LexisNexis®

Agricultural Law NetLetter™

A twice-monthly current awareness service reviewing recent cases on land use, marketing boards, environmental issues, creditors rights, animals, grain, import/export and other matters in an agricultural context.

Thursday, January 13, 2011 - Issue 217

Bi-weekly issues are added on Thursdays.

**** HIGHLIGHTS ****

* The Supreme Court of Canada has held that a plaintiff who seeks damages as a result of the decision of a federal agency need not first bring an application for judicial review to determine whether the decision was lawful or valid under the Federal Courts Act. The Court held that a grain importer, Parrish and Heimbrecker, could commence an action for damages allegedly sustained when the CFIA revoked import permits for wheat on arrival at a Canadian port, without first bringing an application for judicial review. The Court allowed an appeal from the Federal Court of Appeal, a chambers justice, and a prothonotary, all of which had relied on a previous Federal Court of Appeal decision which held that judicial review was an essential prerequisite to a damage action. (Parrish & Heimbecker Ltd. v. Canada (Agriculture and Agri-Food), CALN/2011-001, [2010] S.C.J. No. 64, Supreme Court of Canada)

**** NEW CASE LAW ****

Parrish & Heimbecker Ltd. v. Canada (Agriculture and Agri-Food); CALN/2011-001, Full text: [2010] S.C.J. No. 64; Supreme Court of Canada, Binnie, LeBel, Deschamps, Abella, Charron, Rothstein and, Cromwell JJ. December 23, 2010.

Administrative Law -- Federal Agencies- Damage Actions -- Judicial Review Prerequisite.

Parrish & Heimbecker ("Parrish") is a Canadian grain trader. Parrish obtained permits from the Canadian Food Inspection Agency ("CFIA") to import wheat from Ukraine and Russia. Upon arrival of the wheat to the port of Halifax on December 5, 2002, the import permits granted to Parrish were revoked by the CFIA, allegedly pursuant to section 34 of the Plant Protection Act which allows permits to be revoked to prevent the introduction or spread of pests within Canada. As a result the grain could not be off loaded. The CFIA refused to test the wheat for contaminants. On December 31, 2002, the CFIA issued a

new import permit with conditions requiring Parrish pelletize the wheat, rendering the wheat unacceptable to its intended customers. Parrish filled its original contracts with alternate wheat it had purchased at a greater cost.

Parrish initiated an action against the Crown in Federal Court for misfeasance in public office, unlawful interference with economic relations, negligent misrepresentation and negligence, and claimed lost profits as a result of the revocation by the CFIA. Parrish did not seek judicial review. It alleged doing so would result in delay, and that it could not wait due to overtime charges for the chartered vessel and its commitments to its customers.

A Prothonotary granted the Crown's motion relying on the decision of the Federal Court of Appeal in Canada v. Grenier, 2005 FCA 348. An appeal de novo to the Trial division was dismissed on the same grounds. A further appeal to the Federal Court of Appeal was dismissed by a majority of the court based on Grenier.

Decision: Rothstein J. (the other justices concurring) allowed the appeal [at para 21], who rejected the Crown's argument based on Grenier and concluded for the reasons given in the Court's recent decision in TeleZone, 2010 SCC 62, that the federal court should have decided the damage claim without requiring Parrish to first be successful on judicial review.

Rothstein, J. held [at para 18 to 20]:

> [18] Unlike in TeleZone, the Federal Court's jurisdiction is not at issue in this appeal. Parrish brought its action in the Federal Court. However, the correct procedure -- action or application for judicial review -- is at issue. Section 17 of the Federal Courts Act gives the Federal Court concurrent jurisdiction over claims for damages against the Crown. Section 18 of the Federal Courts Act does not derogate from this concurrent jurisdiction. There is nothing in ss. 17 or 18 that requires Parrish to be successful on judicial review before bringing its claim for damages against the Crown.
>
> [19] Parrish complied with the re-issued import licence. It imported the wheat and fulfilled its contracts. Bringing an application for judicial review to invalidate the licensing decisions would serve no practical purpose. Parrish now brings an action in tort to recover the additional costs of complying with the CFIA's licensing decisions.
>
> [20] The Crown may seek to defend against the action by relying on its statutory authority, under s. 47 of the Plant Protection Act, S.C. 1990, c. 22, and s. 34 of the Plant Protection Regulations, to revoke or amend import permits. If it does so, the merits of this defence will have to be determined at trial.

**** CREDITS ****

This NetLetter is prepared by Brian P. Kaliel, Q.C. of Miller Thomson LLP, Edmonton, Alberta.