffs were, they say, effectively prevented from dealing with PROMILK in Canada. The

defendants (hereinafter the Crown) now move for a summary judgment on the grounds that there is no cause of action or, even if there were, it is time-barred.

DECISION

[2] Although I consider the merits of the action to be extremely tenuous, I am not satisfied that there is no genuine issue for trial with respect to the claim or that there is sufficient evidence before me to make the necessary findings of fact and law to dismiss the action. I am satisfied however that the action is time-barred as it was not taken within three months after the cause of action arose as required by s. 106 of the *Customs Act*. The Crown's motion for summary judgment is granted.

THE FACTS

[3] In 1998 Ingredia entered into discussions with a Canadian company to import milk protein isolate products, particularly PROMILK 872B. PROMILK 852B then had a protein content of 85% on a dry-weight basis. There was a question as to which tariff item applied. If classified under chapter 35 of the *Customs Tariff*, the applicable rate of duty was 6.5%. However the other possibility was chapter 4, which imposed a duty of 270%. The plaintiffs allege that at that rate the cost of the product in Canada would be too prohibitive to market.

[4] An officer of the Canada Customs and Revenue Agency (CCRA), as it was then known, advised that if the protein content could be increased to at least 87% PROMILK 872B would be classified within chapter 35. It is alleged, as a result, that a special PROMILK 872B which met that requirement was specifically developed for the Canadian market.

[5] The plaintiffs then sought a National Customs Ruling (NCR) which is a mechanism by which parties will know in advance of importation how a product will be classified. The NCR Guidelines state that the NCR is binding on both the Department and the importer as long as conditions specified in the original request have not changed, or until the NCR has been modified or revoked.

[6] Although PROMILK 872B was not classified under the specific item the plaintiffs anticipated, it was nevertheless classified in 1999 under chapter 35 at a rate of duty of 6.5%. Allowing for some corporate changes the NCR was transferred in 2001 without any change in substance.

[7] However, come April 2003 the CCRA issued a “Notice of Correction”, putting PROMILK 872 B into chapter 4, which carried with it the 270% duty.

[8] The plaintiffs protested but were advised by the CCRA that the only viable means of challenging the validity of the new 2003 NCR was to import a representative quantity, pay the duty and take advantage of the review and appeal provisions in the *Customs Act*. In June 2003, Advidia imported a pro-forma 1,500 kilograms of PROMILK 872B.

[9] In July 2003, a Customs official classified PROMILK 872B under chapter 4. The duty was paid and the challenge began. The decision was affirmed by the Commissioner in October 2003.

[10] Advidia then appealed to the CITT, the route set out in the *Customs Act*, and in March 2005 was successful. The CITT held that PROMILK 872B should have been classified under Chapter 35, carrying with it a duty of 6.5%.

[11] The Commissioner appealed to the Federal Court of Appeal, as authorized by s. 68(1) of the *Customs Act*. The Federal Court of Appeal heard the appeal on 31 January 2006 and dismissed it from the Bench. Leave to appeal to the Supreme Court was not sought.

[12] In the result, the excess duty was refunded with interest.

[13] On January 24, 2006, one week before the Federal Court of Appeal hearing, the plaintiffs filed their Statement of Claim which has been twice amended.

THE BASIS OF THE CLAIM

[14] The legal basis of Crown liability in a case such as this is the *Crown Liability and Proceedings Act*. Without deciding whether the whole of the plaintiffs' alleged action arose in Quebec, it is not in dispute that the facts of this case are more closely connected to Quebec than to any other province. Liability is defined in s. 2 of the Act with respect to the Province of Quebec as being "extra contractual liability" and with respect to other provinces as "liability in tort".

[15] Section 3(a) provides:

3. The Crown is liable for the damages for which, if it	**3.** En matière de responsabilité, l'État est

were a person, it would be liable	assimilé à une personne pour :
(*a*) in the Province of Quebec, in respect of	*a*) dans la province de Québec :
(i) the damage caused by the fault of a servant of the Crown, or	(i) le dommage causé par la faute de ses préposés,
(ii) the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and	(ii) le dommage causé par le fait des biens qu'il a sous sa garde ou dont il est propriétaire ou par sa faute à l'un ou l'autre de ces titres;

[16] On the facts, the vicarious liability of the Crown has to be grounded in s. 3(a)(*i*), i.e. damage caused by the fault of one of her servants.

[17] The plaintiffs allege a cornucopia of faults on the part of Crown servants, namely Customs officials. To name but some: the NCR was changed in 2003 without regard to the adopted guidelines or legislative requirements and in an exercise of bad faith; the decision was made without regard to procedural fairness and the right to be heard; discrimination in that a product from New Zealand, said to be virtually identical, was allowed to be imported under a different tariff to the benefit of the plaintiffs' commercial competitors and to their detriment; undue consideration was given to the position of the Dairy Farmers of Canada who were opposed to the first classification of PROMILK 872B (the Dairy Farmers were given intervener status before the CITT and the Federal Court of Appeal) and improper consideration of the position taken by the United States Customs Service.

[18] For its part, the Crown denies bad faith or any specific knowledge of the plaintiffs' contractual relationships. The NCR was modified in 2003 in the context of legitimate review verification pursuant to s. 42.01 of the *Customs Act*. The product from New Zealand was different, but in any event there certainly was no intention to give it preferential treatment over PROMILK 872B. The defendants say there is no causal connection between the alleged fault and the damages. To some extent, advantage could have been taken of certain quotas but more particularly the plaintiffs could have imported, paid the duty and once successful would have obtained a refund with interest. The defendants cannot be faulted for their deliberate decision not to import PROMILK 872B during the redetermination and appeal process.

[19] Finally, the claim is statute-barred under section 106 of the *Customs Act* which provides a three-month limitation for actions against those for whom the Crown is vicariously liable. It is further asserted that under sections 10 and 24 of the *Crown Liability and Proceedings Act*, the Crown is not liable unless its servant would have been liable, and that it may raise any defence that would have been available in an action against that person, including time-bar.

[20] The Statement of Claim was filed 24 January 2006. According to the Crown, the cause of action would have accrued before 24 October 2003.

PRINCIPLES OF SUMMARY JUDGMENT

[21] Motions for summary judgment are governed by rule 213 and following of the *Federal Courts Rules*. If the Court is satisfied that there is no genuine issue for trial, it shall grant summary

judgment. If satisfied that the only genuine issue is a question of law, it may determine that question. The essence of the defendants' motion is that in law there is no claim. However, there are some questions of fact and credibility, such as those which deal with allegations of bad faith and undue influence. I am unable to make the necessary findings on the record before me.

[22] Leaving aside time-bar, the plaintiffs' case, although very doubtful, is not, in my opinion, so doubtful that it deserves no further consideration (*Granville Shipping Co. v. Pegagus Lines Ltd. (T.D.)*, [1996] 2 F.C. 853, 111 F.T.R.189).

[23] As to the allegation of tortious interference in contractual relations, as noted by the Federal Court of Appeal in *Kanematsu GmbH. v. Acadia Shipbrokers Ltd.* (2000), 259 N.R. 201, [2000] F.C.J. No. 978 (QL) at paragraph 18, this is a serious factual issue which must be resolved.

[24] Although allegations of bad faith are easy to make and hard to prove, the fact remains that liability may arise with respect to actions taken outside the scope of a statute. (*Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689).

[25] In the final analysis, the classification of PROMILK 852B under Chapter 4 was an error. It certainly does not by any means follow that the original decision-maker was negligent. Indeed, as noted by the Court of Appeal, the issue before it was whether the CITT erred in holding that tariff item 35.04 more specifically described the goods in issue than did tariff item 04.04 (*The*

Commissioner for the Canada Customs and Revenue Agency and the Dairy Farmers of Canada v. Les Produits Laitiers Advidia Inc., 2006 FCA 41, 346 N.R. 309, at para. 4).

[26] As to a duty of care arising from the administration of a statute, and damages flowing therefrom through negligence, see the decision of the Federal Court of Appeal in *Brewer Bros. v. Canada (Attorney General) (C.A.),* [1992] 1 F.C. 25, 129 N.R. 3. The plaintiffs should not be driven from the judgment seat at this stage.

[27] Although a common law lawyer might well characterize this as a claim in tort for pure economic loss, and therefore too remote, the claim is Quebec-centred where the focus is on causality rather than on policy decisions based on remoteness (*Canadian National Railway Co. v. Norsk Pacific Steamship Co.,* [1992] 1 S.C.R. 1021, 137 N.R. 241).

[28] This leads to the allegation that there is no causal connection between the alleged loss and the alleged fault. Had the plaintiffs continued to import and pay the 270% duty, the excess would have been refunded with interest. The plaintiffs say that makes no business sense. A decision of some relevance is that of the House of Lords in *Liesbosch Dredger v. Edison, S.S. (Owners of),* [1933] A.C. 449, which dealt with the assessment of damage following the negligent sinking of the *Liesbosch*. If the plaintiffs had had the wherewithal, they could have purchased a substitute dredger. As it was they had to charter in tonnage which, over time, resulted in a greater loss. Lord Wright held they could not rely on the unfortunate predicament in which they were placed because of their financial embarrassment. He said at page 460:

> In my judgment the appellants are not entitled to recover damages on this basis. The respondents' tortious act involved the physical loss of the dredger; that loss must somehow be reduced to terms of money. But the appellants' actual loss in so far as it was due to their impecuniosity arose from that impecuniosity as a separate and concurrent cause, extraneous to and distinct in character from the tort; the impecuniosity was not traceable to the respondents' acts, and in my opinion was outside the legal purview of the consequences of these acts. The law cannot take account of everything that follows a wrongful act; it regards some subsequent matters as outside the scope of its selection, because "it were infinite for the law to judge the cause of causes," or consequences of consequences.

[29] However, apart from causality, one might also characterize that case as dealing with a failure to mitigate damages. As the burden is upon the defendants to show that the plaintiffs failed to mitigate, I am not satisfied at this stage that their decision not to import while the review process was underway defeats their claim.

[30] The defendants also say that some of the alleged bases of liability are novel and have not been recognized in law. That does not mean they should be dismissed out of hand. See the decision of the Ontario Court of Appeal in *Law Society of Upper Canada v. Ernst & Young* (2003), 65 O.R. (3d) 577, 227 D.L.R. (4th) 577.

TIME-BAR

[31] The starting point on statutory limitations is s. 39 of the *Federal Courts Act* which provides:

39. (1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings in the Federal	**39.** (1) Sauf disposition contraire d'une autre loi, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour

Court of Appeal or the Federal Court in respect of any cause of action arising in that province.	d'appel fédérale ou la Cour fédérale dont le fait générateur est survenu dans cette province.
(2) A proceeding in the Federal Court of Appeal or the Federal Court in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.	(2) Le délai de prescription est de six ans à compter du fait générateur lorsque celui-ci n'est pas survenu dans une province.
[Emphasis added.]	[Je souligne.]

[32] As expressly provided in the *Customs Act* at s. 106:

106. (1) No action or judicial proceeding shall be commenced against an officer for anything done in the performance of his duties under this or any other Act of Parliament or a person called on to assist an officer in the performance of such duties more than three months after the time when the cause of action or the subject-matter of the proceeding arose.	**106.** (1) Les actions contre l'agent, pour tout acte accompli dans l'exercice des fonctions que lui confère la présente loi ou toute autre loi fédérale, ou contre une personne requise de l'assister dans l'exercice de ces fonctions, se prescrivent par trois mois à compter du fait générateur du litige.
(2) No action or judicial proceeding shall be commenced against the Crown, an officer or any person in possession of goods under the authority of an officer for the recovery of anything seized, detained or held in custody or safe-keeping under this Act more than three months after the later of	(2) Les actions en recouvrement de biens saisis, retenus ou placés sous garde ou en dépôt conformément à la présente loi, contre la Couronne, l'agent ou le détenteur de marchandises que l'agent lui a confiées, se prescrivent par trois mois à compter de celle des dates suivantes qui est postérieure à l'autre :

(*a*) the time when the cause of action or the subject-matter of the proceeding arose, and	*a*) la date du fait générateur du litige;
(*b*) the final determination of the outcome of any action or proceeding taken under this Act in respect of the thing seized, detained or held in custody or safe-keeping.	*b*) la date du règlement définitif de toute instance introduite en vertu de la présente loi au sujet des biens en cause.
(3) Where, in any action or judicial proceeding taken otherwise than under this Act, substantially the same facts are at issue as those that are at issue in an action or proceeding under this Act, the Minister may file a stay of proceedings with the body before whom that action or judicial proceeding is taken, and thereupon the proceedings before that body are stayed pending final determination of the outcome of the action or proceeding under this Act.	(3) Lorsque dans deux actions distinctes, l'une intentée en vertu de la présente loi, l'autre non, des faits sensiblement identiques sont en cause, il y a suspension d'instance dans la seconde action, sur demande du ministre présentée à la juridiction saisie, jusqu'au règlement définitif de la première action.

[33] If a specific federal statute such as s. 106 of the *Customs Act* applies, that is the end of the matter. If not, one must consider whether or not the cause of action arose in a province. If so, the appropriate limitation law of that province is to be applied. If the cause of action did not arise in a province then the limitation period is six years. See *Nicholson v. Canada*, [2000] 3 F.C. 225, 181 F.T.R. 200.

[34] If the cause of action arose in a province, that province had to be Quebec and the limitation would be three years as set out in Article 2925 of the *Civil Code of Quebec*. Although I tend to the view that the whole cause of action arose in Quebec (the head office of Customs being incidental (*Pearson v. Canada*, 2006 FC 931, 297 F.T.R. 121, at paragraph 58, upheld on others grounds in 2007 FCA 380, (2007), 371 N.R. 187), it is not necessary to decide the point because the action was taken within three years. If s. 106 of the *Customs Act* does not apply, the claim is not time-barred. This gives rise to three issues:

a) If this action had been instituted against the officers who misconstrued the Customs tariff, could they have availed themselves of the three-month limitation?

b) If so, may the Crown likewise avail itself of the limitation?

c) If so, when did the three months begin to run?

[35] The plaintiffs also suggest that, in any event, it would be open to me to extend time. I disagree. Although the *Customs Act* has a number of provisions within the review process which allow for an extension of time, s. 106 does not. Furthermore this is an action, not an application for judicial review. This Court's power under s. 18.1(2) of the *Federal Courts Act* or Rule 8 to extend time is not applicable. See *Liu v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 94, 362 N.R. 81.

DOES THE THREE-MONTH LIMITATION APPLY TO CROWN SERVANTS?

[36] The plaintiffs allege that the negligence of the servants of the Crown relates, in part, if not in whole, to negligently changing the NCR, and that such an act is not protected by s. 106. This is a hypothetical question which need not be answered. If the NCR was a decision of a federal board, commission or tribunal not covered by the review mechanism in the *Customs Act* itself, then an application for judicial review before this Court should have been brought within 30 days as required by the said s. 18.1 of the *Federal Courts Act* (although the Court may extend time).

[37] In this case, the cause of action arose from the initial decision of the Customs official in July 2003 to classify a specific importation of PROMILK 852B under Chapter 4 rather than Chapter 35. The *Customs Act* is divided into several parts. Section 106 is in Part VI titled Enforcement. Apart from limitations of actions, it deals with the powers of officers, disclosure of information, inquiries, penalties and interest, seizures, return of goods seized, forfeitures, disposal of things abandoned or forfeited, collection of duties on mail, evidence, prohibition, offences and punishment. However, the calculation of duty is in quite another part, Part III, which covers such matters as tariff determination and the right to seek redetermination.

[38] The plaintiffs therefore submit that their cause of action against the Crown for vicarious liability arises from negligent determination of the applicable tariff item under Part III. Had they sued the negligent officer or officers, these officers would not have been able to invoke s. 106, which is in Part VI. I cannot agree. Had the plaintiffs not scrupulously followed the law, but rather attempted to import PROMILK 852B under Chapter 35 rather than Chapter 4, the PROMILK could

have, and should have, been seized. An action arising out of that seizure would surely have been covered by s. 106. The seizure would have been inextricably tied to the application of the wrong tariff item. The situation would have been somewhat analogous to that in *Kearns and McMurchy Inc. v. Canada, et al.*, 2003 FCT 814, 236 F.T.R. 279. In that case the plaintiffs took action against Her Majesty for damages resulting from the detention of certain machine gun parts. Not only did Prothonotary Aronovitch hold that the claim was time-barred against both the Crown and its servants, but also that there was no claim in tort for a simple improper classification of goods, as the *Customs Act* set out a complete avenue of redress.

[39] Furthermore, although headings in statutes are a controversial subject (Sullivan on the *Construction of Statutes*, 5th edition, page 392 and following), s. 106 applies with respect to anything done by an officer in the performance of his duties "…under this or any other act of Parliament." I do not read s. 106 as not applying to potential liability for negligently applying the wrong tariff item.

DOES SECTION 106 APPLY TO THE CROWN?

[40] The next issue is whether the Crown may take advantage of s. 106(1). The plaintiffs draw a distinction between section 106(1) and 106(2) in that only the latter specifically mentions the Crown. However this distinction relates back to damage caused by a servant on the one hand and on the other damage resulting from the act of a thing owned or controlled by the Crown, or by the Crown's fault as custodian or owner, as per s. 3(a)(i) and (ii) of the *Crown Liability and Proceedings Act*, above. Vicarious liability for the act of a servant is set out in article 1463 of the

Civil Code of Quebec, while liability resulting from the autonomous act of a thing under one's custody or for damages caused by the ruin of a building, is found in article 1465 and following.

[41] Apart from *Kearns and McMurchy*, above, reference was made to the decision of the Court of Appeal for Ontario in *144096 Canada Ltd. (USA) v. Canada (Attorney General)*, (2003), 63 O.R. (3d) 172, 222 D.L.R. (4th) 577, in which the defendant Crown and its servant moved for summary judgment dismissing plaintiff's action for damages for wrongful seizure and storage of aircraft on the grounds that the action was barred by s. 106 of the *Customs Act*. Summary judgment was granted in first instance. In appeal, however, Mr. Justice Morden, while noting that as a matter of principle and policy it makes sense that the limitation period governing claims against an employee should also be applicable to the claim against the employer based on vicarious liability, queried whether the pleading of a limitation period was actually a defence, as opposed to a substantive defence which would defeat a claim on its merits. The Court of Appeal applied s. 106 of the *Customs Act* to the Crown servants. However the action was also dismissed against the Crown on the grounds that it could rely on the *(Ontario) Public Authorities Protection Act* which then provided for a six-month limitation period. The remarks of the Court were specifically stated to be obiter.

[42] While the cases under s. 106 are sparse, a somewhat similar provision is found in s. 269 of the *National Defence Act*. On a motion for summary judgment in *Baron v. Canada*, [2000] F.C.J. No. 263 (QL), Madam Justice Dawson granted summary judgment at the behest of the Crown on the grounds of time-bar. She was affirmed in appeal, 2001 FCA 38, [2001] F.C.J. No. 317 (QL).

[43] In my view, a defence includes the defence of time-bar and basing myself upon *Baron*, above, conclude that the Crown may invoke s. 106(1) of the *Customs Act*.

WHEN DID TIME BEGIN TO RUN?

[44] The next inquiry is when the three-month period began to run. For the purposes of this case, it does not matter whether time began to run from the amended NCR or from the imposition of the wrong tariff. In either case the Statement of Claim would have been more than two years out of time when filed. Nor is this an action which arises from an illegal seizure and covered by s. 106(2) of the *Customs Act.* Rather, it is an action relating to goods which were not imported at all. It is an action in tort pursuant to the *Crown Liability and Proceedings Act.* Section 106(3) contemplates such actions which in all likelihood would have been stayed by the Court pending the outcome of the tariff review process, if the Crown itself did not invoke a statutory stay.

[45] The plaintiffs submit that a constituent element of their claim is damages, that the damages were ongoing and could not be quantified earlier. Thus, not all the material facts were established when they sued (*Central Trust Co. v. Rafuse,* [1986] 2 S.C.R. 147, 69 N.R. 321). I dismiss this argument as the plaintiffs were well aware that they had suffered what they consider to be damages and had made detailed calculations in that regard long before filing suit. The damages were unliquidated and would only be determined at trial.

[46] Another argument is that they did not know they had a cause of action until, at the very earliest, the decision of the Federal Court of Appeal, so if anything their action was premature.

While it may be that their chances of success in this action would have been nil had the Court of Appeal not affirmed the CITT, that process does not provide an excuse for not instituting action. Had the plaintiffs continued to import, they would have had to go through the review process on each importation, although administratively the process on those subsequent importations may well have been stayed.

[47] A somewhat related argument is that the judicial review process, which culminated in the decision of the Federal Court of Appeal, and which might possibly have gone to the Supreme Court, had to be complete before an action in damages could be launched.

[48] A most important distinction is to be drawn between an action in damages against the Crown over which both the Federal Court and Provincial Courts have concurrent jurisdiction in virtue of s. 17 of the *Federal Courts Act*, and the judicial review of a decision of a federal board, commission or other tribunal. In the latter case, the Federal Court has default exclusive jurisdiction, unless the statute in question provides otherwise. The *Customs Act* provides that a person may request a redetermination by the Commissioner (now the President) within 90 days (s. 60), and appeal from that decision to the CITT within 90 days (s. 67), and further appeal to the Federal Court on any question of law (s. 68). In addition, by way of exception, the Federal Court of Appeal has original jurisdiction in the judicial review of decisions of the CITT in accordance with s. 28 of the *Federal Courts Act*.

[49] The normal delay for an application for judicial review to the Federal Court, i.e. the default provision, is 30 days as per s. 18.1 (2) of the *Federal Courts Act*. In *Budisukma Puncak Sendirian Berhad v. Canada*, 2005 FCA 267, 338 N.R. 75, Mr. Justice Létourneau, on behalf of the Federal Court of Appeal, stated:

> [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.

[50] Although the remarks in *Berhad* were *obiter*, they were part of the ratio in *Grenier v. Canada v. Canada*, 2005 FCA 348, [2006] 2 F.C.R. 287. *Grenier* is most important. While incarcerated, a decision was made against Mr. Grenier which he considered adverse. Rather than apply for judicial review within 30 days as required by the *Federal Courts Act* he took action just before the expiry of the statute of limitations, which by referential adoption was the three-year prescription under Quebec Law.

[51] In speaking for the Court, Mr. Justice Létourneau pointed out that if an administrative decision is at the heart of an action in damages one has to first begin by way of judicial review. However, I do not think it follows that time does not begin to run on an action in damages arising

from that same decision until after the completion of the full judicial review process, which in this case lasted two and a half years. Parliament could not have intended that a three-month limitation period only begin to run years later. The Court of Appeal went on to say in *Hinton v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 215, 379 N.R. 336, that *Grenier* only requires that the first step be an application for judicial review. It does not stand for the proposition that the outcome of that process has to be realized before an action in damages may be filed. See also *Agustawestland International Ltd. v. Canada (Minister of Public Works and Government Services)*, 2006 FC 1371, 303 F.T.R. 209.

[52] A problem arises from the fact that the granting of damages is beyond the scope of remedies contemplated by judicial review (*Hinton*, above, and *Al-Mhamad v. Canada (Canadian Radio-Television and Telecommunication Commission)*, 2003 FCA 45, [2003] F.C.J. No. 145). In *TeleZone Inc. v. Canada (Attorney General)*, 2008 ONCA 892, [2008] O.J. No. 5291 (QL), the Ontario Court of Appeal refused to follow *Grenier*. TeleZone actually covers four appeals joined for hearing. One of the four, *McArthur v. Canada* is very similar to *Grenier*. McArthur brought an action in the Ontario Superior Court for damages for wrongful or false imprisonment arising from administrative segregation, a decision of a federal board, commission or tribunal, i.e. the Correctional Services of Canada. The Crown moved that the Ontario Superior Court was without jurisdiction. In speaking for the Court of Appeal, Mr. Justice Borins said, with respect to the *Federal Courts Act*, at paragraph 95 that:

> It is plain on its face that s. 18 does not constitute a bar, or a condition precedent, to the jurisdiction of the Superior Court over a claim for damages in contract or in tort against the Crown. Causes of action in contract or tort are distinct from the prerogative writs and

> extraordinary remedies described in s. 18. Shortly put, relief by way of damages is not a form of relief contemplated by s. 18.

This brought a feisty response from Mr. Justice Létourneau speaking for the Federal Court of Appeal in *Manuge v. Canada*, 2009 FCA 29, [2009] F.C.J. No. 73 (QL).

[53] At the present time applications for leave to appeal in both cases are on file with the Supreme Court.

[54] The point is that if the view in *TeleZone*, above, ultimately prevails, then there is no basis whatsoever for any argument that the judicial review process suspended the running of time in an action for damages.

[55] It bears mentioning that the time-bar defence was not raised when the Statement of Defence was originally filed in July 2006, but rather only in an Amended Statement of Defence which was filed with leave of the court, and on consent, in October 2008. I do not consider the Crown's failure to invoke time-bar in its original Statement of Defence constituted a waiver. In this case the Amended Statement of Defence, with the limitation defence, was filed on consent. The only recourse the plaintiffs might have is with respect to wasted costs. Furthermore, to the extent Quebec law might apply, article 2881 of the *Civil Code of Quebec* provides that prescription may be raised at any point even in appeal unless the intention of renunciation has been demonstrated. There has been no such demonstration in this case.

[56] For these reasons the motion for summary judgment shall be granted and the action dismissed. Costs may be spoken to within 20 days.

"Sean Harrington"
Judge

Ottawa, Ontario
April 24, 2009

FEDERAL COURT

SOLICITORS OF RECORD

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CONFIDENTIAL REASONS FOR JUDGMENT ISSUED APRIL 20, 2009 AND SUBSEQUENTLY RELEASED AS THE PUBLIC VERSION:

REASONS FOR JUDGMENT:	HARRINGTON J.
DATE:	April 24, 2009

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