CITATION: TeleZone Inc. v. Attorney General (Canada), 2008 ONCA 892

DATE: 20081224
DOCKET: C48185, C46569, C47300 & C46073

COURT OF APPEAL FOR ONTARIO

Laskin, Borins and Feldman JJ.A.

C48185

BETWEEN

TeleZone Inc.

Plaintiff (Respondent)

and

The Attorney General of Canada

Defendant (Appellant)

Thomas L. James, Karen Lovell and Dale Yurka for the appellant

Peter F.C. Howard, Eliot N. Kolers and Patrick J. Monahan for the respondent

Heard: October 20, 2008

On appeal from the order of Justice Geoffrey B. Morawetz of the Superior Court of Justice dated December 5, 2007, with reasons reported at (2007), 88 O.R. (3d) 173.

C46569

AND BETWEEN

G-Civil Inc.

Plaintiff (Appellant)

and

Her Majesty the Queen in Right of Canada, as represented by the Minister of Public Works and Government Services Canada

Defendant (Respondent)

Marc C. Doucet for the appellant

Richard Casanova and Robert Mackinnon for the respondent

On appeal from the order of Justice Denis J. Power of the Superior Court of Justice dated December 22, 2006, with reasons reported at (2006), 58 C.L.R. (3d) 86.

C47300

AND BETWEEN

Fielding Chemical Technologies Inc.

Plaintiff (Respondent)

and

The Attorney General of Canada

Defendant (Appellant)

Patrick Bendin for the appellant

John Terry and Andrew Finkelstein for the respondent

On appeal from the order of Justice Ellen Macdonald of the Superior Court of Justice dated May 25, 2007, with reasons reported at (2007), 30 C.E.L.R. (3d) 281.

C46073

AND BETWEEN

Michiel McArthur, Margaret Wilkinson and Mikkala Wilkinson, a minor by her Litigation Guardian Margaret Wilkinson

Plaintiff (Appellant)

and

The Attorney General of Canada and Her Majesty the Queen in Right of the Province of Ontario as represented by the Solicitor General for the Province of Ontario and James Blackler, also known as Jim Blackler

Defendants (Respondents)

John A. Ryder-Burbidge for the appellant

Derek Rasmussen for the respondents

On appeal from the order of Justice Kenneth E. Pedlar of the Superior Court of Justice dated September 21, 2006.

Borins J.A.:

I

[1] These are four appeals that were argued consecutively. Each appeal raises the same issue – whether the jurisdiction over each plaintiff's claim lies in the Superior Court of Ontario, or in the Federal Court. In each case, the plaintiff commenced its claim in the Superior Court. Collectively, the claims were for damages for false imprisonment, breach of *Charter* rights, breach of contract, tort and misfeasance in public office. Relying on *Grenier v. Canada (Attorney General)* 2005, 262 D.L.R. (4th) 337 (F.C.A.), and s. 18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (*FCA*), the Crown asserted that jurisdiction lay in the Federal Court because an essential element of each plaintiff's claim

involved an attack on the decision of a federal administrative board or tribunal. Applying *Grenier*, the Crown's position was that it was necessary for the plaintiff to first seek a prerogative remedy in the Federal Court since under s. 18(1) of the *FCA* that court has exclusive jurisdiction to grant prerogative remedies in respect to decisions of federal tribunals. Should the plaintiff succeed in the Federal Court, it could then commence a claim for damages in the Superior Court (or in the Federal Court, which under s. 17 of the *FCA* has concurrent jurisdiction). In the courts below, two judges held that the Federal Court had jurisdiction over the plaintiff's claim, while two judges held on a rule 21.01 motion, that it was not plain and obvious that the Superior Court did not have jurisdiction.

II

[2] The relevant legislation is as follows:

> *Federal Courts Act*, R.S.C. 1985, c. F-7:
>
> 2. (1) In this Act,
>
> …
>
> "federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*;
>
> 17. (1) Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown.
>
> (2) Without restricting the generality of subsection (1), the Federal Court has concurrent original jurisdiction, except as otherwise provided, in all cases in which

(a) the land, goods or money of any person is in the possession of the Crown;

(b) the claim arises out of a contract entered into by or on behalf of the Crown;

(c) there is a claim against the Crown for injurious affection; or

(d) the claim is for damages under the *Crown Liability and Proceedings Act.*

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(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

(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.

(2) The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of *habeas corpus ad subjiciendum*, writ of *certiorari*, writ of prohibition or writ of *mandamus* in relation to any member of the Canadian Forces serving outside Canada.

(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.

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50 (*CLPA*):

21. (1) In all cases where a claim is made against the Crown, except where the Federal Court has exclusive jurisdiction with respect to it, the superior court of the province in which the claim arises has concurrent jurisdiction with respect to the subject-matter of the claim.

Corrections and Conditional Release Regulations, S.O.R./92-620:

19. Where an inmate is involuntarily confined in administrative segregation, the institution head or a staff member designated in accordance with paragraph 6(1)(c) shall give the inmate notice in writing of the reasons for the segregation within one working day after the inmate's confinement.

20. Where an inmate is involuntarily confined in administrative segregation by a staff member designated in accordance with paragraph 6(1)(c), the institutional head shall review the order within one working day after the confinement and shall confirm the confinement or order that the inmate be returned to the general inmate population.

21. (1) Where an inmate is involuntarily confined in administrative segregation, the institutional head shall ensure that the person or persons referred to in section 33 of the Act who have been designated by the institutional head, which person or persons shall be known as a Segregation Review Board, are informed of the involuntary confinement.

(2) A Segregation Review Board referred to in subsection (1) shall conduct a hearing

(a) within five working days after the inmate's confinement in administrative segregation; and

(b) at least once every 30 days thereafter that the inmate remains in administrative segregation.

(3) The institutional head shall ensure that an inmate who is the subject of a Segregation Review Board hearing pursuant to subsection (2)

(a) is given, at least three working days before the hearing, notice in writing of the hearing and the information that the Board will be considering at the hearing;

(b) is given an opportunity to be present and to make representations at the hearing; and

(c) is advised in writing of the Board's recommendation to the institutional head and the reasons for the recommendation.

22. Where an inmate is confined in administrative segregation, the head of the region or a staff member in the regional headquarters who is designated by the head of the region shall review the inmate's case at least once every 60 days that the inmate remains in administrative segregation to determine whether, based on the considerations set out in section 31 of the Act, the administrative segregation of the inmate continues to be justified.

23. Where an inmate is voluntarily confined in administrative segregation by a staff member designated in accordance with paragraph 6(1)(c), the institutional head shall review the order within one working day after the confinement and shall confirm the confinement or order that the inmate be returned to the general inmate population.

III

Jurisdiction

[3] The term jurisdiction has many meanings. In determining jurisdiction, a court may be deciding whether it has power to adjudicate over the person of the defendant or the subject matter of the claim asserted by the plaintiff in its statement of claim. As well, a court may be deciding whether the tribunal has territorial jurisdiction, whether the amount claimed is within the tribunal's monetary jurisdiction, or whether the person sitting as the tribunal has jurisdiction to determine the plaintiff's claim. In these appeals, the concern is whether the Ontario Superior Court has jurisdiction over the subject matter of each of the plaintiffs' claims. Parties, by consent, waiver or any other manner, cannot confer jurisdiction over a tribunal to try a case where none exists. On the other hand, where jurisdiction to adjudicate a claim exists, as the authorities explain, it takes clear legislative language to remove jurisdiction. For example, in *Idziak v. Canada* (*Minister of Justice*), [1992] 3 S.C.R. 631 at p. 651, Cory J. stated: "The *Federal Court Act* does not remove the historic and long standing jurisdiction of provincial superior courts to hear an application for a writ of *habeas corpus*. To remove that jurisdiction from the superior courts would require clear and direct statutory language".

[4] Jurisdiction is the power of the court to render an enforceable judgment. Therefore, for the purpose of these appeals, jurisdiction relates to whether the Ontario Superior Court has the power to adjudicate the claim, or claims pleaded in the four statements of claim. As there are not concepts such as partial, inchoate or contingent jurisdiction, either the Superior Court has jurisdiction, or it does not. Nothing in the *Courts of Justice Act*, R.S.O. 1990, c. C.43 or the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, in any way precludes the Superior Court from having jurisdiction to hear any claim that is substantively adequate. This is because, as I will explain, the superior court is a court of general jurisdiction having inherent jurisdiction to adjudicate claims consisting of virtually any subject matter.

[5] Because all of the controversies arising within the territorial jurisdiction of the province of Ontario are cognizable in the Superior Court, questions of the competence of provincial superior courts to adjudicate a particular kind of case rarely arise. However, there are two common exceptions that give rise to motions attacking the jurisdiction of the superior court. The first is in respect to an arbitration clause contained in a contract between the parties. The other arises from cases where there is a statutory code that governs enabling the plaintiff to recover the remedy that he seeks in his claim in another forum. Perhaps the leading example of the second exception is *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, which I will discuss subsequently.

[6] It is helpful to refer to two cases where the court discussed the jurisdiction of the former Supreme Court of Ontario, the equivalent of the present Superior Court. In *Re*

Michie Estate and City of Toronto et al., [1968] 1 O.R. 266 (H.C.J.), at pp. 268-69, Stark J. stated:

> It appears clear that the Supreme Court of Ontario has broad universal jurisdiction over all matters of substantive law *unless the Legislature divests from this universal jurisdiction by legislation in unequivocal terms*. The rule of law relating to the jurisdiction of superior Courts was laid down at least as early as 1667 in the case of *Peacock v. Bell and Kendall* (1667), 1 Wms. Saund. 73 at p. 74, 85 E.R. 84:…And the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specifically appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged.
>
> Probably the leading case on this principle of broad universal jurisdiction was the case of *Board v. Board*, 48 D.L.R. 13, [1919] A.C. 956, [1919] 2 W.W.R. 940, where the Privy Council dealt with the jurisdiction in divorce matters of the Supreme Courts in the North West Territories and Alberta. At pp. 17-9 [D.L.R.] Viscount Haldane laid down the law in this language:
>
> > But the matter does not rest here. The right to divorce had, before the setting up of a Supreme and Superior Court of Record in Alberta, been introduced into substantive law of the Province. Their Lordships are of the opinion that, in the absence of any explicit and valid legislative declaration that the Court was not to exercise jurisdiction in divorce, that Court was bound to entertain and to give effect to proceedings for making that right operative. Had the Legislature of the Province enacted that its tribunals were not to give effect to the right which the Dominion Parliament had conferred in the exercise of its exclusive jurisdiction, a serious question would have arisen as to whether such an enactment was valid. But not only is there no such enactment but, on the mere

> question of construction of the language of the Provincial Act of 1907, their Lordships are of opinion that a well-known rule makes it plain that the language there used ought to be interpreted as not excluding the jurisdiction. If the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King's Courts of justice. *In order to oust jurisdiction, it is necessary, in the absence of a special law excuding it altogether, to plead that jurisdiction exists in some other Court*. [Emphasis added.]

[7] Subsequently, at p. 270, Stark J. reproduced the following statement of Lord Mansfield in *Mostyn v. Fabrigas* (1774), 1 Cowp. 161 at p. 172: "In every plea to the jurisdiction, you must state another jurisdiction… ."

[8] The other case is *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd. et al.*, [1972] 2 O.R. 280 (C.A.). The motion judge held that he did not have jurisdiction to grant an order expunging an assignment of an agreement of purchase and sale from the title of the plaintiff and to declare that the defendants had no interest in the land. The Court of Appeal concluded that the motion judge was in error. At p. 282, Brooke J.A. stated:

> As a superior Court of general jurisdiction, the Supreme Court of Ontario has all of the powers that are necessary to do justice between the parties. Except where provided specifically to the contrary, the Court's jurisdiction is unlimited and unrestricted in substantive law in civil matters.

Brooke J.A. was of the view that no cause should fail for want of a remedy.

IV

Weber v. Ontario Hydro

[9] *Weber* is an example of a case in which the Superior Court had jurisdiction over the plaintiff's claim, but the jurisdiction was ousted by s. 45(1) of the *Labour Relations Act*, R.S.O. 1990, c. L.2 which provides that "all differences between the parties arising from the interpretation, application, administration or alleged violation of [a collective] agreement" must be resolved by arbitration. As labour relations legislation provides a code governing all aspects of labour relations, and the plaintiff's dispute was within the ambit of the collective agreement the majority of the Supreme Court determined that it

could be resolved only through arbitration. As McLachlin J. stated for the majority at para. 43:

> Where the dispute, regardless of how it may be characterized legally, arises under the collective agreement, then the jurisdiction to resolve it lies exclusively with the labour tribunal and the courts cannot try it.

In her view, to allow concurrent jurisdiction in the courts would be to undermine the purpose of the legislation. She said at para. 44 that "what matters is not the legal characterization of the claim, but whether the facts of the dispute fall within the ambit of the collective agreement."

[10] At para. 67, McLachlin J. concluded :

> I conclude that mandatory arbitration clauses such as s. 45(1) of the Ontario *Labour Relations Act* generally confer exclusive jurisdiction on labour tribunals to deal with all disputes between the parties arising from the collective agreement. The question in each case is whether the dispute, viewed with an eye to its essential character, arises from the collective agreement. This extends to *Charter* remedies, provided that the legislation empowers the arbitrator to hear the dispute and grant the remedies claimed. The exclusive jurisdiction of the arbitrator is subject to the residual discretionary power of courts of inherent jurisdiction to grant remedies not possessed by the statutory tribunal.

[11] Therefore, in *Weber*, it was the essential character of the dispute that placed it within the scope of the collective agreement and thus removed the jurisdiction of the court to resolve the dispute. What was important to the Supreme Court in reaching this conclusion was that the arbitrator had the power to grant essentially the same remedies as the Court could grant.

[12] At paras. 14-18 of *Gaignard v. Canada (Attorney General)* (2003), 67 O.R. (3d) 611 (C.A.), Goudge J.A. provided the following helpful interpretation of *Weber*:

> The *Weber* principle requires a determination of when a particular dispute is within the exclusive jurisdiction of arbitration under the collective agreement and therefore is beyond the reach of court action. Binnie J. articulated the general test for this determination in *Goudie v. Ottawa (City)*, 2003 SCC 14, 223 D.L.R. (4th) 395, at para. 23:

> Subsequent cases have confirmed that if the dispute between the parties in its "essential character" arises from the interpretation, application, administration or violation of the collective agreement, it is to be determined by an arbitrator appointed in accordance with the collective agreement, and not by the courts.

Weber and cases that have followed it have provided guidance on the considerations for assessing "the essential character" of a particular dispute to determine if the exclusive jurisdiction principle applies and therefore if it must be resolved by arbitration.

First, as McLachlin J. said in *Weber*, at p. 955 S.C.R., one must look to the facts giving rise to the dispute rather than the legal characterization of the wrong said to be manifested by those facts. The facts must engage the rights and obligations in the collective agreement in order to be arbitrated.

The second consideration is the corollary of the first, namely (in the language of McLachlin J., at p. 956 S.C.R. of *Weber*), the ambit of the collective agreement. The language chosen by the parties must clearly create rights and obligations that extend to these facts, either expressly or by implication.

The third consideration is whether the arbitration process provided by the collective agreement *can furnish an effective remedy for the dispute. The remedy need not be identical to that which the court would provide, but it must be responsive to the wrong complained of. The arbitration process does not acquire exclusive jurisdiction if the result is a real deprivation of any ultimate remedy*. McLachlin J. put this point as follows in *Weber* at pp. 958-959 S.C.R.:

> It might occur that a remedy is required which the arbitrator is not empowered to grant. In such a case, the courts of inherent jurisdiction in each province may take jurisdiction. This Court in *St. Anne Nackawic* confirmed that the New Brunswick Act did not oust the residual

> inherent jurisdiction of the superior courts to grant injunctions in labour matters (at p. 724). Similarly, the Court of Appeal of British Columbia in *Moore v. British Columbia* (1988), 50 D.L.R. (4th) 29, at p. 38, accepted that the court's residual jurisdiction to grant a declaration was not ousted by the British Columbia labour legislation, although it declined to exercise that jurisdiction on the ground that the powers of the arbitrator were sufficient to remedy the wrong and that deference was owed to the labour tribunal. What must be avoided, to use the language of Estey J. in *St. Anne Nackawic* (at p. 723), is a "real deprivation of ultimate remedy". [Emphasis added.]

[13] Other recent examples, of cases in which the jurisdiction of the Superior Court was ousted as the result of the provisions of a statute are as follows:

> (1) *Fraser v. Beach* (2005), 75 O.R. (3d) 383 (C.A.). The *Tenant Protection Act, 1997*, S.O. 1997, c. 24, expressly takes away the jurisdiction of the Superior Court to order a tenant to vacate a rental premises.
>
> (2) *Liberty Mutual Insurance Co. v. Fernandes* (2006), 82 O.R. (3d) 524 (C.A.). Provisions of the *Insurance Act*, R.S.O. 1990, c. I.8, remove the jurisdiction of the Superior Court to determine whether an insured person sustained catastrophic impairment as the result of a motor vehicle accident.
>
> *(3)* *Beiko v. Hotel Dieu Hospital St. Catharines*, 2007 ONCA 860 CanLII. The *Public Hospitals Act* R.S.O. 1990, c. P-40 ousts the jurisdiction of the Superior Court to determine whether a hospital can reduce a doctor’s operating room allocation.

[14] There are also cases where it has been determined that the Superior Court does not have jurisdiction on the ground that there is no real and substantial connection between the relief claimed by the plaintiff and the jurisdiction of the Superior Court. See, for example, *Khan Resources Inc. v. W.M. Mining Co., LLC* (2006), 79 O.R. (3d) 411 (C.A.).

V

The *Grenier* Case

[15] In *Grenier*, the plaintiff, who had been an inmate in a federal penitentiary, sued the Crown in the Federal Court pursuant to s. 17 of the *FCA* for general and exemplary damages arising from the decision of an administrative head to place him in administrative segregation, or solitary confinement, for a period of 14 days. The action was allowed in part by the Prothonotary who ordered the Crown to pay the plaintiff $3,000 in compensatory damages and $2,000 in exemplary damages. On appeal to the Federal Court, the decision of the Prothontary was upheld. The Crown successfully appealed to the Federal Court of Appeal. Speaking for that court, Létourneau J.A. held that it was necessary to first successfully attack the administrative segregation decision by way of judicial review under s. 18 of the *FCA*, before bringing an action for damages. He, therefore, dismissed the plaintiff's claim for want of jurisdiction.

[16] The institution in which the plaintiff was an inmate was administered by the Correctional Service of Canada under the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (*CCRA*), and the Regulations proclaimed under the Act. The plaintiff did not challenge the decision of the institutional head within 30 days of learning of it, as required by s. 18.1(2) of the *FCA*. Instead, three years after the decision, he commenced his claim for damages in the Federal Court. Sections 19-23 of the Regulations under the *CCRA* deal with reviews of administrative segregation orders.

[17] Létourneau J.A. applied the view of Desjardins J. in *Canada v. Tremblay*, [2004] 4 F.C.R. 165 (C.A.) (*Tremblay* 2004); leave to appeal refused, [2004] 3 S.C.R. xiii, that a litigant who seeks to impugn a federal agency's decision is not free to choose between a judicial review proceeding and an action for damages. He must first proceed by judicial review in order to have the decision invalidated.

[18] Létourneau J.A. added at paras. 27, 31, 33 and 35:

> To allow a proceeding under section 17, whether in the Federal Court or in the provincial courts, in order to have decisions of federal agencies declared invalid, is also to allow an infringement of the principle of finality of decisions and the legal security that this entails.
>
> . . .
>
> The principle of the finality of decisions likewise requires that in the public interest, the possibilities for indirect challenges of an administrative decision be limited and circumscribed,

> especially when Parliament has opted for a procedure for direct challenge of the decision within defined parameters.
>
> . . .
>
> It is especially important not to allow a section 17 proceeding as a mechanism for reviewing the lawfulness of a federal agency's decision when this indirect challenge to the decision is used to obviate the mandatory provisions of subsection 18(3) of the *Federal Courts Act.*
>
> . . .
>
> In conclusion, the respondent could not indirectly challenge the lawfulness of the decision, by way of an action for damages under section 17, of the institutional head ordering on May 29, 1998, that he placed in administrative segregation. In accordance with section 18, he had to apply directly to have this decision nullified or invalidated by way of judicial review.

[19] It is interesting to note that in an earlier case Létourneau J.A. came to the opposite conclusion. In *Canada v. Zarzour* (2000), 153 C.C.C. (3d) 284 (F.C.A.), leave to appeal refused, [2001] 2 S.C.R. xiv, at paras. 48 and 49, he wrote:

> It is necessary, I think, to adopt an utilitarian approach to this, and favour the proceeding that can be used to eliminate or repair the harm resulting from the decision that was rendered. For example, there is no use in requiring that an inmate who has already served his 15-day segregation period seek to have the decision that forced this on him set aside by way of judicial review. However, when a decision is still operative, as is the Board decision in this case imposing a prohibition on contact as a condition of release, it is not only useful but necessary to proceed by judicial review in order to have it quashed. Otherwise, both the decision and its effects will drag on, with possible aggravation of the harm during the period in which the action in damages follows its course.

> It was this pragmatic approach that was rightly adopted by Prothonotary Hargrave in *Shaw v. Canada* (1997), 134 F.T.R. 128. At paragraph 23 of his decision, he writes:
>
> > I do not see that a plaintiff must, in all circumstances, first bring an application for judicial review and only then, if successful, bring an action for damages. All the more so when a declaration would serve no current purpose. Further, this is not a situation in which the procedures the plaintiff employs are alternatives leading to one end: the remedies are very different. Finally, where there are several approaches or procedures a court should impose the least intrusive remedy capable of providing a cure. In summary, I can see no utility in forcing the plaintiff to try to obtain declaratory relief, concerning something that happened over a year ago, in order to then begin a second piece of litigation by which to claim damages.

[20] In para. 16 of *Grenier*, Létourneau J.A. disavowed what he had written in *Zarzour* on the ground that "a decision ordering administrative segregation continues to be effective long after the period of detention in segregation has been served".

VI

Ontario v. Ron Engineering and Construction (Eastern) Ltd.

[21] It is also helpful to refer to *Ontario v. Ron Engineering and Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111, and *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1991] 1 S.C.R. 619. As Iacobucci J. pointed out at para. 15 of *M.J.B. Enterprises,* "any discussion of contractual obligations and the law of tendering must begin" with *Ron Engineering*. That case concerned whether the owner, which was the Ontario Water Resources Commission, had to return the contractor's tender deposit of $150,000 in circumstances where the contractor had omitted a substantial component in calculating its tender price, and, upon realizing its error, asked to withdraw the tender without penalty. Although the terms of the tender documents provided for the forfeiture of the deposit in these circumstances, the contractor sued to recover the deposit. As the tender call conditions were not met, the deposit was not recoverable by the contractor.

[22] In *Ron Engineering*, Estey J. provided an analysis of the law of contract in the tendering process. As the court in *M.J.B. Enterprises* did not agree with the entirety of

Estey J.'s analysis, I will refer to the relevant passages from paras. 16, 17 and 18 of the reasons of Iacobucci J. in that case:

> Estey J., for the Court, held that a contract arose upon the contractor's submission of the tender. This contract, which Estey J. termed "Contract A", was to be distinguished from the construction contract to be entered into upon the acceptance of one of the tenders, which Estey J. termed "Contract B". The terms of Contract A were governed by the terms and conditions of the tender call, which included that the contractor submit a deposit that could only be recovered under certain conditions.
>
> . . .
>
> This Court therefore held that it is possible for a contract to arise upon the submission of a tender and that the terms of such a contract are specified in the tender documents. The submissions of the parties in the present appeal appear to suggest that *Ron Engineering* stands for the proposition that Contract A is always formed upon the submission of a tender and that a term of this contract is the irrevocability of the tender; indeed, most lower courts have interpreted *Ron Engineering* in this manner. There are certainly many statements in *Ron Engineering* that support this view. However, other passages suggest that Estey J. did not hold that a bid is irrevocable in all tendering contexts and that his analysis was in fact rooted in the terms and conditions of the tender call at issue in that case.
>
> . . .
>
> Therefore it is always possible that Contract A does not arise upon the submission of a tender, or that Contract A arises but the irrevocability of the tender is not one of its terms, all of this depending upon the terms and conditions of the tender call. To the extent that *Ron Engineering* suggests otherwise, I decline to follow it.
>
> I also do not wish to be taken to endorse Estey J.'s characterization of Contract A as a unilateral contract in *Ron*

> *Engineering*. His analysis has been strongly criticized: see R. S. Nozick, Comment on *The Province of Ontario and the Water Resources Commission v. Ron Engineering and Construction (Eastern) Ltd.* (1982), 60 *Can. Bar Rev.* 345, at p. 350; J. Swan, Comment on *The Queen v. Ron Engineering & Construction (Eastern) Ltd.* (1981), 15 *U.B.C. L. Rev.* 447, at p. 455; G. H. L. Fridman, "Tendering Problems" (1987), 66 *Can. Bar Rev.* 582, at p. 591; J. Blom, "Mistaken Bids: The Queen in Right of Ontario v. Ron Engineering & Construction Eastern Ltd." (1981-82), 6 *Can. Bus. L.J.* 80, at p. 91; S. M. Waddams, *The Law of Contracts* (3rd ed. 1993), at para. 159. However, each case turns on its facts and since the revocability of the tender is not at issue in the present appeal, I see no reason to revisit the analysis of the facts in *Ron Engineering*.

[23] In my view, the significant aspect about *Ron Engineering* and *M.J.B. Enterprises* is that although they describe the legal parameters of tendering, they do so in the context of the law of contract. *Ron Engineering*, in particular, makes it clear that the law of contract and the law of tender is uniform. There is not a separate law depending on whether one of the tendering parties is the government, and another law if the government is not involved.

VII

[24] I will now proceed to review the facts and the findings of the four appeals.

TeleZone Inc. v. Canada

1. Overview

[25] The Attorney General of Canada (the Crown) appeals from an order refusing the Crown's motion pursuant to rule 21.01(3) of the *Rules of Civil Procedure* to have the action of the respondent, TeleZone Inc. (TeleZone), dismissed.

[26] In 1995, the Ministry of Industry, the successor of which is Industry Canada (collectively, Industry Canada), rejected TeleZone's application for a licence to provide personal communication services (PCS) in Canada. In 1999, TeleZone brought an action in the Superior Court against the Crown for damages for breach of contract, or in the alternative, for negligence, alleging that Industry Canada did not apply the licensing criteria fairly and in good faith to TeleZone's application. In 2007, the Crown brought a motion to dismiss the action on the ground that the Ontario Superior Court of Justice does not have jurisdiction to hear it. The Crown argued that in declining TeleZone's application for a licence, the Minister of Industry Canada (Minister) was acting as a

federal board, commission, or other tribunal under s. 2(1) of the *FCA*, and as such, the Minister's decision could only be challenged by way of an application for judicial review in the Federal Court under ss. 18 and 18.1 of the *FCA*. Morawetz J. refused the motion.

2. Background

[27] The facts set out here are based on those pled in TeleZone's Amended Statement of Claim, which are to be taken as true or at least capable of proof in a motion under Rule 21.

[28] TeleZone is a successor corporation to a corporation formed in 1992 for the purpose of obtaining a licence from Industry Canada to provide personal communication services (PCS) in Canada.

[29] Industry Canada encouraged TeleZone's efforts to launch a PCS business in Canada. In particular, in the fall of 1994, Industry Canada represented to TeleZone that applicants who had honoured previously-granted licences, as TeleZone had with respect to its previously-granted licence to provide personal cordless telephone services, would be advantaged in the application process for PCS licences.

[30] In June 1995, Industry Canada issued a call for PCS licence applications, and released a document setting out the policy and procedural framework within which potential service providers could submit applications for a PCS licence (Policy Statement). The Policy Statement provided that Industry Canada could grant up to six PCS licences.

[31] Articles 9.4 through 9.5.6 of the Policy Statement set out the requirements and criteria for each stage of the application process. Article 9.5 provided that Industry Canada would evaluate applications based on the criteria described in the Policy Statement, and that each application should clearly reflect those criteria. Industry Canada did not reserve the right to evaluate applications based on criteria other than those set out in the Policy Statement.

[32] In September 1995, TeleZone submitted its application for a PCS licence to Industry Canada, in preparation of which it incurred costs of approximately $20,000,000.00. In December 1995, Industry Canada announced its decision regarding the PCS licence applications. There were four successful applicants, but TeleZone was not among them.

[33] TeleZone issued its statement of claim in the Superior Court in 1999. It seeks damages in the amount of $250,000,000.00. TeleZone pleads that it was either an express or implied term of the Policy Statement that Industry Canada would only issue fewer than six licences where the applications did not meet the criteria set out in the Policy Statement. TeleZone alleges that its application was superior to those of the four applicants who were successful. TeleZone further alleges that its application satisfied all of the criteria set out in the Policy Statement, and that if those criteria had been applied to

TeleZone's application in a fair manner, TeleZone would have been granted a PCS licence. TeleZone pleads that Industry Canada departed from the criteria set out in the Policy Statement and considered factors which were not disclosed to TeleZone, and which were not contained in the Policy Statement.

[34] TeleZone alleges that an implied contract arose between itself and Industry Canada as a result of Industry Canada's call for applications for PCS licences and TeleZone's submission of an application in compliance with the call. The implied contract imposed an obligation on Industry Canada to act in good faith and treat all applicants fairly. In the alternative, TeleZone alleges that in incurring expenses exceeding $20,000,000.00, it relied on the understanding that Industry Canada would proceed in good faith and in accordance with the Policy Statement. In its statement of claim, TeleZone does not seek to impugn the Minister's decision to award the licenses.

3. The Crown's Rule 21.01(3) Motion

[35] The Crown issued its statement of defence on June 1, 1999. The action was set down in January 2007 for a trial to commence in January 2008. In July 2007, the Crown amended its statement of defence, and in August 2007, it brought a motion pursuant to rule 21.01(3) to dismiss the action on the ground that the Ontario Superior Court of Justice does not have jurisdiction over the subject matter of the action.

[36] According to the Crown, the Minister had discretionary statutory authority to issue PCS licences, pursuant to the *Radiocommunication Act*, R.S.C. 1985, c. R-2, and its associated regulations. As such, in making a decision to grant licences, the Minister was acting as a federal board, commission or other tribunal, as defined in s. 2 of the *FCA*. The Federal Court has exclusive jurisdiction to review a decision of a federal board, commission or other tribunal under s. 18 of the *FCA*.

[37] The Crown submits that TeleZone did not seek judicial review in the Federal Court of the Minister's licensing decision, but instead, by bringing an action for breach of contract or damages, TeleZone seeks to have the Ontario Superior Court effectively review the Minister's decision.

[38] The Crown further submits that although TeleZone's allegations are framed in breach of contract and negligence, they constitute a collateral attack on the validity of the Minister's licensing decision.

[39] Finally, the Crown submits that TeleZone can only bring an action for damagees after having first been successful on a judicial review of the decision.

4. The Motion Judge's Reasons

[40] Before the motion judge, the Crown relied on a recent line of cases in support of its position that judicial review is a condition precedent to an action for damages in this case: *Grenier*; *Tremblay* 2004; *Tremblay v. Canada* (2005), 280 F.T.R. 133 (F.C.T.D.),

affirmed (2006), 352 N.R. 367 (F.C.A.); *McArthur v. Attorney General of Canada* (September 21, 2006), Kingston, 13720/01 (S.C.); and *G-Civil Inc. v. Canada (Minister of Public Works and Government Services)* (2006), 58 C.L.R. (3d) 86 (S.C.J.). The latter two cases are among those under appeal before this court.

[41] The Crown further submitted that the court should consider the true nature of a complaint, rather than the plaintiff's characterization of it. The true nature of TeleZone's complaint was that it did not receive a PCS licence, which was a decision of a federal board, commission, or other tribunal.

[42] TeleZone argued that it pleads genuine civil claims that are distinct from a judicial review proceeding. TeleZone does not seek an order invalidating the licences issued to the successful applicants, nor does it seek to compel the Minister to award it a licence.

[43] TeleZone further argued that damages are not a form of relief contemplated by s. 18 of the *FCA*, and thus s. 18 of the *FCA* does not limit TeleZone's right to seek damages against the Crown in the Ontario Superior Court. Instead, this action is within the scope of s. 21 of the *CLPA*, which confirms the Superior Court of Justice's concurrent jurisdiction with the Federal Court over claims against the Crown.

[44] TeleZone relied on *Authorson (Litigation Guardian of) v. Canada (Attorney General)* (2002), 58 O.R. (3d) 417, in which this court held that a similar claim did not fall within the exclusive jurisdiction of the Federal Court. This court's decision was ultimately reversed by the Supreme Court of Canada at [2003] 2 S.C.R. 40, but not on the jurisdictional issue.

[45] The motion judge, Morawetz J., followed *Authorson*, and held at para. 88 that "[t]he [Crown] has not established that it is plain and obvious that this court does not have jurisdiction to entertain TeleZone's action as pleaded."

[46] Beginning with the applicable statutory provisions, the motion judge noted that s. 21 of the *CLPA* and s. 17 of the *FCA* affirm the basic principle that the Superior Court has jurisdiction in all cases other than those for which the Federal Court has been given exclusive jurisdiction. The key to this case, though, according to the motion judge, is s. 18 of the *FCA*, which grants exclusive jurisdiction to the Federal Court 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.

[47] According to the motion judge, the Crown could not succeed on the motion, as it failed to fit TeleZone's claim within the four corners of s. 18. The Supreme Court of Canada has held that Parliament must use clear and explicit statutory language in order to vest exclusive jurisdiction in a statutory court, such as the Federal Court: *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 46. Given this, the motion judge held, at paras. 52-53, that while the explicit language of s. 18(1) of the *FCA* excludes the jurisdiction of the

superior courts of the provinces over prerogative writs, the same cannot be said for damages flowing from civil causes of action:

> Section 18(1) of the *FCA* focuses on the "relief" that is sought in the claim. The listed items in subsection (*a*) comprise the prerogative writs which, if granted, would alter or defeat the legal effect of the decision in issue. Subsection (*b*) then speaks of relief that is in the nature of the relief in subsection (*a*). The Federal Court thus has extensive supervisory jurisdiction over exercises of federal power. That court may review whether actions were consistent with the statutory or prerogative power pursuant to which they were taken, and if they were not, that court alone has jurisdiction to reverse or vary those actions. By virtue of s. 18(1) the superior courts of the provinces have no such power – they have no jurisdiction to alter the legal status of these federal actions.
>
> I accept that the Minister was empowered to conduct the licensing process by the [*Radiocommunication Act*] and therefore fell within the definition of "federal board, commission, or other tribunal" in s. 2(1) of the *FCA*. However, damages stemming from civil causes of action are not enumerated in s. 18(1)(*a*), nor are they relief "in the nature of the relief contemplated" in s. 18(1)(*a*). Therefore, in my view, this action is not beyond the jurisdiction of the Superior Court.

[48] The motion judge found support for his conclusion in *Authorson*, which was a class proceeding brought by a group of disabled war veterans who claimed that the Crown, through the Department of Veterans Affairs (DVA), had breached a fiduciary duty owed to them by not investing their pension funds or paying interest. The Crown moved to dismiss the action on the ground that the Federal Court had exclusive jurisdiction pursuant to s. 18 of the *FCA*. In upholding the rejection of the motion by the motion judge, Brockenshire J., the Court of Appeal stated at paras. 39-40:

> Brockenshire J. dismissed the Crown's motion for a stay. In doing so, he held that the action is not one for judicial review of the acts or omissions of the Pension Commission (which was abolished by statute in 1995) or of the DVA. *Rather, he held that the action is a claim for equitable relief as against the Crown itself for breach of its duty, fiduciary or otherwise, to invest the money it was administering for the benefit of*

> *disabled veterans or in the alternative, to pay interest on that money.*
>
> We agree with [Brockenshire J.'s] conclusion. The claim does not arise from the acts or omission of any board, commission or other tribunal but from the alleged neglect of the Crown itself. *The claim does not seek administrative law remedies*. That being the case, there can be no objection to the claim being heard in the Superior Court of Ontario. [Emphasis added.]

[49] In applying the Court of Appeal's reasoning to the case at bar, the motion judge stated at para. 60:

> I am not persuaded that it is plain and obvious that this court has no jurisdiction to hear this civil action. In my view, s. 18(1) of the *FCA* does not contain clear and explicit language precluding the Superior Court from hearing a civil action against the federal Crown that engages, *but does not seek to disturb*, a decision taken pursuant to a federal grant of power. [Emphasis added.]

[50] Although his conclusion on the application of s. 18(1) of the *FCA* was sufficient to dispose of the motion, the motion judge commented on the doctrine of collateral attack in the *Grenier* line of cases, given the emphasis put on it by the Crown. The *Grenier* line of cases stands for the proposition that "an action for damages stemming from an administrative decision constitutes a collateral attack on that decision" (para. 63).

[51] The motion judge held that *Grenier* is distinguishable from the case at bar, because in *Grenier* "the sole source of damages appears to have been the unlawfulness of the decision *in an administrative law sense*. There was no cause of action independent of the allegation that the decision was inconsistent with the statutory or prerogative power pursuant to which it was taken" (emphasis in original) (para. 69).

[52] The motion judge concluded, at para. 82, that TeleZone's action is not a collateral attack:

> The collateral attack doctrine applies when a litigant is seeking to challenge the legal force of a prior court order, or judicial or quasi-judicial decision of an administrative tribunal, in subsequent proceedings. *In its pleading, TeleZone is not challenging the decision of the Minister. It is not seeking to set aside the licences that have been granted. It is*

> *not seeking a licence for itself. It is seeking damages as a result of alleged breach of contract and negligence and the collateral attack doctrine has no application.*…A claim should only be struck as a collateral attack if it seeks to affect a decision's legal validity. [Emphasis added.]

VIII

G-Civil Inc. v. Canada

1. Overview

[53] G-Civil Inc. (G-Civil) appeals from an order granting the respondent's motion pursuant to rule 21.01(3) of the *Rules of Civil Procedure* to dismiss its action.

[54] The respondent, the Minister of Public Works and Government Services Canada (the Crown), issued a call for tenders for repair work to be done in Ottawa. G-Civil submitted a tender, but the Crown disqualified it because it was incomplete. In February 2004, G-Civil brought an action in the Superior Court for damages for breach of contract, alleging that its tender form was properly completed in accordance with the specifications provided, and that it was the low tenderer. On December 1, 2006, the Crown served a notice of motion to dismiss the action on the ground that the Ontario Superior Court of Justice does not have jurisdiction to hear it. The Crown argued that in disqualifying G-Civil's tender, the Minister's representative was acting as a federal board, commission or other tribunal, and as such, the Minister's decision can only be challenged by way of an application for judicial review in the Federal Court under s. 18 of the *FCA*. Power J. granted the motion.

2. Background

[55] The facts set out here are based on those pled in G-Civil's Statement of Claim, which are to be taken as true or at least capable of proof in a motion under Rule 21.

[56] The Crown issued a call for tenders for repair work to be done on the walls of the Rideau Canal in Ottawa. The call required each tenderer to complete a five-page tender form, as prescribed by the Crown. The tender form divided the total price of the work into the estimated amount for the Fixed Price portion of the work and the estimated amount for the Unit Price portion of the work.

[57] G-Civil claims that its tender form was complete. On its tender form, it indicated that the total tender amount would be $654,654.00, and that the total estimated amount for the Unit Price portion of the work would be $654,654.00. G-Civil further claims that the Crown's specifications regarding the tender forms did not define what was to be included under the rubric of the Fixed Price portion of the work. Accordingly, it was

open to G-Civil to not charge any amount with respect to the Fixed Price portion of the work.

[58] At the closing of the tendering process, G-Civil was the low tenderer; however, it was not awarded the contract. On February 17, 2004, G-Civil issued its statement of claim, with the Ontario Superior Court of Justice, alleging that the Crown's refusal to award it the contract constituted a breach of contract, as a consequence of which it incurred damages in the amount of $196,396.20. G-Civil did not attack the decision disqualifying its bid.

3. The Crown's Rule 21.01(3) Motion

[59] The Crown delivered its statement of defence in March 2004. A trial date was set for December 18, 2006. On December 1, 2006, without leave, the Crown served a notice of motion seeking an order to dismiss the action on the ground that the Superior Court of Justice has no jurisdiction over the subject matter of the action. The Crown submitted that in deciding to disqualify G-Civil's tender, the Minister of Public Works and Government Services exercised powers conferred by the *Department of Public Works and Government Services Act*, S.C. 1996, c. 16, the *Financial Administration Act*, R.S.C. 1985, c. F-11, and the *Government Contracts Regulations*, SOR/87-402.

[60] According to the Crown, since G-Civil is seeking to impugn a Minister's administrative decision, it must first proceed by way of judicial review in order to have that decision invalidated. G-Civil is not free to choose between judicial review and an action for damages. Since G-Civil did not seek to judicially review the administrative decision, that decision remains in effect.

[61] Finally, the Crown argued that to permit an action for breach of contract in order to impugn an administrative decision that has not yet been successfully challenged would infringe the principles of *res judicata* and the finality of decisions, leading to legal uncertainty.

4. The Motion Judge's Reasons

[62] The motion judge, Power J., held that the disqualification of the tender constituted an administrative decision of a federal board, commission or other tribunal as defined in s. 2(1) of the *FCA*. Since G-Civil's claim for damages was essentially based on a claim that the decision to disqualify the tender was unlawful and/or wrong, it was required to commence an application for judicial review under s. 18 of the *FCA*.

[63] In holding that the decision to disqualify the tender was an administrative one, the motion judge relied, at paras. 47 and 50, on *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, [1995] 2 F.C. 694 (C.A.), for the proposition that "the Minister of Public Works and Government Services Canada is exercising a power conferred by or under an Act of Parliament within the meaning of the definition of federal board, commission or other tribunal when the Minister issues a

call for tenders and develops and applies a procedure for the tender in process." The motion judge, at paras. 49-50, rejected the argument that *Ron Engineering* stands for the proposition that government decisions regarding a call for tenders fall within the purview of contract law as opposed to administrative law. According to the court in *Gestion*, at p. 701, this question could be answered by determining whether there was an exercise of "powers conferred by or under an Act of Parliament" within the meaning of the definition of "federal board, commission or other tribunal" pursuant to s. 2 of the *FCA*. In *Gestion*, the court held, at p. 705, that there was such an exercise of power, as "it would be contrary to the letter and the spirit of paragraph 18(1)(*a*) to say that a minister expressly empowered by a regulation made pursuant to paragraph 16(2)(b) of the *Federal Real Property Act* to lease real property is not exercising a power 'conferred by or under an Act of Parliament' when he issues a call for tenders prior to the conclusion of a lease."

[64] In the case at bar, the motion judge made reference to numerous statutory provisions conferring powers on the Minister to issue a call for tenders, including various sections of the *Department of Public Works and Government Services Act*, the *Financial Administration Act*, and the *Government Contracts Regulations*.

[65] Although he recognized that his conclusion results in two-step litigation when a party claims damages arising from administrative acts authorized by federal legislation, the motion judge granted the Crown's motion and dismissed G-Civil's action for want of jurisdiction in the Superior Court.

IX

Fielding Chemical Technologies Inc. v. Canada

1. Overview

[66] The Attorney General of Canada (the Crown) appeals from an order refusing the Crown's motion pursuant to rule 21.01(3) of the *Rules of Civil Procedure* to have the action of the respondent, Fielding Chemical Technologies Inc. (Fielding), dismissed.

[67] From November 1995 to February 1997, the Government of Canada issued a series of orders culminating in a final order banning the export of PCB waste to the United States. In July 2005, Fielding brought an action in the Superior Court against the Crown for damages for the tort of misfeasance in public office, alleging that the Minister of the Environment authorized the orders for the purpose of protecting the Canadian waste disposal industry, and not for the purpose of protecting the environment and human health, as required by s. 35(1) of the *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16 (*CEPA*). In 2007, the Crown brought a motion to strike out Fielding's claim and to dismiss the action on the ground that the Superior Court of Justice does not have jurisdiction to hear it. The Crown argued that the orders in question constitute decisions of a federal board, commission or other tribunal within the meaning of s. 2(1) and ss. 18

and 18.1 of the *FCA*, and as such, the orders can only be challenged by way of an application for judicial review in the Federal Court. The motion judge dismissed the motion.

2. Background

[68] The facts set out here are based on those pled in Fielding's Statement of Claim, which are to be taken as true or at least capable of proof in a motion under Rule 21.

[69] Fielding's principal business is chemical recycling and hazardous waste disposal. In 1989, Fielding acquired a significant volume of polychlorinated biphenyl (PCB) waste and stored it in accordance with applicable laws. From 1990 to 1995, Fielding stored the PCB waste at its facility because it was not permitted to export the waste from Ontario for treatment. In 1995, approval was granted to export PCB waste in Ontario for treatment to Chem-Security in Alberta. In addition, a U.S. company, S.D. Myers, advised Fielding that it hoped to be able to import PCB waste from Canada by late 1995. Fielding obtained quotes for disposal from both Chem-Security and S.D. Myers. The quotes from S.D. Myers were significantly lower than those given by Chem-Security.

[70] In early November 1995, the United States Environmental Protection Agency issued an "enforcement discretion" that permitted PCBs to be imported to the S.D. Myers facility. Subsequently, in November 1995, the Minister of the Environment issued an emergency interim order banning the export of PCBs to the United States for 14 days. The Minister purported to do so on the basis of what was then s. 35(1) of *CEPA*, which allowed interim orders to be issued when the "Ministers [of Environment and Health] believe immediate action is required to deal with a significant danger to the environment or to human life or health". The emergency interim order was later re-issued as a final interim order, and in February 1996, it was transformed into a final order banning the export of PCB waste to the U.S.A.

[71] In February 1997, Canada reopened its border to permit the export of PCB waste to the United States. Fielding began preparation for the disposal of its PCB waste at the S.D. Myers facility. However, five months later, in July 1997, the United States prohibited any further export of PCB waste from Canada to the United States. Fielding had not completed its preparations, and was not able to dispose of its PCB waste at the S.D. Myers facility.

[72] On August 17, 1999, Fielding was directed by Ontario's Ministry of Environment and Energy to remove the PCB waste from its facility and dispose of it at the Chem-Security facility in Alberta. Fielding did so, and paid Chem-Security a sum significantly higher than that quoted by S.D. Myers for the disposal of the waste.

[73] In November 2000, an arbitral tribunal constituted under Chapter 11 of the North American Free Trade Agreement (NAFTA) found that the interim and final orders issued by the Minister violated S.D. Myers's rights to national treatment and fair and equitable

treatment under the NAFTA investment provisions. The tribunal made various findings of fact, including that "there was no legitimate environmental reason for introducing the ban". The Federal Court of Canada upheld the tribunal's decision, and concluded that "[t]here is no dispute that the Canadian ban on PCB exports sought to protect the Canadian companies from U.S. competition and was not for a legitimate environmental purpose": *Canada (Attorney General) v. S.D. Myers, Inc.*, [2004] 3 F.C.R. 368 (T.D.), at paras. 18 and 73.

[74] Fielding first became aware that the interim and final orders had been made for an improper purpose when it became aware of the Federal Court's decision. It issued a statement of claim in the Superior Court on July 19, 2005, and an amended statement of claim on October 11, 2005. Fielding alleges that the former Minister of the Environment, the former Minister of Health, and/or officers and employees of Environment Canada and the Ministry of Health engaged in misfeasance in public office when authorizing, approving, recommending or concurring with the issuance of the interim and final orders in the purported exercise of public functions under the *CEPA*. Fielding claims that it has suffered damages as a result of paying a higher price to dispose of the waste at the Chem-Security facility in Alberta than the price quoted by S.D. Myers, and as a result of storing the PCB waste at its facility for additional years while losing the opportunity to use the land and equipment at its facility for other purposes during that time. Fielding did not attack the Minister's decision banning export of the PCB to the United States.

3. The Crown's Rule 21.01(3) Motion

[75] The Crown brought a motion, heard February 14, 2007, to strike Fielding's amended statement of claim and dismiss the action. The Crown submitted that the Minister or other relevant officers exercised powers conferred by s. 35(1), s. 35(3) and s. 35(5) of the *CEPA*. As such, the interim and final orders constitute decisions of a federal board, commission or other tribunal within the meaning of s. 2(1) of the *FCA*. Further, the Federal Court has exclusive jurisdiction to review the lawfulness of decisions made by a federal board or commission, pursuant to s. 18 and s. 18.1 of the *FCA*. It follows, according to the Crown, that Fielding would need to bring a successful judicial review application before the Federal Court prior to maintaining an action for damages in the Superior Court.

[76] In support of its motion, the AG relied on *Grenier*, and *Tremblay* 2004.

4. The Motion Judge's Reasons

[77] The motion judge, Macdonald J., like Morawetz J. in *TeleZone*, framed the key issue in terms of whether it was plain and obvious that the Superior Court does not have jurisdiction to permit Fielding's action to proceed (para. 11). She noted, at para. 14, that the statutory decision in question, namely the final order, had been repealed on February 4, 1997. Accordingly, it was not effective at the time when Fielding brought its action.

She held that it was not plain and obvious that the rule in *Grenier* applies to a case where the impugned decision is no longer operative. It was also not plain and obvious that the action was a collateral attack on the export ban orders. Rather, the motion judge saw the action as challenging the conduct of public officials, as opposed to challenging the lawfulness of a statutory decision.

[78] For these reasons, the motion judge dismissed the Crown's motion.

X

McArthur v. Canada

1. Overview

[79] Michiel McArthur (McArthur) appeals from an order made pursuant to rule 21.01(3) of the *Rules of Civil Procedure* granting the motion of the Attorney General of Canada (the Crown) and James Blackler (Blackler) (collectively, the respondents), to dismiss McArthur's action on the ground that the Superior Court did not have jurisdiction over the subject matter of his claim.

[80] For approximately four years and six months, from October 1994 until 1999, McArthur was continuously confined in involuntary solitary confinement, also known as administrative segregation. Blackler was the warden of the penitentiaries in question at the relevant times. In April 2001, McArthur brought an action in the Superior Court for, among other things, damages for the tort of wrongful or false imprisonment. In September 2006, the respondents brought a motion to dismiss the action on the ground that the Superior Court of Justice does not have jurisdiction to hear it. The Crown argued that the only way to challenge a decision to place an inmate in administrative segregation is by way of an application for judicial review in Federal Court pursuant to ss. 18 and 18.1 of the *FCA*. Pedlar J. granted the motion.

2. Background

[81] The facts set out here are based on those pled in McArthur's Amended Amended Statement of Claim, which are to be taken as true or at least capable of proof in a motion under Rule 21.

[82] In October 1994, while on parole, McArthur was arrested, charged with numerous offences, and brought to Millhaven Institution to await trial. Blackler was the warden of Millhaven Institution at that time. On the instructions of Blackler, McArthur was confined to solitary confinement for approximately eighteen months at Millhaven Institution. In May 1996, McArthur was voluntarily transferred from Millhaven Institution to Kingston Penitentiary. Just prior to McArthur's arrival there, Blackler became the warden of Kingston Penitentiary. Upon McArthur's arrival at Kingston Penitentiary, Blackler caused him to be placed in solitary confinement for another

fourteen months. Subsequently, the Correctional Service of Canada (CSC) caused McArthur to be transferred to the Special Handling Unit at Ste. Anne des Plaines, a super maximum form of deep segregation, where he was incarcerated in solitary confinement for a further four months. In total, McArthur spent a total of four years and six months in solitary confinement, segregation, or a special handling unit.

[83] McArthur alleges that four years and six months of involuntary solitary confinement constitutes arbitrary detention and cruel and unusual punishment, contrary to ss. 9 and 12 of the *Canadian Charter of Rights and Freedoms*. He further alleges that the respondents failed to comply with the *CCRA*, which, together with its regulations and Commissioner's Directives, governs the circumstances in which an inmate may be placed in solitary confinement. Rather, McArthur submits, the decisions of the respondents to place him in solitary confinement for such an extensive period of time were made negligently, or deliberately and maliciously. Thus, he seeks damages for the tort of wrongful or false imprisonment, and the intentional or negligent infliction of emotional and mental distress.

3. The Crown's Rule 21.01(3) Motion

[84] The respondents issued their Statement of Defence on October 20, 2003. In September 2006, they issued their Amended Statement of Defence and also brought a motion pursuant to rule 21.01(3) to dismiss the action on the ground that the Superior Court of Justice does not have jurisdiction to hear the action.

[85] According to the Crown, the *CCRA* and its regulations establish a comprehensive scheme governing the decision to place an inmate in administrative segregation; this scheme provides for periodic reviews of the decision by a Segregation Review Board. Each of these reviews results in a discrete administrative decision. The only way to challenge such a decision is by way of an application for judicial review in Federal Court, pursuant to ss. 18 and 18.1 of the *FCA*. McArthur has never made an application for judicial review from any of the decisions related to his segregation.

[86] The Crown submits that the Superior Court has no jurisdiction over the subject matter of McArthur's action, and to find otherwise would be to allow an impermissible collateral attack on the scheme for reviewing the lawfulness of administrative decisions.

4. The Motion Judge's Reasons

[87] The motion judge, Pedlar J., followed *Grenier*, and granted the Crown's motion to dismiss the action. In his oral reasons, he referred to paras. 24-26 from *Grenier*:

> 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.

To accept that the lawfulness of the decisions of federal agencies can be reviewed through an action in damages is to allow a remedy under section 17. Allowing, for that purpose, a remedy under section 17 would, in the first place, disregard or deny the intention clearly expressed by Parliament in subsection 18(3) that the remedy must be exercised only by way of an application for judicial review. The English version of subsection 18(3) emphasizes the latter point by the use of the word "only" in the expression "may be obtained only on an application for judicial review".

It would also judicially reintroduce the division of jurisdictions between the Federal Court and the provincial courts. It would revive in fact an old problem that Parliament remedied through the enactment of section 18 and the granting of exclusive jurisdiction to the Federal Court and, in the section 28 cases, the Federal Court of Appeal. It is precisely this legislative intention that the Quebec Court of Appeal recognized in the *Capobianco* case, *supra*, in order to preclude the action in damages filed in the Superior Court of Québec attacking the lawfulness of the decisions of federal boards, commissions or other tribunals from leading, in fact and in law, to a dysfunctional dismemberment of federal administrative law.

[88] The motion judge, then, relied primarily on the intention of Parliament in accepting the Crown's argument that the Superior Court is without jurisdiction. In addition, he alluded to the policy reasons articulated in *Grenier*. Specifically, at paras. 27-28 and 31, the Federal Court of Appeal in *Grenier* cautioned against allowing an infringement of the principle of finality of decisions and the legal security that this principle entails. Because of this principle, it is in the public interest to limit and circumscribe indirect challenges to administrative decisions.

[89] According to the motion judge, those who wish to challenge administrative decisions are still able to make a claim for damages. However, one must first succeed on an application for judicial review before doing so.

[90] For these reasons, the motion judge granted the Crown's motion and dismissed McArthur's claims on the ground that the Superior Court lacked jurisdiction to hear them.

XI

Analysis

[91] In my view, the Ontario Superior Court has jurisdiction over the plaintiff's claims in each of the four appeals. In *TeleZone* the plaintiff's claim, broadly speaking, was for damages for breach of contract and negligence. In *G-Civil* the plaintiff's claim was for damages for breach of contract in reliance on *Ron Engineering*. In *Fielding* the plaintiff sued for damages for misfeasance in public office. In *McArthur*, the plaintiff's claim was for damages for false imprisonment and breach of his *Charter* rights to be protected from cruel and unusual punishment. In none of the four cases did the plaintiff seek to set aside the underlying administrative decision.

[92] I agree with Morawetz J. in *TeleZone* and Macdonald J. in *Fielding* that the proper approach is to determine whether the Superior Court has jurisdiction to adjudicate the plaintiff's claim. If it does, that ends the matter unless there is legislation, or there is an arbitral agreement, that clearly and unequivocally removes that jurisdiction. As a court of general jurisdiction, the Superior Court has jurisdiction over every conceivable claim, unless it is shown that it does not constitute a reasonable cause of action. Hence, jurisdiction lies in the Superior Court in each case unless removed by s. 18 of the *FCA*. As I will explain, s. 18 does not remove the Superior Court's jurisdiction. Section 18 deals with remedies, not with jurisdiction. However, both Morawetz J. and MacDonald J. in *Fielding* were incorrect in applying the plain and obvious test, suitable for a rule 21.01(1)(b) motion dealing with whether a statement of claim discloses a reasonable cause of action. Either the Superior Court has jurisdiction, or it doesn't have jurisdiction.

[93] The first twenty years of the Federal Court's existence produced a large number of jurisdictional difficulties, not the least of which occurred when a plaintiff joined a claim against the federal Crown with a claim against another person. They had to be determined in different courts – the Federal Court and a provincial superior court. Prior

to 1990, the Federal Court held exclusive jurisdiction over claims against the federal Crown. The 1990 amendments to the *FCA* made the Federal Courts' jurisdiction in claims against the Crown concurrent with the provincial superior courts. These remedial amendments were intended to avoid split or multiple proceedings in suits against the Crown. Thus, s. 17 of the *FCA* and s. 21 of the *CLPA* reaffirm that the Superior Court has jurisdiction in all cases other than those in which the Federal Court has been given exclusive jurisdiction.

[94] The exclusive jurisdiction provision of the *FCA*, which is central to all of the appeals, is s. 18 which provides the Federal Court with exclusive original jurisdiction to issue a prerogative remedy or grant declaratory relief "against any federal board, commission or other tribunal". To maintain that the Superior Court lacks jurisdiction over any of the claims, the Crown must fit the plaintiffs' claims squarely within s. 18(1). In my view, the Crown has failed to do so. Section 18 does not give the Federal Court the power to take away the jurisdiction of the Superior Court except for the remedies it emanates. Section 18 does not deal with procedure. It deals with remedies. In none of the cases is a remedy sought that comes within the prerogative writs or extraordinary remedies of s. 18. Section 18 does not empower the Federal Court to award damages, which are sought in each of the four cases. To the extent that *Grenier* supports the position of the Crown, I believe that it was wrongly decided. In any event, it is not binding on this court.

[95] In summary, s. 17 of the *FCA* complements s. 21 of the *CLPA*, both statutes conferring concurrent jurisdiction on the provincial superior courts and the Federal Court where claims, such as those advanced in the four cases that form this appeal, are made against the Crown. 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.

XII

[96] The Crown focuses its argument on the submission that in *TeleZone, G-Civil, Fielding* and *McArthur* the Superior Court does not have jurisdiction to hear the plaintiffs' claims because the plaintiffs have collaterally attacked the administrative decisions that played a role in the factual history of each case. To present this argument, the Crown greatly expanded the record beyond the claims in the plaintiffs' statements of claim and relied on *Grenier*. Collateral attack, like abuse of process, is a defence that finds its proper place in a statement of defence. In any event, as I will explain, in none of the cases was there a collateral attack on any administrative decision. Neither from the pleadings, nor from the record, can a collateral attack be discerned.

[97] In *R. v. Wilson*, [1983] 2 S.C.R. 594, at p. 599, the rule against collateral attack was stated as follows:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally—and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

In other words, when a separate and new action is filed to challenge some aspect of an earlier and separate case, it is called a collateral attack on the earlier case. That is not what happened in any of the four cases. None of the plaintiffs in its statement of claim attacked, or challenged the correctness of, the underlying administrative decision. Assuming that it is permissible to consider extrinsic evidence, it does not assist the Crown in making out a collateral attack. In *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] 3 S.C.R. 77, it was held in *orbiter* that the collateral attack doctrine applies to the decisions of administrative boards and tribunals. In *Consolidated Maybrun*, as in *Weber*, under the *Environmental Protection Act*, R.S.O. 1980, c. 141, the legislature had set up a specialized tribunal to hear questions relating to the environment. The accused, who had been charged and convicted with failing to comply with a Ministerial directive, was not permitted to collaterally challenge the correctness of the order on his prosecution for failing to comply with the directive. He had to appeal to the Environmental Appeal Board. In *C.U.P.E.* it was held to be an abuse of process for an arbitrator to revisit the finding of a criminal court that a grieving employee was guilty of a sexual assault. Both *Consolidated Maybrun and C.U.P.E.* demonstrate that collateral attack as well as issue estoppel and abuse of process are defences.

[98] I agree with the following comments of Morawetz J. about collateral attack at para. 82 of *TeleZone*:

> In my view, TeleZone's claims against the Crown do not necessarily constitute a collateral attack on decisions of a federal board or tribunal. The collateral attack doctrine applies when a litigant is seeking to challenge the legal force of a prior court order, or judicial or quasi-judicial decision of an administrative tribunal, in subsequent proceedings. In its pleading, TeleZone is not challenging the decision of the Minister. It is not seeking to set aside the licences that have been granted. It is not seeking a licence for itself. It is

> seeking damages as a result of alleged breach of contract and negligence and the collateral attack doctrine has no application. Phrases like "challenge to the lawfulness of a decision" and "impugning a federal agency's decision" must be used with care in this context in order to be consistent with the Supreme Court of Canada's jurisprudence on the doctrine of collateral attack. A claim should only be struck as a collateral attack if it seeks to affect a decision's legal validity.

[99] In *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, the Supreme Court held that the doctrine of collateral attack did not apply where orders of the Ontario Energy Board permitted Consumers' Gas to charge its customers a criminal rate of interest when paying accounts late, and where the plaintiff had not attacked the orders. At para. 71, Iacobucci J. stated:

> The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000), at pp. 369-70). Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review). In *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, this Court described the rule against collateral attack as follows: [the passage from *Wilson v. The Queen* set out in para. 99 is quoted]
>
> Based on a plain reading of this rule, the doctrine of collateral attack does not apply in this case because here the specific object of the appellant's action is not to invalidate or render inoperative the Board's orders, but rather to recover money that was illegally collected by the respondent as a result of Board orders. Consequently, the collateral attack doctrine does not apply.

XIII

[100] As I will explain, *Grenier* was not correctly decided. In any event, it is not binding on this court. The procedure that it advocates would take litigants back to the

days of *Bleak House* where they had to go from court to court until they were finally able to obtain their remedy. Moreover, if generally accepted, *Grenier's* insistence that actions in provincial superior courts against the Crown are precluded without a prior application for judicial review would have far reaching implications with respect to principles of Crown liability. In particular, the Crown's position as based on *Grenier*, would require split or multiple proceedings in different forums, waste scarce judicial resources, impose huge additional costs on plaintiffs, and subject every tort and contract claim against the Crown to a draconian 30-day limitation period.

[101] At least five decisions of this court have routinely permitted actions in damages against the Crown to proceed in the Superior Court. In each case there were no prior judicial review proceedings in the Federal court. Notably, all but the first of these cases were decided before *Grenier*. They are: *Sauer v. Canada (Attorney General)* (2007), 225 O.A.C. 143 (C.A.), leave to appeal refused, [2007] S.C.C.A. No. 454; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), leave to appeal refused, [2005] S.C.C.A. No. 50; *Bonaparte v. Canada (Attorney General)* (2003), 64 O.R. (3d) 1 (C.A.); *144096 Canada Ltd. (USA) v. Canada (Attorney General)* (2003), 63 O.R. (3d) 172 (C.A.); *Al's Steak House and Tavern Inc. v. Deloitte and Touche* (1997), 13 C.P.C. (4th) 90 (Ont. C.A.).

[102] In all of these cases, the Crown's liability was vicarious, in that it arose from the actions of persons who were officers, servants or agents of the Crown. All of these persons acting on behalf of the Crown were exercising powers under federal statute or prerogative order, and thus would have fallen within the definitions of a "federal board" in s. 2(1) of the *FCA*. In each case, if the rule proposed by the Crown were in effect, the claim would have been outside the jurisdiction of the Superior Court in the absence of a prior judicial review proceeding in the Federal Court. The Crown's position would also recreate many of the same difficulties of divided and split jurisdiction over actions that the 1990 amendments to the *FCA* were intended to remedy.

[103] There are additional cases that are very helpful. The first is *Genge v. Canada (Attorney General*) (2007), 285 D.L.R. (4th) 259 (Nfld. & L. C.A.). The plaintiff had sought damages for loss of revenue during the 2004 seal fishery after an officer of the federal Crown had erroneously advised him that a particular seal fishery area had been closed. The Crown's position, in reliance on *Grenier*, was that a provincial court did not have jurisdiction over a tort when the actions of a federal official were impugned unless there had been a successful judicial review before the Federal Court under s. 18 of the *FCA*. Barry J.A. concluded as follows at para. 34:

> I do not interpret s. 18 of the *Federal Courts Act* as limiting the concurrent jurisdiction provided to superior courts of the provinces by s. 21 of the *Crown Liability and Proceedings Act* or as requiring judicial review in the Federal Court as a prerequisite for the statutory right of action created by s. 3 of

> the *Act*. If Parliament had intended to so limit the jurisdiction of superior courts or to make judicial review a prerequisite to an action in tort for damages, I would expect Parliament to have done so expressly.

[104] *R. v. Miller*, [1985] 2 S.C.R. 613, a case decided 20 years before *Grenier* and not referred to by the court in its reasons for judgment, concerned whether a provincial superior court has jurisdiction to issue *certiorari* in aid of *habeas corpus* to determine the validity of an inmate's confinement in a special handling unit of a federal penitentiary. The Crown contended that under s. 18 of the *FCA*, jurisdiction was in the Federal Court. The Supreme Court held that a superior court has jurisdiction notwithstanding s. 18. The court held that s. 18 indicates a clear intention on the part of Parliament to leave the jurisdiction by way of *habeas corpus* to review the validity of a detention imposed by federal authority with the provincial superior courts. While s. 18 confers an exclusive and very general review jurisdiction over federal authorities by the prerogative writs and extraordinary remedies, to which specific reference is made, it deliberately omits reference to *habeas corpus*. The court said that this omission was not an oversight but a well considered decision.

[105] A similar result, in similar circumstances, was reached in *May v. Ferndale Institution*, [2005] 3 S.C.R. 809, a case decided shortly after *Grenier*. LeBel and Fish JJ.A. stated at para. 44:

> To sum up therefore, the jurisprudence of this Court establishes that prisoners choose to challenge the legality of a decision affecting their residual liberty either in a provincial superior court by way of *habeas corpus* or in the Federal Court by way of judicial review. As a matter of principle, a provincial superior court should exercise its jurisdiction when it is requested to do so. *Habeas corpus* jurisdiction should not be declined merely because another alternative remedy exists and would appear as or more convenient in the eyes of the court. The option belongs to the applicant. Only in limited circumstances will it be appropriate for a provincial superior court to decline to exercise its *habeas corpus* jurisdiction. For instance, in criminal law, where a statute confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be, *habeas corpus* will not be available (*i.e. Gamble*). Jurisdiction should also be declined where there is in place a complete, comprehensive and expert procedure for review of an administrative decision (*i.e. Pringle* and *Peiroo*).

[106] LeBel and Fish JJ. reiterated that provincial superior courts should decline *habeas corpus* jurisdiction only where legislation has put in place a complete, comprehensive and expert procedure for review of an administrative decision. They then considered the grievance procedure contained in the Regulations, and concluded that Parliament had not put such a procedure in place. At para. 64, they concluded:

> Therefore, in view of the structural weaknesses of the grievance procedure, there is not justification for importing the line of reasoning adopted in the immigration law context. In the prison context, Parliament has not yet enacted a comprehensive scheme of review and appeal similar to the immigration scheme. The same conclusion was previously reached in *Idziak* with regard to extradition (pp. 652-53).

[107] Thus, in my view, *Miller* and *May* make it clear by analogy that under s. 18 of the *FCA* the Federal Court does not have jurisdiction over any of the claims contained in the four appeals. That being the case, the Superior Court retains jurisdiction over all the claims.

XIV

[108] Motions to determine whether a court has jurisdiction to adjudicate a plaintiff's claim are intended to be decided expeditiously and early in the proceedings, preferably before a statement of defence has been filed. Invariably, such proceedings are decided by reading the plaintiff's claim: *cf. Fortier v. Longchamp*, [1942] S.C.R. 240. No extrinsic evidence is required, as on a motion to determine the substantive adequacy of a pleading. If the claim is within the subject matter jurisdiction of the Superior Court, that is the end of the matter. The courts' jurisdiction will be affirmed. However, as I have pointed out, there are exceptions. The court will be deprived of its jurisdiction where there is a statutory scheme intended to determine the subject matter of the claim administratively and able to provide the remedy sought by the plaintiff. An example of this type of case is *Weber*. As the jurisdiction of a court to adjudicate a claim can, and should, be decided without the consideration and application of extrinsic evidence bearing upon the conduct of the parties that gave rise to their dispute, this court is in a position to decide the issue in these appeals by examining the statement of claim in each case. However, I am of the view that extrinsic evidence that has been explicitly referred to within the pleadings or documents referred to and relied on in the statement of claim may be considered to determine the substance and the nature of the plaintiff's claim when this is unclear from reading the statement of claim.

[109] The process to decide whether a court has subject matter jurisdiction is found in rule 21.01(3) which permits a defendant to move to have an action stayed or dismissed on the ground that the court has no jurisdiction over the subject matter of the action. This a

summary procedure well suited to determining the issue as a preliminary matter. To follow this procedure avoids such a motion becoming a trial within a trial into facts not even pleaded in the underlying statements of claim, as occurred in each of these cases. See, for example, *Halifax Insurance Co. of Canada v. Innopex Ltd.* (2004), 72 O.R. (3d) 522 (C.A.), leave to appeal refused, [2004] S.C.C.A. No. 586, where it was held that whether an insurance company was required to defend the insured is to be decided on the statement of claim. In my view, so long as the facts pleaded in the statement of claim raise a claim cognizable in the Superior Court, that court has jurisdiction to decide the claim. This would occur in virtually all cases given that the Superior Court is a court of general jurisdiction. That is why extrinsic evidence of facts not pleaded is generally not receivable. Moreover, it is essential to decide jurisdiction motions early in the proceedings and expeditiously so that the plaintiff can get on with its case. However, in all four cases the Crown did not raise the jurisdiction issue until well on in the proceedings. Two cases were literally on the eve of trial. The Crown was criticized for delaying an application of this sort until the eve of the hearing as far back as *Idziak v. Canada (Minister of Justice).* The plaintiffs in each case would incur considerable expense were I to agree with the Crown that *Grenier* should govern the circumstances of each appeal. Indeed, as the Crown was candidly admitted, it was the release of the decision in *Grenier* that caused it to bring its motion in each case.

XV

[110] Before I conclude by dealing with each of the appeals, I will provide a brief summary. Subject matter jurisdiction refers to the power of a particular court to decide a particular type of case. The Ontario Superior Court, as a court of general jurisdiction, has the *prima facie* power to decide every type of case, provided the statement of claim discloses a reasonable cause of action. Only by clear and explicit limitation may the power of the Superior Court to decide a particular type of case be curtailed. For example, as in *Weber*, a statutory remedial scheme or an arbitration clause will remove the jurisdiction of the Superior Court. Section 18 of the *FCA* clearly does not limit the right to bring an action in contract or tort, or for breach of *Charter* rights, in the Superior Court. It does not provide for the remedy sought by the plaintiff in any of the four cases. Thus, a judgment may be properly rendered if a court has the power to adjudicate the type of controversy contained in the statement of claim. The Superior Court has such power in each of the four cases.

[111] A collateral attack refers to challenging the correctness of a judgment through subsequent independent proceedings. The attack is collateral to the initial judgment that was accepted and not appealed. There is no attack on the relevant administrative decision in the pleadings of any of the four cases. Nor does an attack emerge from the record. In each case the plaintiff claimed damages in tort or contract. It is also noteworthy that in none of the cases did the plaintiff participate in the decision-making process of the administrative decision. Therefore, in none of the four cases was there a collateral attack

on an administrative decision. Moreover, a collateral attack is a defence and does not go to jurisdiction.

XVI

TeleZone Inc. v. Canada

[112] Morawetz J. was correct in holding that the Superior Court has jurisdiction to hear the plaintiff's claim. He was also correct in relying on *Authorson*, in which this court dismissed a similar jurisdictional motion, holding that the plaintiff's claim did not fall within the exclusive jurisdiction of the Federal Court. The plaintiff's claim in contract and tort is clearly within the jurisdiction of the Superior Court, and does not constitute a collateral attack on the decision to issue the licences to the other applicants. The facts pleaded in the statement of claim do not come within the ambit of s. 18 of the *FCA*. Moreover, in its statement of claim TeleZone does not attack, nor seek to set aside, the decision to issue the licences, nor seek to compel the Minister to issue a licence to it. There are similarities to *Ron Engineering*, where the Supreme Court made it clear that there is no difference between a contract with the government and a contract between private parties. The jurisdiction of the Superior Court cannot depend on the result of a judicial review application, as the Crown contends. Either the Superior Court has jurisdiction over TeleZone's claim, or it does not have jurisdiction. There is no such thing as conditional jurisdiction. I would, therefore, dismiss the Crown's appeal.

G-Civil Inc. v. Canada

[113] Power J. erred in following *Grenier* and holding that the Superior Court did not have jurisdiction over G-Civil's contract action. This is a tender case and is governed by *Ron Engineering*. In its statement of claim, the plaintiff does not attack the administrative decision that disqualified its tender bid. It sues for breach of contract and relies on the *Ron Engineering* line of cases. Its claim is within the jurisdiction of the Superior Court. The Crown is wrong to contend that G-Civil has collaterally attacked this decision and, therefore, was required to bring an application for a prerogative remedy under s. 18 of the *FCA*. The Superior Court's jurisdiction is not taken away by s. 18 of the *FCA*. The facts as pleaded are not within the ambit of s. 18. I would, therefore, allow G-Civil's appeal, set aside the order of the motion judge and order that the Superior Court has jurisdiction over G-Civil's claim.

Fielding Chemical Technologies Inc. v. Canada

[114] Macdonald J. was correct in holding that the Superior Court has jurisdiction over Fielding's claim for damages for misfeasance in public office. In its statement of claim, Fielding does not attack the administrative decision that prevented it from exporting PCBs, and that was made 13 years ago. On the Crown's theory, again relying on *Grenier*, because Fielding has collaterally attacked the administrative decision, s. 18 of

the *FCA* requires that it apply for judicial review. This is wrong. It makes no sense to attack an administrative decision made 13 years ago. Fielding does not challenge the lawfulness of the administrative decision. Its claim challenges the conduct of public officials. As such, it is not a collateral attack on the PCB export orders. Clearly, the Superior Court has jurisdiction over Fielding's claim. This jurisdiction is not removed by s. 18 of the *FCA*. I would, therefore, dismiss the Crown's appeal.

McArthur v. Canada

[115] Pedlar J. erred in holding that the jurisdictional issue was "nailed by *Grenier*", which he saw to be on all fours with this case. Perhaps it is. If so, from what follows it was wrongly decided. McArthur's claim for his four years in solitary confinement is for damages based on a tortious breach of his constitutionally guaranteed right to be free from cruel and unusual punishment. The Crown says the Superior Court does not have jurisdiction over this claim because there is a statutory scheme for challenging assignments to solitary confinement which McArthur did not follow. Therefore, he is first required to apply for judicial review under s. 18 of the *FCA*, even though the solitary confinement orders were made between 10 and 14 years ago. The statutory scheme referred to by the Crown is found in ss. 19-23 of the Regulations under the *CCRA* that I have quoted in para. 2. It was the same scheme that applied in *Grenier*. This scheme does nothing more than give the inmate a hearing before a Segregation Review Board. The Regulations do not set out the powers of the Board, or the relief, if any, it can give. It does not contain a true grievance procedure, as did the legislation in *Weber*. The *Weber* model that excludes the jurisdiction of the court is premised on a statutory regime where the complainant can obtain all his remedies. In this case, he cannot. The Segregation Review Board does not have the power to award damages. Therefore, McArthur's only recourse is to the court. The Superior Court has jurisdiction over his claim. It is not removed by the Regulation or by s. 18 of the *FCA*. In any event, there would be no point in challenging historic events that occurred 10 to 14 years ago by way of judicial review: *Zarzour v. Canada* (2000), 153 C.C.C. (3d) 284 (F.C.A.), leave to appeal refused, [2001] 2 S.C.R. xiv. Moreover, as I explained earlier, *Miller* and *May*, both decisions of the Supreme Court of Canada, demonstrate that the Superior Court has jurisdiction over McArthur's claims. I would, therefore, allow McArthur's appeal, set aside the order of the motion judge and order that the Superior Court has jurisdiction over his claim.

XVII

[116] For the foregoing reasons, I would dismiss the appeal in *TeleZone*, allow the appeal in *G-Civil*, dismiss the appeal in *Fielding* and allow the appeal in *McArthur*. All of the successful parties will have their costs. The successful parties will have 15 days from the release of these reasons to make their brief costs submissions. The unsuccessful parties will have 10 days to reply.

RELEASED: December 24, 2008 (“J.L.”)

“S. Borins J.A.”
“I agree J.I. Laskin J.A.”
“I agree K. Feldman J.A.”