

CASE LAW UPDATE

Mark Edelstein *

Canada (Attorney-General) v. Telezone

2010 SCC 62 (Released 23 December 2010)

Administrative Law – Judicial Review and Statutory Appeal – Tort Law – Practice and Procedure

Telezone's application for a telecommunications licence was rejected by Industry Canada. Although Telezone did not seek to overturn or invalidate this administrative decision, it subsequently brought a related civil action for damages against the Federal Crown on a number of grounds. In its defence, the Crown asserted that an action could only be brought following an application for judicial review of the subject decision, based on *Canada v. Grenier*, 2005 FCA 348. The Supreme Court ultimately rejected the expansive reading of *Grenier* put forward by the Crown and held that an action for damages could be brought against the Crown in the Ontario Superior Court without an application for judicial review in the Federal Court.

The court held that for litigants like Telezone who do not seek to overturn an administrative decision but rather seek compensation or damages flowing from that decision, requiring an application for judicial review simply imposes additional cost and delay on litigants. Imposing judicial review as a preliminary step was inappropriate. The court emphasized the clear doctrinal distinction between the Crown's liability in tort or contract as the result of an administrative decision and the validity of the underlying administrative decision.

The court also noted that any derogation from the jurisdiction of the Superior Courts requires clear and explicit language. The court held that the Superior Court's jurisdiction has not been ousted by statute, and found that the Superior Court's jurisdiction was in fact affirmed by s. 17 of the Federal Courts Act, which provides for the concurrent jurisdiction of the Superior Courts and the Federal Court for claims against the Crown. The court emphasized that the statutory scheme as a whole, and particularly the brief 30-day limitation period for seeking judicial review in the Federal Court, underscored that judicial review was not meant to be a gate keeping mechanism for civil claims against the Crown.

The court also noted that if there are genuine concerns regarding collateral attack, the doctrine can be raised as a defence (as could the defence of statutory authority), but it held the existence of such concerns do not deprive the Superior Court of jurisdiction. The court, furthermore, suggested a claim like that of Telezone's would be unlikely to be found to be a collateral attack given the nature of the claim and given the statutory context. The court also

rejected the argument that concerns about “artful pleading” warranted limiting the jurisdiction of the Superior Court over such claims.

A number of other cases involving actions brought against the Crown that were subject to similar jurisdictional objections were also permitted to proceed without an application for judicial review being brought to the Federal Court, based on the Telezone analysis.

See:

Canada (Attorney General) v. McArthur, 2010 SCC 63;

Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada, 2010 SCC 66;

Manuge v. Canada, 2010 SCC 67;

Nu-Pharm Inc. v. Canada (Attorney General), 2010 SCC 65; and

Parrish & Heimbecker Ltd. v. Canada (Agriculture and Agri-Food), 2010 SCC 64.

* Mark Edelstein is an Associate at WeirFoulds LLP (www.weirfoulds.com)