Date: 20081121

Docket: A-377-07

Citation: 2008 FCA 362

CORAM: **NADON J.A.**
SHARLOW J.A.
PELLETIER J.A.

BETWEEN:

PARRISH & HEIMBECKER LIMITED

Appellant

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

Respondents

Heard at Ottawa, Ontario, on September 9, 2008.

Judgment delivered at Ottawa, Ontario, on November 21, 2008.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRING REASONS BY: NADON J.A.
DISSENTING REASONS BY: SHARLOW J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] This is an appeal from a decision of Mr. Justice Barnes of the Federal Court, reported as *Parrish & Heimbecker Ltd. v. Canada (Minister of Agriculture)*, 2007 FC 789, [2007] F.C.J. No. 1032, in which the effect of this Court's decision in *Grenier v. Canada*, 2005 FCA 348, [2006] 2 F.C.R. 287 (*Grenier*), is once again in issue.

[2] Parrish & Heimbecker (P&H) commenced an action in which Her Majesty the Queen (as represented by the Minister of Agriculture), the Attorney General for Canada and the Canada Food Inspection Agency (the Agency) are named as respondents. The action arises from the allegedly unlawful revocation of import permits authorizing P&H to import wheat from Ukraine into Canada and the subsequent issuance of new import permits imposing more onerous conditions which made the wheat unfit for the purpose for which P&H had contracted to sell it to its customers. The statement of claim alleges that the revocation of the permits and the subsequent issuance of the new permits were unlawful and caused P&H to suffer losses. It also alleges that the Agency negligently misrepresented that the cargo of wheat would be allowed entry to Canada on the terms set out in the original import permits, that the actions of the Agency amounted to unlawful interference in P&H's economic relations with its customers, and that the actions of the Agency amounted to misfeasance in public office. The actions in question are the revocation and re-issuance of the import permits. Finally, the statement of claim sets out eight specific allegations of negligence.

[3] The revocation of the original permits and the issuance of the revised permits occurred in December 2002. P&H did not challenge either of those decisions by way of judicial review at any time prior to issuing its statement of claim on December 2, 2005. The Agency responded by bringing a motion to strike out P&H's statement of claim on the basis that the Court had no jurisdiction to entertain the action so long as the Agency's decisions with respect to the revocation and re-issuance of the permits were not set aside in proceedings taken pursuant to section 18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the Act).

[4] The Agency's motion was heard by Prothonotary Morneau who concluded that, notwithstanding the absence of a specific claim for a declaration that the decisions in issue were unlawful, P&H's action constituted a collateral attack on the lawfulness of those decisions and, as such, was caught by the decision of this Court in *Grenier*. The Prothonotary described the effect of *Grenier* as follows:

> [27] … 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.
>
> [*Parrish & Heimbecker Ltd. v. Canada (Minister of Agriculture and Agri-Food)*, 2006 FC 1102, 303 F.T.R. 21, at para. 27.]

[5] However, rather than dismissing P&H's claim outright, the Prothonotary stayed the action for 30 days to allow P&H to make an application for an extension of time to bring an application for judicial review and, if the motion for the extension was granted, extending the stay for so long as the application for judicial review was pending. If P&H failed to bring a motion for an extension of time to commence an application for judicial review in the allotted time, its action would stand dismissed.

[6] P&H appealed the Prothonotary's order to the Federal Court and, as insurance against the possibility of the dismissal of its appeal, also brought a motion seeking an extension of time to commence an application for judicial review. Relying on *Jazz Air LP v. Toronto Port Authority*, 2007 FC 624, 314 F.T.R. 54, the motions judge found that since the decision under appeal was vital to the final issue in the case, he was free to consider the matter afresh and exercise his own discretion, even though no error could be shown in the Prothonotary's exercise of his discretion.

[7] In the end result, the motions judge exercised his discretion as the Prothonotary had exercised his. He found no error of fact or law in the Prothonotary's reasoning and concluded that this Court's decision in *Grenier* compelled the conclusion reached by the Prothonotary. In short, the motions judge found that P&H could not claim damages from the alleged wrongful exercise of the Agency's statutory discretion without first having that decision set aside by means of an application for judicial review in the Federal Court. He therefore dismissed the appeal.

[8] The motions judge then turned to P&H's request for an extension of time to commence an application for judicial review. He reviewed the circumstances and concluded that it was appropriate to grant the extension of time. However, he declined to make an order "merging" (consolidating) the judicial review with the action, or ordering that they be heard at the same time. In his view, this would constitute an "end run" around *Grenier*.

[9] P&H appeals from the motion judge's conclusion that it must first proceed by way of judicial review of the orders which it alleges are unlawful before it can proceed with its action in damages. It says in substance that it has made a choice of remedies, namely that it has chosen not to seek judicial review, but has instead chosen to proceed with an action for damages incurred because of the Crown's negligence or misfeasance in its handling of the issue. P&H says that nothing in section 18 of the Act precludes it from making such a choice.

[10] It is not necessary, in order to dispose of this case, to review the jurisprudence leading to the decision in *Grenier* since this case falls squarely within the principle enunciated by the latter.

Mr. Grenier, it will be recalled, was an inmate in a federal correctional establishment who was placed in administrative segregation as a result of having acted aggressively towards a staff person by throwing forms at him. In addition, he was sentenced to 14 days of disciplinary segregation for the same conduct, pursuant to the disciplinary procedure provided in the *Corrections and Conditional Release Act*, S.C. 1992, c. 20. *Grenier* did not challenge either of these decisions by means of an application for judicial review. Some three years later, however, he commenced an action for damages against the Crown in which he sought damages arising from his time in segregation.

[11] Because the amount claimed in the action was less than $50,000, it was heard by a Prothonotary as provided in Rule 50(2) of the *Federal Courts Rules*, SOR/98-106. The Prothonotary allowed the action and awarded *Grenier* compensatory damages in the amount of $3,000 as well as $2,000 in punitive damages. The Prothonotary's decision was upheld on appeal to the Federal Court.

[12] On appeal to this Court, the Prothonotary's decision was set aside on the basis that an administrative decision, made under the authority of a statute continues to have effect and is lawfully binding until such time as it is set aside in proceedings taken for that purpose under section 18 of the Act. In coming to this conclusion, this Court, speaking through Létourneau J.A., qualified its earlier ruling in *Zarzour v. Canada*, 196 F.T.R. 320, [2000] F.C.J. No. 2070 (*Zarzour*), to the effect that judicial review was necessary only where "the decision giving rise to the harm is still operative at the time the remedy is sought" and conversely "where the decision which gave rise to the alleged harm is no longer effective at the time, it is possible for the applicant to bring an action

claiming damages.": see *Grenier*, at para. 15. The Court went on to note that, even though the inmate had served his time in administrative segregation, the decision to impose segregation had continuing effects in relation to such matters as parole eligibility and classification. Against that background, the Court restated the underlying rationale for the exclusive jurisdiction granted to the Federal Court by section 18 of the Act:

> 24. In creating the Federal Court and in enacting section 18, Parliament sought to put an end to the existing division in the review of the lawfulness of the decisions made by federal agencies. At the time, this review was performed by the courts of the provinces: see Patrice Garant, *Droit administratif, 4th ed.*, vol. 2 (Les Éditions Yvon Blais Inc., 1996), at pages 11 to 15. Harmonization of disparities in judicial decisions had to be achieved at the level of the Supreme Court of Canada. In the interests of justice, equity and efficiency, subject to the exceptions in section 28, Parliament assigned the exercise of reviewing the lawfulness of the decisions of federal agencies to a single court, the Federal Court. This review must be exercised under section 18, and only by filing an application for judicial review. The Federal Court of Appeal is the court assigned to ensure harmonization in the case of conflicting decisions, thereby relieving the Supreme Court of Canada of a substantial volume of work, while reserving it the option to intervene in those cases that it considers of national interest.
>
> [*Grenier*, at para. 24.]

[13] This case falls squarely within the principle stated in *Grenier* and illustrates its underlying rationale. Presumably, P&H could have brought its claim in any of the provincial superior courts and, on the basis of the allegations in its pleadings, asked that court to determine the legality of the revocation of the original permits and the issuance of the replacement permits. Had another shipper encountered the same problem, it could have chosen to proceed in another of the provincial superior courts and asked for a determination of the same issue. Different cases could yield different conclusions leading to an unravelling of the fabric of consistency in the judicial review of federal administrative action.

[14] *Grenier*, as Barnes J. found, is dispositive of this case. But before leaving the case, I wish to comment on another matter which was raised at the hearing of this appeal.

[15] On its own motion, the Court raised the question of the effect of section 8 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 (the *CLPA*), which is reproduced below, together with section 3 which is the section which founds P&H's right of action against the Crown:

3. The Crown is liable for the damages for which, if it were a person, it would be liable	3. En matière de responsabilité, l'État est assimilé à une personne pour :
(*a*) in the Province of Quebec	*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;
(*b*) in any other province, in respect of	*b*) dans les autres provinces :
(i) a tort committed by a servant of the Crown, or	(i) les délits civils commis par ses préposés,
(ii) a breach of duty attaching to the ownership, occupation, possession or control of property.	(ii) les manquements aux obligations liées à la propriété, à l'occupation, à la possession ou à la garde de biens.
[…]	. . .
8. Nothing in sections 3 to 7 makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority that, if those sections had not been passed, would have been exercisable by virtue of the prerogative of the Crown, or any power or authority conferred on the Crown by any statute, and, in particular,	8. Les articles 3 à 7 n'ont pas pour effet d'engager la responsabilité de l'État pour tout fait — acte ou omission — commis dans l'exercice d'un pouvoir qui, sans ces articles, s'exercerait au titre de la prérogative royale ou d'une disposition législative, et notamment pour les faits commis dans l'exercice d'un pouvoir

but without restricting the generality of the foregoing, nothing in those sections makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority exercisable by the Crown, whether in time of peace or of war, for the purpose of the defence of Canada or of training, or maintaining the efficiency of, the Canadian Forces.	dévolu à l'État, en temps de paix ou de guerre, pour la défense du Canada, l'instruction des Forces canadiennes ou le maintien de leur efficacité.

[16] The question put to the parties at the hearing of the appeal was whether section 8 of the *CLPA* required that the Agency's decision be set aside in judicial review proceedings before proceeding with an action because, otherwise, section 8 would operate as a defence to the action. Such a reading of section 8 would provide an additional argument for the result arrived at in *Grenier*.

[17] Section 8 of the *CLPA* was first enacted as subsection 3(6) of the *Crown Liability Act*, S.C. 1952-53, c. 30. Given that its enactment precedes the creation of the Federal Court by approximately 20 years, it cannot easily be characterized as a constituent part of a scheme to centralize judicial review of federal institutions in the Federal Court.

[18] In addition, this disposition has, for the most part, been ignored in discussions of Crown liability. To the extent that it has been considered, it has not been given much scope. In *Robitaille v. The Queen*, [1981] 1 F.C. 90 (T.D.) (*Robitaille*), Marceau J. (as he then was) wrote:

> 6. The issue is thus joined in terms of the facts and the general principles of liability. Defendant nowhere sought to rely on an exclusion of liability to which she might be entitled under subsection 3(6) of the said *Crown Liability Act*, and she was correct in not doing so,

> despite the submissions made by her counsel during the verbal argument. The immunity conferred by that section only applies inasmuch as the power exercised is exercised in a normal and reasonable manner, and the whole point of the action is that this was not true in the case at bar.

[19] In one of the first cases, if not the first case, in which subsection 3(6) was considered by this Court, *Baird v. The Queen*, [1984] 2 F.C. 160 (*Baird*), it was suggested that the disposition applied "… to statutory powers but not to statutory duties, and further, that it contemplates power or authority of the Crown itself, such as prerogative power and statutory authority that should be regarded as conferred on the Crown, as distinct from that conferred on specific Crown servants chosen to perform a particular statutory function.": see *Baird*, at p. 185. No anterior jurisprudence on the meaning of subsection 3(6) of the *Crown Liability Act* was referred to in *Baird* nor, for that matter, in *Robitaille*.

[20] Section 8 of the *CLPA* has been held by this Court to apply only to non-negligent acts by crown servants: see *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1995] 2 F.C. 467, at para. 49 (C.A.) (*Comeau's Sea Foods Ltd.*), and *Swanson v. Canada (Minister of Transport)*, [1992] 1 F.C. 408, at para.29 (C.A.) (*Swanson*). *Comeau's Sea Foods Ltd.* was a case involving the failure to issue fisheries licenses while *Swanson* was a case involving the Minister of Transport's responsibility for aircraft safety.

[21] It would appear from this that section 8 of the *CLPA* is not available as a defence where negligence is alleged against the Crown, as it has been in this case. But, more importantly, section 8 has never been successfully raised as a bar to an action claiming damages where there is an issue of

the legality of a decision of a federal board commission or tribunal. Given its legislative history and its judicial treatment, section 8 is simply not available as an alternate ground for the result arrived at in *Grenier*.

[22] P&H also appealed from Barnes J.'s refusal to order that its judicial review application proceed at the same time as its action on the ground that this would constitute an "end run" around *Grenier*. Since then, this Court decided in *Hinton v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 215, [2008] F.C.J. No. 1004 (*Hinton*), that a claim for damages could be included in a judicial review which had been converted to an action pursuant to subsection 18.4(2) of the Act.

[23] *Hinton* allows P&H to argue that there is no impediment to having its action and its application for judicial review to proceed together since the application for judicial review could be converted to an action which includes a claim for damages. Since this argument was not before Barnes J., given that *Hinton* was decided after Barnes J. had rendered his decision, we are asked to consider it at first instance.

[24] In deciding as it did in *Hinton*, this Court was aware of the possibility that the conversion of judicial review applications to actions (including claims for damages) could easily lead to the unwinding of the Federal Court's exclusive jurisdiction over judicial review: see *Hinton*, at para. 51. While that concern is not present here, as there are two separate proceedings, there remains a need for prudence. It is not at all clear that actions and applications for judicial review can be

consolidated without indirectly converting the application for judicial review into an action. If that is true of a consolidation, the fact of hearing them together may lead to the same practical result. Given the history of these proceedings and the centrality of the issue of the lawfulness of the decisions taken by the Agency, it is appropriate that the application for judicial review proceed to its conclusion before the action resumes. This is consistent with the caveat registered by this Court in *Hinton* at paragraph 54.

[25] In the end result, I would dismiss the appeal with costs.

"J.D. Denis Pelletier"

J.A.

NADON J.A. CONCURRING

[26] I have read, in draft, the Reasons of my colleagues Sharlow J.A. and Pelletier. J.A. For the reasons which Pelletier J.A. gives, I am of the opinion that the appeal ought to be dismissed with costs. I would, however, add the following.

[27] I recognize the strength of Sharlow J.A.'s opinion that on her reading of section 18(1) of the *Federal Courts Act*, R.S. 1985, c. F-7, the broad view adopted by this Court in *Grenier v. Canada*, 2005 FCA 348, [2006] 2 FCR 87, i.e. that the determination of the lawfulness of decisions rendered by a "federal board, commission or other tribunal" must always be made by way of judicial review, cannot be correct. However, it is my view that it is not open to us to revisit *Grenier, supra*.

[28] First, in *Hinton v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 215, 2008 F.C.J. No. 1004 (Q.L.) and in *Nu-Pharm Inc. v. H.M.Q. et al*, 2008 FCA 227, we recently reiterated the principles set out in *Grenier, supra*.

[29] Second, it cannot be said that *Grenier, supra*, "is manifestly wrong, in the sense that the Court overlooked a relevant statutory provision or a case that ought to have been followed" (see *Miller v. Canada (A.G.)*, 2002 FCA 370, at paragraphs 8, 9 and 10). Although Sharlow J.A. does not expressly refer to *Miller, supra*, she appears to have concluded that it is open to us to overrule *Grenier, supra*, because of the parties' failure in that case to refer the panel to the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. 50 (the Act).

[30] With respect, I cannot agree with that view. As Pelletier J.A. demonstrates at paragraphs 15 to 21 of his Reasons, even if the parties in *Grenier, supra,* had specifically referred the panel to the Act, the conclusion reached in that case and the principles enunciated by the Court would not have been different.

[31] I would therefore dismiss the appeal with costs.

"M. Nadon"

J.A.

SHARLOW J.A. (DISSENTING REASONS)

[32] I have read in draft the reasons of my colleague Justice Pelletier. I regret that I am unable to agree with him.

[33] The appellant alleges in its statement of claim that the Canadian Food Inspection Agency (CFIA) granted the appellant an import permit for wheat from Ukraine and then, without communicating any reasons, revoked the permit when it was too late for the appellant to mitigate the resulting loss, and then issued new permits which arbitrarily imposed new conditions that caused the appellant further loss. The appellant also alleges that certain acts taken by the CFIA, including the revocation of the import permit, were unlawful in the sense that they were made without statutory authority. At this preliminary stage, these allegations must be assumed to be true.

[34] The statutory foundation of the appellant's right to assert a claim for damages against the Crown is the section 3 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. 50, which reads as follows:

3. The Crown is liable for the damages for which, if it were a person, it would be liable	3. En matière de responsabilité, l'État est 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;

(*b*) in any other province, in respect of	*b*) dans les autres provinces :
(i) a tort committed by a servant of the Crown, or	(i) les délits civils commis par ses préposés,
(ii) a breach of duty attaching to the ownership, occupation, possession or control of property.	(ii) les manquements aux obligations liées à la propriété, à l'occupation, à la possession ou à la garde de biens.

[35] By the combined operation of section 21 of the *Crown Liability and Proceedings Act* and section 17 of the *Federal Courts Act*, a person asserting a claim for damages against the Crown may proceed either in the Federal Court or in the superior court of the province in which the claim arose. In this case the appellant commenced its action in the Federal Court.

[36] Section 8 of the *Crown Liability and Proceedings Act* addresses the situation where a claim for damages against the Crown is based in whole or in part on an allegation that the damages were caused by the wrongful exercise of a statutory power. The appellant has made such an allegation in this case (paragraph 14 of the statement of claim). Section 8 of the *Crown Liability and Proceedings Act* reads in relevant part as follows:

8. Nothing in sections 3 to 7 makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority that, if those sections had not been passed, would have been exercisable by virtue of the prerogative of the Crown, or any power or authority conferred on the Crown by any statute […].	8. Les articles 3 à 7 n'ont pas pour effet d'engager la responsabilité de l'État pour tout fait — acte ou omission — commis dans l'exercice d'un pouvoir qui, sans ces articles, s'exercerait au titre de la prérogative royale ou d'une disposition législative […].

[37] The meaning and scope of section 8 of the *Crown Liability and Proceedings Act* may well be the subject of debate. However, for the purposes of this appeal I assume, without deciding, that section 8 is intended, at least, to give the Crown a defence to any claim for damages resulting from

the valid exercise of statutory authority (absent proof of negligence). The question that arises in this case is who is to determine, in the first instance, whether the exercise of statutory authority is valid. The Crown argues that this question necessarily must be answered in an application for judicial review. The appellant argues that, having asserted a claim against the Crown for damages, and having included in the statement of claim allegations that are intended to defeat the Crown's inevitable defence under section 8 of the *Crown Liability and Proceedings Act*, it is entitled to have the issue of the validity of the exercise of the Crown's statutory authority determined at trial.

[38] If the Crown is correct, the appellant must in effect bring two separate proceedings governed by two different limitation periods and two sets of procedural rules. An application for judicial review to challenge the decision of a federal agency or official must be brought in either the Federal Court or the Federal Court of Appeal within 30 days and must be determined on the basis of affidavit evidence, subject to a court order extending the time or permitting oral evidence at the hearing. In contrast, an action for damages may be brought in either the Federal Court or the superior court of a province, is subject to a longer limitation period (generally either two years or six years), and is determined by a trial preceded by discovery proceedings.

[39] In my view, the Crown's position is not consistent with the statutory scheme that governs claims for damages against the Crown. The fact that the defence of statutory authority is part of the *Crown Liability and Proceedings Act* suggests that Parliament contemplated that the task of assessing the validity of such a decision could be undertaken in the course of determining the claim for damages.

[40] The position of the Crown, and the basis for its motion in Federal Court to dismiss or stay the appellant's action for damages, is that the validity of the decisions of the CFIA that are at the root of the appellant's claim, and thus the availability of the section 8 defence, must be assessed as a matter of public law under the statutory procedure governing applications for judicial review.

[41] Justice Barnes accepted the Crown's argument because of the decision of this Court in *Grenier v. Canada*, 2005 FCA 348. As I read *Grenier*, it establishes that where a claim is made against the Crown for damages allegedly caused by an unlawful decision of a "federal board, commission or other tribunal" (as defined in the *Federal Courts Act*), the claim will necessarily fail unless the decision is quashed or declared invalid upon an application for judicial review of the decision pursuant to the *Federal Courts Act*. Unfortunately, it would appear that the Court in *Grenier* was not referred to the *Crown Liability and Proceedings Act*. As a result, the Grenier principle was developed without taking into account certain aspects of the statutory scheme governing federal Crown litigation that in my view cast doubt on the *Grenier* analysis.

[42] Clearly the CFIA is a "federal board, commission or other tribunal" as defined in the *Federal Courts Act*. A decision of the CFIA to issue or revoke an import permit, or to impose conditions on an import permit, may be challenged in the Federal Court by way of an application for judicial review pursuant to the *Federal Courts Act*. If such a challenge is made, the Federal Court may quash the decision or declare it to be unlawful. However, *Grenier* says that the determination of the lawfulness of those decisions can be determined only by way of judicial review under the

Federal Courts Act. That premise is based on an interpretation of the section 18 of the *Federal Courts Act* that I am unable to accept.

[43] Section 18 of the *Federal Courts Act* reads in relevant part as follows:

18.(1) […] the Federal Court has exclusive original jurisdiction	18.(1) […] la Cour fédérale a compétence exclusive, en première instance, pour :
(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and	*a*) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;
(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.	*b*) connaître de toute demande de réparation de la nature visée par l'alinéa *a*), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.
[…]	[…]
(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.	(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

[44] Subsection 18(1) of the *Federal Courts Act* gives the Federal Court the exclusive jurisdiction to grant the traditional public law remedies against any "federal board, commission or other tribunal" (subject to an exception, not relevant in this case, for certain matters that are within the exclusive jurisdiction of this Court). Subsection 18(3) requires the listed public law remedies to be granted by the Federal Court only upon an application for judicial review. However, section 18 does not say or necessarily imply that a dispute as to the validity of the exercise of statutory

authority by a "federal board, commission or other tribunal" cannot be determined in the course of a trial governed by the *Crown Liability and Proceedings Act.*

[45] According to the analysis presented in *Grenier*, the purpose of section 18 is to assign to the Federal Court alone the task of reviewing the lawfulness of decisions of federal agencies (see *Grenier*, paragraph 24), so as to avoid the problem of inconsistent decisions from different jurisdictions and perhaps also to give the Crown the further protection of a very short limitation period. Perhaps these are the objectives of section 18, but the language of subsection 18(1) is somewhat narrower. It is significant, in my view, that the exclusive original jurisdiction of the Federal Court in subsection 18(1) is described by reference to particular judicial remedies and not by reference to the nature of the decisions that might be challenged.

[46] Further, it seems to me that the correct interpretation of subsection 18(1) must be informed by the manifest intention of Parliament that parties asserting a claim for damages for damages are entitled assert their claim in an action, and to do so in either the Federal Court or the superior court of a province.

[47] In my view, this Court should not require the commencement of multiple proceedings to resolve a claim for damages in every case where the legality of the decision of a federal agency is the basis of the claim, unless compelled by explicit statutory language to do so. I am unable to read subsection 18(1) of the *Federal Courts Act* as sufficiently explicit for that purpose.

[48] The decision in *Grenier* was also based on the notion that, if the legality of federal decisions can be determined in the course of an action, the Crown may be deprived of the advantage of the 30 day time limit for the commencement of an application for judicial review. I agree that the finality of administrative decisions is in the public interest, and I also recognize that there is some potential for undue prejudice against the Crown if a claimant is permitted to use the device of an action for damages to avoid the 30 day limitation period applicable to applications for judicial review.

[49] However, these are not considerations that justify the interpretation of section 18 that was adopted in *Grenier*. Rather, they are considerations that will come into play in cases if the Federal Court (or the superior court of a province) is asked to determine whether the commencement of a particular action is an abuse of process in the sense, for example, that the claimant is engaged in a collateral attack on a final administrative decision, or that the claimant is attempting to claim the practical benefit of a public remedy for an administrative decision without observing the applicable procedural limitations. I understand that to be the situation in *Canada v. Tremblay (F.C.A.),* [2004] 4 F.C.R. 165. In that case, a person seeking reinstatement to a position terminated by virtue of a mandatory retirement law was not permitted to proceed with a claim for damages for the wrongful termination without first taking appropriate steps to have the termination declared invalid. While I do not accept all of the reasoning in that case, the result is reasonable based on the particular facts of the case.

[50] In this case there is no evidence, and the Crown has not suggested, that the appellant is not asserting a *bona fide* claim for damages. It is clear from the record that the appellant has no interest

in seeking a public law remedy because it would derive no practical advantage from any judicial remedy except an award of damages. Nor has the Crown alleged that the appellant is seeking to achieve indirectly what it cannot achieve directly because of a missed limitation period. The decisions made by the CFIA that the appellant claims are unlawful were respected. They are now spent and have no continuing effect. No one except the appellant has an interest in those decisions. If they are found to be invalid, no one will be affected except the parties to this litigation. The Crown's interest in the integrity of the administration of the import permit regime is amply protected by section 8 of the *Crown Liability and Proceedings Act*.

[51] For these reasons, I would allow this appeal with costs, set aside the decisions of the Federal Court and the Prothonotary, and dismiss the motion of the Crown for an order dismissing or staying the action, with costs in the cause.

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-377-07
APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE BARNES, DATED JULY 27, 2007, DOCKETS NUMBERS T-2140-05, 06-T-76	
STYLE OF CAUSE:	*PARRISH & HEIMBECKER LIMITED v. HER MAJESTY THE QUEEN ET AL*
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	September 9, 2008
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRING REASONS BY:	NADON J.A.
DISSENTING REASONS BY:	SHARLOW J.A.
DATED:	November 21, 2008

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