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Suing a Federal Entity Simplified: SCC

The Supreme Court of Canada has ruled in *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62 (and related cases *Manuge*, *Canadian Food Inspection Agency*, McArthur, Parrish, and Nu-Pharm) that judicial review is not a necessary precursor to a claim for damages against a federal entity. The court rejected the Attorney General's argument that an action for damages is a collateral attack prohibited under s.18 of the *Federal Courts Act.* Characterizing *Telezone* as an appeal "fundamentally about access to justice," the court found:

> People who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize unnecessary costs and complexity. The court's approach should be practical and pragmatic with that objective in mind.
>
> If a claimant seeks to set aside the order of a federal decision maker, it will have to proceed by judicial review, as the *Grenier* court held. However, if the claimant is content to let the order stand and instead seeks compensation for alleged losses (as here), there is no principled reason why it should be forced to detour to the Federal Court for the extra step of a judicial review application (itself sometimes a costly undertaking) when that is not the relief it seeks. Access to justice requires that the claimant be permitted to pursue its chosen remedy directly and, to the greatest extent possible, without procedural detours. (paras. 18 and 19)

Competitive Activity Acceptable Commercial Behaviour: MBCA

Courts should be slow to expand the scope of the economic torts, especially in the commercial world where competitive activity is to be encouraged, according to the court in *Johnson v. BFI Canada Inc.*, 2010 MBCA 101. The court overturned the lower court decision which had found BFI liable to Johnson for intentionally interfering with its contract with a third party (a client both parties were vying to serve in the waste management business). Finding that the trial judge had

mischaracterized the cause of action as one involving intentional interference with economic or contractual relations, rather than inducing breach of contract as pled and argued, and that he had therefore neglected to consider the defence of justification, the Court of Appeal made a fresh assessment of the evidence on this issue. It found BFI's actions in negotiating a renewal contract to be justified:

> BFI was attempting no more than to preserve, protect and defend its existing contractual relationship with its customer, and the rights accruing to it thereunder. Its actions were proactive, as were Johnson's. BFI acted in a manner consistent with the protection of its existing proprietary and contractual rights, and its purpose was to preserve those rights. Its conduct was acceptable commercial behaviour. It did not cross Robertson J.A.'s Rubicon. (para.101)

Security for Costs: MBQB

Two recent Q.B. decisions involving out of province plaintiffs consider whether it is just to order security for costs. In both cases the court declines to make an order. In *Dr. Marek Los v. Myers Weinberg LLP*, 2010 MBQB 260 the court found that it would not "serve the interests of justice" to order security for costs against the non-resident plaintiff due to the nature of his application (which involves conflict of interest allegations against a lawyer/firm). In *Wood v. Julien et al*, 2010 MBQB 257 the court declined to order security for costs against the impecunious plaintiff who had been moved out of province by the federal government, a defendant in the slip and fall case. The court noted that the move to a different military base also limited the plaintiff's ability to seek security for costs under s.56.09 of the Queen's Bench Rules against one of the other defendants who had similarly been moved out of province by the government.

Recommended Reading

In the Slaw article *Just Plain Wrong* author David Cheifetz questions the reasons, not the results, in *Clements (Litigation Guardian of) v. Clements*, 2010 BCCA 581, a recent BCCA decision involving the *Resurfice* material contribution test. His earlier article, *A Little Help From My Friends (and Others) Please* also deals with the *Resurfice* decision, which, as noted below, is on the program agenda at the upcoming MBA Mid-Winter.

Tariff Amendments in Force

Significant Amendments to Court of Queen's Bench Tariffs "A" and "B" and Related Rules will come into force on January 1, 2011. The changes are found in MR 139/2010 and MR 140/2010 and the transitional provisions are found in QB Rule 1.02(2). Recoverable amounts have increased significantly since the last revision in 1989 and wording and organizational changes have also been made. Tariff "A" is now called Tariff of Recoverable Costs, and Tariff "B" is the Tariff of Disbursements.

Winter CPD - LSM

These upcoming continuing professional development programs may be of interest to litigators:

- Update from the JADR Review Committee - The Judicially Assisted Dispute Resolution Review Committee has completed its review of the JADR program and will present its results at this lunch time session on January 13, 2011 at the Law Society classroom. Join Justices Suche, Little and Spivak for this informative overview of their recommendations.
- Gain the Edge! Negotiation Strategies for Lawyers - This day long seminar, presented by Martin Latz, negotiation expert and author of *Gain the Edge! Negotiating to Get What You Want*, received rave reviews when it was presented in 2009. Attendees will learn to approach negotiations with a strategic mindset, a critical skill that benefits inexperienced and seasoned negotiators alike. The program will be held February 11, 2011 at the Law Society classroom. Register by January 15th to take advantage of the early bird discount.

MBA Mid-Winter 2011

The 2011 Mid-Winter Meeting will take place January 20-22, 2011 at the Fairmont Winnipeg,

with professional development programs on January 21. Topics that may interest litigators include:

- Developments in Cause-in-Fact since ***Resurfice*** - Professor Russell Brown will discuss the *Resurfice* test and explore potential solutions to the problem of scientific uncertainty from 9:30-11:30 a.m.;

- Aboriginal Law Primer - What Every Practitioner Should Know - this session will review how aboriginal law overlaps with other areas of practice. It also runs from 9:30-11:30 a.m.;

- An Overview of Cost Awards - this refresher on cost awards is timely given the changes to the tariff coming into effect January 2011. This program takes place from 2:00-4:00 p.m.

Contact the Bar Association for further details.

Online CBA Programming

The CBA Skilled Lawyer Series - Litigation Stream will present the program Conducting and Defending a Discovery on February 7, 2011 starting at 11:00 a.m. Topics covered include strategies for getting the most from witnesses and responding to unprofessional conduct from opposing counsel.