

Canada (Attorney General) v. TeleZone Inc., 2010 SCC 62 (CanLII), [2010] 3 SCR 585

Date: 2010-12-23

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Other citations: 410 NR 1 — 327 DLR (4th) 527 — 273 OAC 1 — [2011] EXP 42 — 56 CELR (3d) 1 — AZ-50703926 — JE 2011-18 — [2010] SCJ No 62 (QL) — 96 CLR (3d) 1 — [2010] ACS no 62 — 196 ACWS (3d) 98

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Most recent unfavourable mention: [Sagkeeng First Nation v. Canada \(Attorney General\)](#), 2015 FC 1113 (CanLII) [...] [27] However, even if the affidavit is admitted, Manuge, Huronne-Wendat FC and **TeleZone are distinguishable** as they all address situations where the issue to be decided was whether an action should be stayed on the basis that the relief sought should have been obtained by means of an application for judicial review. [...]



SUPREME COURT OF CANADA

CITATION: Canada (Attorney General) v. TeleZone Inc., 2010 SCC 62, [2010] 3 S.C.R. 585

DATE: 20101223
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BETWEEN:

Attorney General of Canada
Appellant
and
TeleZone Inc.
Respondent

CORAM: Binnie, LeBel, Deschamps, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 81)

Binnie J. (LeBel, Deschamps, Abella, Charron, Rothstein and Cromwell JJ. concurring)

Canada (Attorney General) v. TeleZone Inc., 2010 SCC 62, [2010] 3 S.C.R. 585

Attorney General of Canada

Appellant

v.

TeleZone Inc.*Respondent***Indexed as: Canada (Attorney General) v. TeleZone Inc.****2010 SCC 62**

File No.: 33041.

2010: January 20, 21; 2010: December 23.

Present: Binnie, LeBel, Deschamps, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Courts — Jurisdiction — Provincial superior courts — Action brought against federal Crown in Ontario Superior Court of Justice seeking damages for breach of contract, negligence and unjust enrichment arising from decision rejecting application for telecommunications licence — Whether plaintiff entitled to proceed by way of action in Ontario Superior Court of Justice without first proceeding by way of judicial review in Federal Court — [Federal Courts Act, R.S.C. 1985, c. F-7, ss. 17, 18](#); [Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 21](#).

In 1995, Industry Canada issued a call for personal communication services licence applications, and released the policy statement within which potential service providers could shape their applications. The statement provided that Industry Canada would grant up to six licences on the basis of criteria it set out. T submitted an application, but when Industry Canada announced its decision, there were only four successful applicants and T was not among them. T filed an action against the Federal Crown in the Ontario Superior Court of Justice for breach of contract, negligence and unjust enrichment, and sought compensation for claimed losses of \$250 million. It claimed that it was an express or implied term of the policy statement that Industry Canada would only issue fewer than six licences if fewer than six applications met the criteria. Since its application satisfied all the criteria, it says, Industry Canada must have considered other undisclosed factors when it rejected T's application. The Attorney General of Canada, relying on *Canada v. Grenier*, [2005 FCA 348](#), [2006] 2 F.C.R. 287, challenged the jurisdiction of the Superior Court on the ground that the claim constituted a collateral attack on the decision, which is barred by the grant to the Federal Court, by [s. 18](#) of the [Federal Courts Act](#), of exclusive judicial review jurisdiction in relation to decisions of all federal boards, commissions or other tribunals. The Superior Court dismissed the objection on the ground that it was not plain and obvious that the claim would fail. The Court of Appeal upheld the decision, holding that *Grenier* was wrongly decided. In that court's view [s. 17](#) of the [Federal Courts Act](#) and [s. 21](#) of the [Crown Liability and Proceedings Act](#) conferred concurrent jurisdiction on the superior courts and the Federal Court for claims against the Crown, and [s. 18](#) of the [Federal Courts Act](#) did not remove relief by way of an award of damages from the jurisdiction of superior courts.

Held: The appeal should be dismissed.

This appeal is fundamentally about access to justice. People who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize unnecessary costs and complexity. The Court's approach should be practical and pragmatic with that objective in mind. Acceptance of *Grenier* would tend to undermine the effectiveness of the [Federal Courts Act](#) reforms of the early 1990s by retaining in the Federal Court exclusive jurisdiction over a key element of many causes of action proceeding in the provincial courts despite Parliament's promise to give plaintiffs a choice of forum and to make provincial superior courts available to litigants "in all cases in which relief is claimed against the [federal] Crown" except as otherwise provided.

Apart from constitutional limitations, none of which are relevant here, Parliament may by statute transfer jurisdiction from the superior courts to other adjudicative bodies including the Federal Court. However, any derogation from the jurisdiction of the provincial superior courts (in favour of the Federal Court or otherwise) requires clear and explicit statutory language. Nothing in the [Federal Courts Act](#) satisfies this test. The explicit grant to the provincial superior courts of concurrent jurisdiction in claims against the Crown in [s. 17](#) of that Act (as

well as s. 21 of the *Crown Liability and Proceedings Act*) directly refutes the Attorney General's argument. The grant of exclusive jurisdiction to judicially review federal decision makers in s. 18 is best understood as a reservation or subtraction from the more comprehensive grant of concurrent jurisdiction in s. 17 "in all cases in which relief is claimed against the [federal] Crown". This reservation or subtraction is expressed in s. 18 of the *Federal Courts Act* in terms of particular remedies. All the remedies listed are traditional administrative law remedies and do not include awards of damages. If a claimant seeks compensation, he or she cannot get it on judicial review, but must file an action.

The *Federal Courts Act* contains other internal evidence that Parliament could not have intended judicial review to have the gatekeeper function envisaged by *Grenier*. Section 18.1(2) imposes a 30-day limitation for judicial review applications. A 30-day cut off for a damages claimant would be unrealistic, as the facts necessary to ground a civil cause of action may not emerge until after 30 days have passed, and the claimant may not be in a position to apply for judicial review within the limitation period. While the 30-day limit can be extended, the extension is discretionary and would subordinate the fate of a civil suit brought in a superior court to the discretion of a Federal Court judge ruling upon a request for an extension of time for reasons that have to do with public law concerns, not civil damages. Moreover, the grant of judicial review is itself discretionary and may be denied even if the applicant establishes valid grounds for the court's intervention. This does not align well with the paradigm of a common law action for damages where, if the elements of the claim are established, compensation ought generally to follow as a matter of course. Further, s. 8 of the *Crown Liability and Proceedings Act*, which codifies the defence of statutory authority, is evidence that Parliament envisaged that the lawfulness of administrative decisions could be assessed by the provincial superior court in the course of adjudicating a claim for damages.

The *Grenier* approach cannot be justified by the rule against collateral attacks. T's claim is not an attempt to invalidate or render inoperative the Minister's decision; rather, the decision and the financial losses allegedly consequent to it constitute the very foundation of the damages claim. In any event, given the statutory grant of concurrent jurisdiction in s. 17 of the *Federal Courts Act*, Parliament has stated that provincial superior courts possess the concurrent necessary jurisdiction to dispose of the whole of a claim and this includes any attack on the validity of the Minister's decision where this issue is essential to the cause of action and where adjudicating the matter is a necessary step in disposing of the claim. While the doctrine of collateral attack may be raised by the Crown in the provincial superior court as a defence, the possible availability of the defence is not an argument against provincial superior court jurisdiction. Similarly, while it may be open to the Crown, by way of defence, to argue that the government decision maker was acting under statutory authority which precludes compensation for consequent losses, this is not a matter of jurisdiction and can be dealt with as well by the provincial superior court as by the Federal Court.

It is true that the provincial superior courts and the Federal Court have a residual discretion to stay a damages claim if, in its essential character, it is a claim for judicial review with only a thin pretence to a private wrong. However, where a plaintiff's pleading alleges the elements of a private cause of action, the provincial superior court should not in general decline jurisdiction on the basis that the claim looks like a case that could be pursued on judicial review. If the plaintiff has pleaded a valid cause of action for damages, he or she should generally be allowed to pursue it.

Here, T's claim as pleaded is dominated by private law considerations. It is not attempting to nullify or set aside the decision to issue licences. Nor does it seek to deprive the decision of any legal effect. T's causes of action in contract, tort and equity are predicated on the finality of that decision excluding it from participation in the telecommunications market. The Ontario Superior Court of Justice has jurisdiction over the parties and the subject matter, and has the power to grant the remedy of damages. There is nothing in the *Federal Courts Act* to prevent the Ontario Superior Court from adjudicating T's claim.

Cases Cited

Overruled: *Canada v. Grenier*, 2005 FCA 348, [2006] 2 F.C.R. 287; **referred to:** *Canada (Attorney General) v. McArthur*, 2010 SCC 63, [2010] 3 S.C.R. 626; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38; *The Queen in right of Canada v. Saskatchewan Wheat Pool*, 1983 CanLII 21 (SCC), [1983] 1 S.C.R. 205; *Agricultural Research Institute of Ontario v. Campbell-High* (2002), 2002 CanLII 10432 (ON CA), 58 O.R. (3d) 321, leave to appeal refused, [2003] 1 S.C.R. vii; *Ryan v. Victoria (City)*, 1999 CanLII 706 (SCC), [1999] 1 S.C.R. 201; *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Edwards v. Law Society of Upper*

Canada, 2001 SCC 80, [2001] 3 S.C.R. 562; *Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551; *R. v. Consolidated Maybrun Mines Ltd.*, 1998 CanLII 820 (SCC), [1998] 1 S.C.R. 706; *Hinton v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 215, [2009] 1 F.C.R. 476; *Parrish & Heimbecker Ltd. v. Canada (Minister of Agriculture and Agri-Food)*, 2008 FCA 362, [2009] 3 F.C.R. 568, rev'd 2010 SCC 64, [2010] 3 S.C.R. 639; *Donovan v. Canada (Attorney General)*, 2008 NLCA 8, 273 Nfld. & P.E.I.R. 116; *Lidstone v. Canada (Minister of Canadian Heritage)*, 2008 PESCTD 6, 286 Nfld. & P.E.I.R. 244; *River Valley Poultry Farm Ltd. v. Canada (Attorney General)*, 2009 ONCA 326, 95 O.R. (3d) 1; *Los Angeles Salad Co. v. Canadian Food Inspection Agency*, 2009 BCSC 109, 92 B.C.L.R. (4th) 379; *Leroux v. Canada Revenue Agency*, 2010 BCSC 865, 2010 D.T.C. 5123; *Fantasy Construction Ltd., Re*, 2007 ABCA 335, 89 Alta. L.R. (4th) 93; *Genge v. Canada (Attorney General)*, 2007 NLCA 60, 270 Nfld. & P.E.I.R. 182; *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, 1995 CanLII 3600 (FCA), [1995] 2 F.C. 694; *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, 314 D.L.R. (4th) 340, leave to appeal refused, [2009] 3 S.C.R. vii; *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860; *R. v. Al Klippert Ltd.*, 1998 CanLII 821 (SCC), [1998] 1 S.C.R. 737; *Ordon Estate v. Grail*, 1998 CanLII 771 (SCC), [1998] 3 S.C.R. 437; *Pringle v. Fraser*, 1972 CanLII 14 (SCC), [1972] S.C.R. 821; *Canada (Human Rights Commission) v. Canadian Liberty Net*, 1998 CanLII 818 (SCC), [1998] 1 S.C.R. 626; *Peacock v. Bell* (1667), 1 Wms. Saund. 73, 85 E.R. 84; *Mills v. The Queen*, 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863; *R. v. Morgentaler* (1984), 1984 CanLII 55 (ON CA), 41 C.R. (3d) 262; *R. v. Rahey*, 1987 CanLII 52 (SCC), [1987] 1 S.C.R. 588; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *Attorney General of Canada v. Law Society of British Columbia*, 1982 CanLII 29 (SCC), [1982] 2 S.C.R. 307; *Canada Labour Relations Board v. Paul L'Anglais Inc.*, 1983 CanLII 121 (SCC), [1983] 1 S.C.R. 147; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Harelkin v. University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 S.C.R. 561; *Immeubles Port Louis Ltée v. Lafontaine (Village)*, 1991 CanLII 82 (SCC), [1991] 1 S.C.R. 326; *Wilson v. The Queen*, 1983 CanLII 35 (SCC), [1983] 2 S.C.R. 594; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629; *R. v. Litchfield*, 1993 CanLII 44 (SCC), [1993] 4 S.C.R. 333; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Tock v. St. John's Metropolitan Area Board*, 1989 CanLII 15 (SCC), [1989] 2 S.C.R. 1181; *City of Manchester v. Farnworth*, [1930] A.C. 171; *Sutherland v. Canada (Attorney General)*, 2002 BCCA 416, [2002] 10 W.W.R. 1, leave to appeal refused, [2003] 1 S.C.R. xi (sub nom. *Jones v. Attorney General of Canada*); *Lake v. St. John's (City)*, 2000 NFCA 48, 192 Nfld. & P.E.I.R. 84; *Neuman v. Parkland (County)*, 2004 ABPC 58, 36 Alta. L.R. (4th) 161; *Danco v. Thunder Bay (City)* (2000), 13 M.P.L.R. (3d) 130; *Landry v. Moncton (City)*, 2008 NBCA 32, 329 N.B.R. (2d) 212; *Roy v. Kensington and Chelsea and Westminster Family Practitioner Committee*, [1992] 1 A.C. 624.

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Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, ss. 3, 8, 21.

Federal Court Act, S.C. 1970-71-72, c. 1.

Federal Courts Act, R.S.C. 1985, c. F-7, ss. 2(1) “federal board, commission or other tribunal”, 17, 18, 18.1, 18.4, 39, 50(1).

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APPEAL from a judgment of the Ontario Court of Appeal (Laskin, Borins and Feldman JJ.A.), [2008 ONCA 892](#), 94 O.R. (3d) 19, 303 D.L.R. (4th) 626, 245 O.A.C. 91, 86 Admin L.R. (4th) 163, 40 C.E.L.R. (3d) 183, [2008] O.J. No. 5291 (QL), 2008 CarswellOnt 7826, affirming a decision of Morawetz J. (2007), [2007 CanLII 52788 \(ON SC\)](#), 88 O.R. (3d) 173, [2007] O.J. No. 4766 (QL), 2007 CarswellOnt 7847. Appeal dismissed.

Christopher M. Rupar, Alain Préfontaine and Bernard Letarte, for the appellant.

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

The judgment of the Court was delivered by

[1] BINNIE J. — TeleZone Inc. claims it was wronged by the decision of the Minister of Industry Canada that rejected its application for a licence to provide telecommunications services. It seeks compensation in the Ontario Superior Court of Justice against the Federal Crown for its claimed losses of \$250 million. It pleads breach of contract, negligence, and, in the alternative, unjust enrichment arising out of monies it had thrown away on the application.

[2] The Attorney General challenges the jurisdiction of the Superior Court to proceed with the claim for compensation unless and until TeleZone obtains from the Federal Court of Canada an order quashing the Minister’s decision. TeleZone’s claim, he says, constitutes an impermissible collateral attack on the Minister’s order. Such a collateral attack is barred, he argues, by the grant to the Federal Court of *exclusive* judicial review jurisdiction in relation to decisions of all federal boards, commissions or other tribunals — [Federal Courts Act, R.S.C. 1985, c. F-7, s. 18](#). The Attorney General relies on a line of cases in the Federal Court of Appeal to this effect, giving particular prominence to *Canada v. Grenier*, [2005 FCA 348](#), [2006] 2 F.C.R. 287, hence the “*Grenier* principle”.

[3] The definition of “federal board, commission or other tribunal” in the Act is sweeping. It 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” (s. 2), with certain exceptions, not relevant here, e.g., decisions of Tax Court judges. The federal decision makers that are included run the gamut from the Prime Minister and major boards and agencies to the local border guard and customs official and everybody in between. The *Grenier* principle would shield the Crown from private law damages involving any of these people or entities in respect of losses caused by unlawful government decision making without first passing through the Federal Court. Such a bottleneck was manifestly not the intention of Parliament when it enacted the judicial review provisions of the [Federal Courts Act](#).

[4] The *Grenier* principle would undermine s. 17 of the same Act granting concurrent jurisdiction to the provincial superior courts “in all cases in which relief is claimed against the Crown” as well as the grant of concurrent jurisdiction to the superior courts in s. 21 of the [Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50](#), to deal with tort claims. A central issue in some (but not all) damages claims against the federal Crown will be the “lawfulness” of the government decision said to have caused the loss. *Grenier* would deny the provincial superior courts the jurisdiction to deal with that central issue in a damages claim pending before them. Adoption of the *Grenier* principle would relegate the provincial superior courts in such matters to a subordinate and contingent jurisdiction — not concurrent, i.e., subordinate to the Federal Court’s decision on

judicial review and contingent on the Federal Court being willing to grant a discretionary order on judicial review in favour of the plaintiff.

[5] The Ontario Court of Appeal rejected the Attorney General’s position, and in my respectful opinion, it was correct to do so. *Grenier* is based on what, in my respectful view, is an exaggerated view of the legal effect of the grant of judicial review jurisdiction to the Federal Court in s. 18 of the *Federal Courts Act*, which is best understood as a reservation or subtraction from the more comprehensive grant of concurrent jurisdiction in s. 17 “in all cases in which relief is claimed against the [federal] Crown”. The arguments of the Attorney General, lacking any support in the express statutory language of s. 18, are necessarily based on suggested inferences and implications, but it is well established that inferences and implications are not enough to oust the jurisdiction of the provincial superior courts.

[6] In the present case, the Ontario Superior Court has jurisdiction over the parties, the subject matter and the remedies sought by TeleZone. That jurisdiction includes the authority to determine every legal and factual element necessary for the granting or withholding of the remedies sought unless such authority is taken away by statute. The *Federal Courts Act* does not, by clear and direct statutory language, oust the jurisdiction of the provincial superior courts to deal with these common law and equitable claims, including the potential “unlawfulness” of government orders. That being the case, the Superior Court has jurisdiction to proceed. The Ontario Superior Court ((2007), 2007 CanLII 52788 (ON SC), 88 O.R. (3d) 173) and the Ontario Court of Appeal (2008 ONCA 892, 94 O.R. (3d) 19) so held. I agree. I would dismiss the appeal.

I. Facts

[7] The alleged faults of the Minister of Industry Canada in dealing with the application under the *Radiocommunication Act*, R.S.C. 1985, c. R-2, are detailed in the amended Statement of Claim. For present purposes, we must take TeleZone’s allegations as capable of proof.

[8] TeleZone was created in 1992 with the ultimate goal of obtaining a licence to provide personal communication services (“PCS”) — essentially a cell phone network. In December 1992, as a preliminary step toward this goal, TeleZone obtained a licence to provide personal cordless telephone service. Between 1993 and 1995, TeleZone alleges that it kept Industry Canada apprised of its efforts to raise capital and acquire the necessary expertise to provide PCS services. TeleZone says that Industry Canada encouraged it to continue these efforts.

[9] In June 1995, Industry Canada issued a call for PCS licence applications (the “Call”), and released a document setting out the policy and procedural framework within which potential service providers could shape their applications (the “Policy Statement”). The Policy Statement provided that Industry Canada would grant up to six PCS licences on the basis of criteria it set out. TeleZone alleges that Industry Canada promoted a general policy in favour of awarding more rather than fewer licences to encourage competition and consumer choice. TeleZone governed itself accordingly.

[10] Article 9.1 of the Call created a three-step application process: (1) expressions of interest by potential service providers; (2) detailed applications by potential service providers; and (3) the announcement and awarding of PCS licences by Industry Canada. Articles 9.4 to 9.5.6 set out the criteria that would be used to evaluate the applications. The Call did not explicitly reserve to Industry Canada the right to consider additional factors. TeleZone alleges that Industry Canada was prohibited from considering any criteria beyond the factors set out in the Call.

[11] In September 1995, TeleZone submitted its detailed application for a PCS licence to Industry Canada, which was prepared, it says, at a cost of approximately \$20 million. In December 1995, Industry Canada announced its decision regarding the PCS licence applications. There were only four successful applicants. TeleZone was not among them.

[12] The amended statement of claim pleads that it was either an express or implied term of the Policy Statement that Industry Canada would only issue fewer than six licences if fewer than six applications met the criteria (para. 12). TeleZone says that its application satisfied all the criteria in the Call. Accordingly, it says,

the Minister must have considered factors other than those in the Call when it rejected TeleZone's application (para. 17). These other factors were not disclosed to TeleZone.

[13] On the contractual branch of its case, TeleZone argues that the tendering process gave rise to a tendering contract (Contract A) which imposed an obligation on Industry Canada to act in accordance with the Call and the Policy Statement and to treat all applicants fairly and in good faith in awarding the PCS licences (R.F., at para. 133). TeleZone submits that the Crown breached "Contract A" by (1) granting fewer licences than it represented would be awarded; (2) not adhering to the requirements of the Call including the listed criteria (para. 134); and (3) failing to conform to a duty of care and a duty to act in good faith (para. 135).

[14] In its amended statement of claim, TeleZone does not seek to impugn the Minister's decision to award the licences. TeleZone does not seek a licence for itself or to remove licences from the successful applicants; it simply seeks damages. Accordingly, TeleZone submits that whether or not the licences were validly issued to the other applicants is irrelevant because under the Call and Policy Statement, there was still room for two more PCS licences and TeleZone only takes issue with the conduct of the Crown *vis-à-vis* TeleZone itself (para. 136).

II. Judicial History

A. *Ontario Superior Court of Justice (Morawetz J.) (2007)*, [2007 CanLII 52788 \(ON SC\)](#), 88 O.R. (3d) 173

[15] On a preliminary motion to dismiss TeleZone's action for want of jurisdiction, the Attorney General argued that TeleZone must first have the Minister's order quashed on judicial review in the Federal Court as a condition precedent to a civil suit against the Crown. TeleZone countered that its claim is based on causes of action that are distinct from an application for judicial review. It does not seek to set aside the licences. It seeks damages for negligence, breach of contract, or unjust enrichment. Morawetz J. dismissed the objection because, in his view, it was not plain and obvious that TeleZone's claim in the Superior Court would fail.

B. *Ontario Court of Appeal (Laskin, Borins and Feldman JJ.A.)*, [2008 ONCA 892](#), 94 O.R. (3d) 19

[16] Borins J.A., writing for a unanimous court, held that s. 17 of the *Federal Courts Act* and s. 21 of the *Crown Liability and Proceedings Act* conferred concurrent jurisdiction on the superior courts and the Federal Court for claims against the Crown. The Ontario Superior Court, as a court of general and inherent jurisdiction, may entertain any cause of action in the absence of legislation or an arbitration agreement to the contrary. Section 18 of the *Federal Courts Act* removed from the superior courts' jurisdiction the prerogative writs and extraordinary remedies listed (para. 94). Since the relief sought by TeleZone (damages) is not listed in s. 18, he concluded that the Superior Court continues to have jurisdiction. The appeal was dismissed.

III. Relevant Enactments

[17] *Constitution Act, 1867*

101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

Federal Courts Act, R.S.C. 1985, c. F-7

2. (1) . . .

"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) [Relief against the Crown] 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) [Cases] Without restricting the generality of subsection (1), the Federal Court has concurrent original jurisdiction, except as otherwise provided, in all cases in which

. . .

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

. . .

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

(5) [Relief in favour of Crown or against officer] The Federal Court has concurrent original jurisdiction

. . .

(b) in proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of the duties of that person as an officer, servant or agent of the Crown.

18. (1) [Extraordinary remedies, federal tribunals] 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.

. . .

(3) [Remedies to be obtained on application] 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) [Application for judicial review] 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) [Time limitation] 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) [Powers of Federal Court] 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.

18.4 (1) [Hearings in summary way] Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.

(2) [Exception] The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.

- 3. [Liability]** The Crown is liable for the damages for which, if it were a person, it would be liable
- (a) in the Province of Quebec, in respect of
 - (i) the damage caused by the fault of a servant of the Crown, or
 - (ii) the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and
 - (b) in any other province, in respect of
 - (i) a tort committed by a servant of the Crown, or
 - (ii) a breach of duty attaching to the ownership, occupation, possession or control of property.

8. [Saving in respect of prerogative and statutory powers] Nothing in [sections 3 to 7](#) makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority that, if those sections had not been passed, would have been exercisable by virtue of the prerogative of the Crown, or any power or authority conferred on the Crown by any statute, and, in particular, but without restricting the generality of the foregoing, nothing in those sections makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority exercisable by the Crown, whether in time of peace or of war, for the purpose of the defence of Canada or of training, or maintaining the efficiency of, the Canadian Forces.

21. (1) [Concurrent jurisdiction of provincial court] 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.

IV. Analysis

[18] This appeal is fundamentally about access to justice. People who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize unnecessary cost and complexity. The Court’s approach should be practical and pragmatic with that objective in mind.

[19] If a claimant seeks to set aside the order of a federal decision maker, it will have to proceed by judicial review, as the *Grenier* court held. However, if the claimant is content to let the order stand and instead seeks compensation for alleged losses (as here), there is no principled reason why it should be forced to detour to the Federal Court for the extra step of a judicial review application (itself sometimes a costly undertaking) when that is not the relief it seeks. Access to justice requires that the claimant be permitted to pursue its chosen remedy directly and, to the greatest extent possible, without procedural detours.

[20] The Attorney General argues that a detour to the Federal Court is necessary because the damages action represents a “collateral attack” prohibited by “inferences” derived from [s. 18](#) of the *Federal Courts Act*. His argument, in a nutshell, is:

Simply pleading damages, or some other remedy that is not available by way of judicial review in the Federal Court, should not be accepted as a means to bypass the intention of Parliament that review of federal administrative decisions must take place in the Federal Court.

(A.G. Factum,[\[1\]](#) at para. 4)

[21] The Attorney General accepts that judicial review is not required “for all proceedings that in any manner involve a decision or conduct of a federal board, commission or tribunal” (para. 29). However, the detour is required for claims that engage, directly or indirectly, the “validity and unlawfulness” of such decisions (para. 2). “Lawfulness” is a broad term. The Attorney General uses “invalid” and “unlawful” conjunctively (e.g., at para. 49). He seems to use the term “unlawful” to cover virtually any government order that could lay the basis

for a finding of fault in the private law sense although he excludes such bureaucratic actions as providing erroneous information, performing a “physical task or activity” negligently, or breaching a duty to warn (Factum, at para. 50).

[22] The Attorney General’s concern is that permitting different damages claims to proceed in different provinces before a variety of superior court judges arising out of the same or related federal government decisions would re-introduce the spectre of inconsistency and uncertainty across Canada which the enactment of the *Federal Courts Act* was designed to alleviate. However, this concern must have been considered by Parliament when it granted concurrent jurisdiction in all cases in which relief is claimed against the federal Crown to the superior courts. Undoubtedly, the juxtaposition of ss. 17 and 18 of the *Federal Courts Act* creates a certain amount of subject matter overlap with respect to holding the federal government to account for its decision making. This degree of overlap is inherent in the legislative scheme designed to provide claimants with “convenience” and “a choice of forum” in the provincial courts (see statement of the Minister of Justice in Parliament, *House of Commons Debates*, 2nd Sess., 34th Parl., November 1, 1989, at p. 5414, reproduced below, at para. 58).

[23] I do not interpret Parliament’s intent, as expressed in the text, context and purposes of the *Federal Courts Act*, to require an awkward and duplicative two-court procedure with respect to all damages claims that directly or indirectly challenge the validity or lawfulness of federal decisions. Such an outcome would have to be compelled by clear and explicit statutory language. Neither the *Federal Courts Act* nor the *Crown Liability and Proceedings Act* do so, in my opinion. With respect, not only is such language absent, but the reasonable inferences from both statutes, especially the concurrent jurisdiction in all cases where relief is claimed against the Crown granted to the provincial superior courts, leads to the opposite conclusion.

A. The Nature of Judicial Review

[24] The Attorney General correctly points to “the substantive differences between public law and private law principles” (Factum, at para. 6). Judicial review is directed at the legality, reasonableness, and fairness of the procedures employed and actions taken by government decision makers. It is designed to enforce the rule of law and adherence to the Constitution. Its overall objective is good governance. These public purposes are fundamentally different from those underlying contract and tort cases or causes of action under the *Civil Code of Québec*, R.S.Q., c. C-1991, and their adjunct remedies, which are primarily designed to right private wrongs with compensation or other relief.

[25] Not all invalid government decisions result in financial losses to private persons or entities. Not all financial losses that *do* occur will lay the basis for a private cause of action. Subordinate legislative and adjudicative functions do not in general attract potential government liability for damages. For practical purposes, the real concern here is with executive decisions by Ministers and civil servants causing losses that may or may not be excused by statutory authority.

[26] The focus of judicial review is to quash invalid government decisions — or require government to act or prohibit it from acting — by a speedy process. A bookstore, for example, will have a greater interest in getting its foreign books through Canada Customs — despite ill-founded allegations of obscenity — than in collecting compensation for the trifling profit lost on each book denied entry (*Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38). Thus s. 18.1 of the *Federal Courts Act* establishes a summary procedure with a 30-day time limit. There is no pre-hearing discovery, apart from what can be learned through affidavits and cross-examination. The applications judge hears no *viva voce* evidence. Damages are not available. Judicial review suits the litigant who wishes to strike quickly and directly at the action (or inaction) it complains about. A damages claimant, on the other hand, will often be unaware of the nature or extent of its losses in a 30-day time frame, and may need pre-trial discovery to either make its case or find out it has none.

[27] The question must therefore be asked: What is the practical benefit to a litigant who wants compensation rather than a reversal of a government decision to undergo the *Grenier* two-court procedure? TeleZone, for example, would acquire no practical benefit from a judicial review application. Its primary complaint is for damages arising from the breach of an alleged tendering contract. It no longer seeks the benefit of the contract (or the PCS licence). It seeks compensation for substantial costs thrown away and lost profits. The Crown does not argue that the tendering contract (if it was made) was *ultra vires*, or that the alleged breach (if it occurred) was mandated by statutory authority. The argument, instead, is that TeleZone’s claim constitutes a

collateral attack on the ministerial order under the *Radiocommunication Act* that failed to award it a PCS licence. But in TeleZone's circumstances, judicial review of the Minister's decision would not address the claimed harm and would seem to offer little except added cost and delay.

[28] Negligence is also alleged by TeleZone. Tort liability, of course, is based on fault, not invalidity. As the Court made clear many years ago in *The Queen in Right of Canada v. Saskatchewan Wheat Pool*, 1983 CanLII 21 (SCC), [1983] 1 S.C.R. 205, at pp. 222-25, breach of a statute is neither necessary nor is it sufficient to ground a private cause of action. It is not necessary because a government decision that is perfectly valid may nevertheless give rise to liability in contract (*Agricultural Research Institute of Ontario v. Campbell-High* (2002), 2002 CanLII 10432 (ON CA), 58 O.R. (3d) 321 (C.A.), leave to appeal refused, [2003] 1 S.C.R. vii) or tort (*Ryan v. Victoria (City)*, 1999 CanLII 706 (SCC), [1999] 1 S.C.R. 201).

[29] Nor is a breach of statutory power necessarily sufficient. Many losses caused by government decision making do not give rise to any cause of action known to the law. As the Attorney General correctly points out, "[e]ven if a discretionary decision of a federal board, commission or tribunal has been declared invalid or unlawful, that in itself does not create a cause of action in tort or under the Quebec regime of civil liability" (Factum, at para. 28).

[30] In *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, Charron J. wrote that "[a] person accused of a criminal offence enjoys a private right of action when a prosecutor acts maliciously in fraud of his or her prosecutorial duties with the result that the accused suffers damage. However, the civil tort of malicious prosecution is not an after-the-fact judicial review of a Crown's exercise of prosecutorial discretion" (para. 7 (emphasis added)). H. Woolf, J. Jowell and A. Le Sueur point out in *De Smith's Judicial Review* (6th ed. 2007), that "[u]nlawfulness (in the judicial review sense) and negligence are conceptually distinct" (pp. 924-25). Put another way, while Crown liability in tort and the validity of an underlying administrative decision may generate some overlapping considerations, they present distinct and separate justiciable issues.

[31] The main difficulty in suing government for losses arising out of statutory decisions is often not the public law aspects of the decision but the need to identify a viable private cause of action, and thereafter to meet such special defences as statutory authority. In *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, for example, it was alleged that the conduct of the Registrar of mortgage brokers contributed significantly to the loss of some claimant investors, but it was held that there was insufficient proximity between the Registrar and the claimants to give rise to a duty of care. See also *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562; *Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551, at para. 8.

[32] The enactment of the *Federal Court Act*, S.C. 1970-71-72, c. 1, and the subsequent amendments in 1990 were designed to enhance government accountability as well as to promote access to justice. The legislation should be interpreted in such a way as to promote those objectives. The *Grenier* approach does not do so, in my respectful opinion, as will now be discussed.

B. *The Grenier Case*

[33] The shadow of the *Grenier* case perhaps extends beyond what was intended by the *Grenier* court itself.

[34] *Grenier* did not concern a conflict between the Federal Court and a provincial superior court. It concerned which of two alternative Federal Court modes of procedure should be pursued by an inmate of a federal penitentiary. He complained of the adverse effects of administrative segregation for 14 days pursuant to the *Corrections and Conditional Release Act*, S.C. 1992, c. 20. The inmate did not seek judicial review of the decision of the head of the institution to place him in administrative segregation. Instead, after waiting three years, he brought an action for damages against the federal Crown under s. 17 of the *Federal Courts Act*. At trial, the administrative segregation was found to be arbitrary. He was awarded \$5,000 in compensatory and exemplary damages.

[35] On appeal, the Attorney General objected that the inmate should have sought judicial review of his administrative segregation under s. 18 of the Act before bringing his action for damages under s. 17 of the Act. The argument, in essence, was that the *Federal Courts Act* has several procedural doors and the inmate had tried to

enter the wrong one. He knocked on [s. 17](#) whereas he should have gone through [s. 18](#). The Federal Court of Appeal agreed, taking the view that “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” (para. 24 (emphasis added)). The court reasoned that even within the same court, the [s. 17](#) action for damages constituted an impermissible collateral attack on the decision of the prison authority (paras. 32-33) because the trial court “had to review the lawfulness of the institutional head’s decision . . . and set it aside” (para. 34), which could only be done under s. 18 of the same Act. It was thought that the judicial review jurisdiction of the Federal Court, with its unique statutory procedure, must be protected from erosion. Such a conclusion, in the *Grenier* court’s view, was consistent with *R. v. Consolidated Maybrun Mines Ltd.*, [1998 CanLII 820 \(SCC\)](#), [1998] 1 S.C.R. 706.

[36] Moreover, according to the *Grenier* court, it made no difference that the administrative segregation Mr. Grenier complained of had long since been served. “[A] decision of a federal agency, such as the one by the institutional head in this case”, the court reasoned, “retains its legal force and authority, and remains juridically operative and legally effective so long as it has not been invalidated” (para. 19). Accordingly, the prison order, even in its afterlife, was still a complete answer to the [s. 17](#) damages action.

[37] More recently, the Federal Court of Appeal itself seems to be losing some enthusiasm for *Grenier*’s “separate silos” approach. In *Hinton v. Canada (Minister of Citizenship and Immigration)*, [2008 FCA 215](#), [2009] 1 F.C.R. 476, the court allowed an application for judicial review to be converted into an action for damages which was also certified as a class action, Sexton J.A. commenting that “[s]ometimes, such as the case at bar, it may prove too cumbersome to initiate a separate action for damages either concurrently with, or subsequent to, an application for judicial review” (para. 50).

[38] More recently in *Parrish & Heimbecker Ltd. v. Canada (Minister of Agriculture and Agri-Food)*, [2008 FCA 362](#), [2009] 3 F.C.R. 568 (which, on appeal, was heard concurrently in this Court with the present appeal), Sharlow J.A., dissenting, took the view that “the *Grenier* principle was developed without taking into account certain aspects of the statutory scheme governing federal Crown litigation [including the *Crown Liability and Proceedings Act*] that in my view cast doubt on the *Grenier* analysis” (para. 41).

[39] At the same time, some provincial courts have accepted the *Grenier* approach: see, e.g., *Donovan v. Canada (Attorney General)*, [2008 NLCA 8](#), 273 Nfld. & P.E.I.R. 116; *Lidstone v. Canada (Minister of Canadian Heritage)*, [2008 PESCTD 6](#), 286 Nfld. & P.E.I.R. 244. Most provincial courts, however, have either not followed *Grenier* or distinguished it: see, e.g., *River Valley Poultry Farm Ltd. v. Canada (Attorney General)*, [2009 ONCA 326](#), 95 O.R. (3d) 1, at para. 30; *Los Angeles Salad Co. v. Canadian Food Inspection Agency*, [2009 BCSC 109](#), 92 B.C.L.R. (4th) 379, at para. 24; *Leroux v. Canada Revenue Agency*, [2010 BCSC 865](#), 2010 D.T.C. 5123, at para. 54; see also *Fantasy Construction Ltd., Re*, [2007 ABCA 335](#), 89 Alta. L.R. (4th) 93, at para. 43; *Genge v. Canada (Attorney General)*, [2007 NLCA 60](#), 270 Nfld. & P.E.I.R. 182, at para. 34.

C. The Attorney General’s Expansive View of the *Grenier* Decision

[40] According to the Attorney General, *Grenier* denied the *jurisdiction* of either the Federal Court or a provincial superior court to proceed to adjudicate a damages claim without first passing through the “unique” judicial review procedure set out in [s. 18](#) of the *Federal Courts Act* if the “lawfulness” of an administrative decision or order is in issue. The Attorney General uses the expression “invalidity or lawfulness” which, he points out, may extend even to contract claims. He cites *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, [1995 CanLII 3600 \(FCA\)](#), [1995] 2 F.C. 694, at pp. 703-6, where the Federal Court of Appeal concluded that the exercise by a Minister of a statutory power to seek tenders and to enter into contracts for the lease of land by the Crown could be subject to judicial review. See also *Irving Shipbuilding Inc. v. Canada (Attorney General)*, [2009 FCA 116](#), 314 D.L.R. (4th) 340, at paras. 21-25, leave to appeal refused, [2009] 3 S.C.R. vii. However, in this Court’s decision in *Martel Building Ltd. v. Canada*, [2000 SCC 60](#), [2000] 2 S.C.R. 860, a tendering case, although in the end the claim was dismissed, there was no suggestion in the judgment that judicial review was a necessary preliminary step to the recovery of contract damages against the Crown.

[41] Moreover, I do not think the Attorney General’s position is supported by *Consolidated Maybrun* or its companion case of *R. v. Al Klippert Ltd.*, [1998 CanLII 821 \(SCC\)](#), [1998] 1 S.C.R. 737. Those cases dealt with the narrow issue of whether a person facing penal charges for failing to comply with an

administrative order can challenge the validity of the order by way of defence despite failure to take advantage of the appeal process provided for by the law under which the order was issued. In both cases, the Court paid close attention to the regulatory statute under which an order is made and concluded that to permit such a defence “would encourage conduct contrary to the [regulatory] Act’s objectives and would tend to undermine its effectiveness” (*Consolidated Maybrun*, at para. 60). These cases thus stand for a rather nuanced view of where collateral attack is (or is not) permissible. The outcome largely depends on the court’s view of the statute under which an order is made “and must be answered in light of the legislature’s intention as to the appropriate forum” for resolving the dispute (*Consolidated Maybrun*, at para. 52). In my respectful view, having regard to these policy considerations, it would be adherence to the *Grenier* approach that “would tend to undermine [the] effectiveness” of the *Federal Courts Act* reforms which had as one of their objectives making the provincial superior courts an equally “appropriate forum” for resolving in an efficient way financial claims against the federal Crown.

D. *The Jurisdiction of the Provincial Superior Courts*

[42] What is required, at this point of the discussion, is to remind ourselves of the rule that any derogation from the jurisdiction of the provincial superior courts (in favour of the Federal Court or otherwise) requires clear and explicit statutory language: “[The] ouster of jurisdiction from the provincial superior courts in favour of vesting exclusive jurisdiction in a statutory court . . . requires clear and explicit statutory wording to this effect”: *Ordon Estate v. Grail*, 1998 CanLII 771 (SCC), [1998] 3 S.C.R. 437, at para. 46; see also *Pringle v. Fraser*, 1972 CanLII 14 (SCC), [1972] S.C.R. 821, at p. 826; *Canada (Human Rights Commission) v. Canadian Liberty Net*, 1998 CanLII 818 (SCC), [1998] 1 S.C.R. 626, at para. 38. The Attorney General’s argument rests too heavily on what he sees as the negative implications to be read into s. 18.

[43] The oft-repeated incantation of the common law is that “nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially 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”: *Peacock v. Bell* (1667), 1 Wms. Saund. 73, 85 E.R. 84, at pp. 87-88. In contrast, the jurisdiction of the Federal Court is purely statutory.

[44] The term “jurisdiction” simply is shorthand for the collection of attributes that enables a court or tribunal to issue an enforceable order or judgment. A court has jurisdiction if its authority extends to “the person and the subject matter in question and, in addition, has authority to make the order sought”: *Mills v. The Queen*, 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863, per McIntyre J., at p. 960, quoting Brooke J.A. in *R. v. Morgentaler* (1984), 1984 CanLII 55 (ON CA), 41 C.R. (3d) 262, at p. 271, and per Lamer J., dissenting, at p. 890; see also *R. v. Rahey*, 1987 CanLII 52 (SCC), [1987] 1 S.C.R. 588, at p. 603; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at para. 15; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765. The Attorney General does not deny that the Superior Court possesses *in personam* jurisdiction over the parties, or dispute the Superior Court’s authority to award damages. The dispute centres on subject matter jurisdiction.

[45] It is true that apart from constitutional limitations (see, e.g., *Attorney General of Canada v. Law Society of British Columbia*, 1982 CanLII 29 (SCC), [1982] 2 S.C.R. 307, and cases under s. 96 of the *Constitution Act, 1867*, which are not relevant here), Parliament may by statute transfer jurisdiction from the superior courts to other adjudicative bodies including the Federal Court. It did so, for example, with respect to the judicial review of federal decision makers: *Canada Labour Relations Board v. Paul L’Anglais Inc.*, 1983 CanLII 121 (SCC), [1983] 1 S.C.R. 147, at p. 154. However, the onus lies here on the Attorney General to establish the existence and extent of such a transfer of jurisdiction in statutory terms that are clear, explicit and unambiguous.

[46] Nothing in the *Federal Courts Act* satisfies this test. Indeed, as mentioned, the explicit grant to the provincial superior courts of concurrent jurisdiction in claims against the Crown in s. 17 of that Act (as well as s. 21 of the *Crown Liability and Proceedings Act*) directly refutes it. As Sharlow J.A., dissenting, pointed out in *Parrish & Heimbecker Ltd.* (appeal allowed and judgment released concurrently herewith, 2010 SCC 64, [2010] 3 S.C.R. 639), s. 8 of the *Crown Liability and Proceedings Act*, which codifies the defence of statutory authority, is evidence that Parliament envisaged that the assessment of lawfulness would be made by the provincial superior court in the course of adjudicating a claim for damages (para. 39).

E. *Claimed “Inferences” From Section 18 of the Federal Courts Act*

[47] An application for judicial review under the *Federal Courts Act* combines an allegation that a federal authority has acted contrary to the substantive principles of public law, along with a claim for one of the kinds of relief listed in s. 18(1). It is only this procedure that is in the exclusive jurisdiction of the Federal Court. As the Court recently observed in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, “[t]he genesis of the *Federal Courts Act* lies in Parliament’s decision in 1971 to remove from the superior courts of the provinces the jurisdiction over prerogative writs, declarations, and injunctions against federal boards, commissions and other tribunals” (para. 34). Section 18 does *not* say that a dispute over the lawfulness of exercise of statutory authority cannot be assessed in the course of a trial governed by the *Crown Liability and Proceedings Act* brought in the provincial superior court or pursuant to s. 17 of the *Federal Courts Act* itself.

[48] The Attorney General argues that a “remedies” oriented approach, similar to the view adopted by the Ontario Court of Appeal in this case, results in “a rigid, formalistic and literal interpretation” of s. 18 (Factum, at para. 66) and gives insufficient weight to context and, in particular, to the intention of Parliament. I agree that the context and Parliamentary purpose are essential to a proper interpretation of s. 18, but I do not think a broad and contextual approach assists the Attorney General’s argument.

(i) The Parliamentary Context

[49] The Parliamentary debates in 1971 took place in the context of the enormous growth of federal regulatory regimes, the perceived need for a “national perspective” on judicial review, and a concern about inconsistent supervision of federal public bodies by various provincial superior courts across the country (see D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at para. 2:4100). Thus, Parliament radically transformed the old Exchequer Court into a new Federal Court and crafted a new procedure which resulted in the Federal Court’s supervisory jurisdiction over federal decision makers.

[50] The Minister of Justice in 1970 emphasized that Parliament’s concern was supervision (not compensation) and in particular its concern was about fragmented judicial review of federal adjudicative tribunals. One provincial superior court might uphold as valid an important decision, e.g., by the National Energy Board, which a superior court in a different province might decide to quash. Thus:

This multiple supervision [by the provincial courts], with a lack of consistent jurisprudence and application, can work serious hardship not only on the boards and commissions but on those who appear before them. . . . It is for this reason . . . that the conclusion was reached that this superintending jurisdiction should be vested in a single court that enjoyed the same nation wide jurisdiction as the federal boards, commissions and tribunals themselves. The bill is therefore designed to create a single and uniform basis of superintending jurisdiction in relation to federal boards and commissions and to place them on the same footing in this regard as provincial boards and commissions.

(*House of Commons Debates*, 2nd Sess., 28th Parl. March 25, 1970, at pp. 5470-71; see also A.G. Factum, at para. 79; *Khosa*, at para. 34.)

However, the very broad statutory definition in s. 2 of “federal board, commission or other tribunal” goes well beyond what are usually thought of as “boards and commissions” and its very breadth belatedly (and perhaps unintentionally) precipitated the *Grenier* controversy about how to prioritize the overlapping subject matter shared by judicial review and the trial of common law claims for compensation based on fault. The grant of concurrent jurisdiction in s. 17 does not negate the possibility of inconsistency, but Parliament has agreed to live with the possibility in the interest of easier access to justice.

(ii) The Statutory Text

[51] The grant of *exclusive* jurisdiction to judicially review federal decision makers is found in s. 18 of the *Federal Courts Act* and is expressed in terms of particular remedies:

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.

. . .

(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.

[52] All of the remedies listed in s. 18(1)(a) are traditional administrative law remedies, including the four prerogative writs — *certiorari*, prohibition, *mandamus* and *quo warranto* — and declaratory and injunctive relief in the administrative law context. Section 18 does not include an award of damages. If a claimant seeks compensation, he or she cannot get it on judicial review. By the same token, the plaintiff in a damages action is not entitled to add a supplementary claim for a declaration or injunction to prevent the government from acting on a decision said to be tainted by illegality. That is the domain of the Federal Court.

(iii) Reading the Act as a Whole

[53] There is much internal evidence in ss. 18 and 18.1 of the *Federal Courts Act* to indicate that Parliament could not have intended judicial review to have the gatekeeper function envisaged by *Grenier*.

[54] As mentioned, the 30-day limitation period for judicial review applications under s. 18.1(2) of the *Federal Courts Act* is one such indication. Such a short limitation is consistent with a quick and summary judicial review procedure — but not a damages action. TeleZone’s action in Ontario would have a six-year limitation. A 30-day cut off for a damages claimant would be unrealistic. The claimant may not be in a position to apply for judicial review within the limitation period. The facts necessary to ground a civil cause of action may not emerge until after 30 days have passed.

[55] The 30-day limit can be extended by order of a Federal Court judge (s. 18.1(2)) but the extension is discretionary, and would subordinate the fate of a civil suit brought in a superior court to the discretion of a Federal Court judge ruling upon a request for an extension of time for reasons that have to do with public law concerns, not civil damages. In practical terms, the effect of the *Grenier* argument would be to impose a discretionary limitation period (determined by the Federal Court) on actions for damages against the Crown in a provincial superior court, an outcome which, in my opinion, Parliament cannot have intended. Apart from anything else, it undermines s. 39 of the *Federal Courts Act*, which provides that, ordinarily, claims against the Crown in the Federal Court are subject to the limitation period applicable “between subject and subject” in the province where the claim arose, or six years in respect of a “cause of action arising otherwise than in a province”.

[56] As recently affirmed in *Khosa*, the grant of relief on judicial review is in its nature discretionary and may be denied even if the applicant establishes valid grounds for the court’s intervention:

. . . the language of s. 18.1 generally sets out threshold grounds which permit but do not require the court to grant relief. Whether or not the court should exercise its discretion in favour of the application will depend on the court’s appreciation of the respective roles of the courts and the administration as well as the “circumstances of each case”. [para. 36]

See also *Harelkin v. University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 S.C.R. 561, at pp. 592-93; *Immeubles Port Louis Ltée v. Lafontaine (Village)*, 1991 CanLII 82 (SCC), [1991] 1 S.C.R. 326, at p. 372. Such an approach does not align well with the paradigm of a common law action for damages where, if the elements of the claim are established, compensation ought generally to follow as a matter of course. In judicial review, “the discretionary nature of the courts’ supervisory jurisdiction reflects the fact that unlike private law, its orientation is not, and never has been, directed exclusively to vindicating the rights of individuals” (Brown and Evans, at para. 3:1100).

(iv) The 1990 Amendments to the *Federal Courts Act*

[57] The current version of s. 17 of the *Federal Courts Act*, which only came into force on February 1, 1992, allows parties to institute civil claims against the Federal Crown in the superior courts of the provinces. For ease of reference, I repeat the operative language:

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.

The grant of jurisdiction is thus framed in terms of relief, i.e., “all cases in which relief is claimed” except as otherwise provided. Section 18(1) otherwise provides in relation to the specific forms of relief listed therein. Section 18(3) of the Act expressly provides that *remedies in the nature of judicial review* “may be obtained only on an application for judicial review made under section 18.1”. The *Federal Courts Act* lists no other relevant exclusions from s. 17, and we have not been referred to any other Act of Parliament having a bearing on this subject.

[58] As the Minister of Justice stated in 1989 before the Legislation Committee examining Bill C-38, which resulted in, among other changes, today’s version of s. 17:

[W]e have made provision in the bill whereby ordinary common law and civil law actions for relief against the federal Crown, which are presently the exclusive jurisdiction of the Federal Court, may also be heard by provincial courts. Such provision acknowledges the fact that the Federal Court possesses no unique expertise in areas of ordinary contract and tort law. [The Minister here went on to describe the practical jurisdictional and procedural problems created by the Federal Court’s prior exclusive jurisdiction over federal authorities.]

(*Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-38*, No. 1, 2nd Sess., 34th Parl., November 23, 1989, at pp. 14-15)

On second reading of the Bill, the Minister again emphasized that the purpose of the amendments was to allow the plaintiffs to sue the federal Crown in either the provincial superior courts or the Federal Court:

For example, a person should be able to sue the Crown in a suitably convenient court for breach of contract to purchase goods or for negligent driving by a Crown employee that causes injuries to another motorist. At the moment, such actions can only be brought in the Federal Court. However, it is not as available as provincial courts.

...

Moreover, for both citizen and lawyer alike, provincial courts, including their procedures and personnel, are much more familiar.

Therefore, the Federal Court is often not the most convenient one for the private litigant. With this in mind, the government has proposed that both the provincial courts and the Federal Court share jurisdiction with respect to such actions, thereby generally giving a plaintiff a choice of forum. [Emphasis added.]

(*House of Commons Debates*, 2nd Sess., 34th Parl., November 1, 1989, at p. 5414)

[59] The effect of the argument of the Attorney General, if accepted, would be to undermine the purpose and intended effect of the 1990 amendment by retaining in the Federal Court exclusive jurisdiction over a key element of many causes of action proceeding in the provincial courts despite the promise to give plaintiffs a “choice of forum” and to make available relief in the provincial superior courts that may be more “familiar” to litigants.

F. *The Doctrine of Collateral Attack*

[60] The Attorney General contends that to permit TeleZone to proceed with its claim in the provincial superior court in the absence of prior judicial review would be to allow an impermissible “collateral attack” on the Minister’s decision. The Court has described a collateral attack as

an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

(*Wilson v. The Queen*, 1983 CanLII 35 (SCC), [1983] 2 S.C.R. 594, at p. 599)

[61] The rule is a judicial creation (which must therefore yield to a contrary legislative enactment) based on general considerations related to the administration of justice, as explained in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 72:

The fundamental policy behind the rule against collateral attack is to “maintain the rule of law and to preserve the reputation of the administration of justice” (*R. v. Litchfield*, 1993 CanLII 44 (SCC), [1993] 4 S.C.R. 333, at p. 349). The idea is that if a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it. [Emphasis added.]

[62] In *R. v. Litchfield*, 1993 CanLII 44 (SCC), [1993] 4 S.C.R. 333, the criminal case referred to in *Garland*, the Court declined to apply the rule against collateral attack. In *Garland* itself, class action plaintiffs brought a claim against a gas company seeking restitution on the grounds of unjust enrichment of late payment penalties previously approved by the Ontario Energy Board. In its defence, the gas company argued that the claim for restitution was a collateral attack on the Board's order. The defence failed.

[63] I do not think the Attorney General's collateral attack argument can succeed on this appeal for three reasons. Firstly, as Borins J.A. pointed out in his scholarly judgment, the doctrine of collateral attack may be raised by the Attorney General in the provincial superior court as a defence if he or she believes that, in the particular circumstances, to do so is appropriate. However, the possible availability of the defence is not an argument against provincial superior court jurisdiction. Nor does it justify inserting the Federal Court into every claim for damages predicated on an allegation that the government's decision that caused the loss was “invalid or unlawful”.

[64] Secondly, TeleZone is not seeking to “avoid the consequences of [the ministerial] order issued against it” (*Garland*, at para. 72). On the contrary, the ministerial order and the financial losses allegedly consequent on that order constitute the foundation of the damages claim. This was the result in *Garland* itself, where Iacobucci J. held for the Court:

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. [Emphasis added; para. 71.]

[65] Similarly in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, Arbour J. declined to apply the collateral attack doctrine in a case arising out of a grievance arbitration where CUPE sought to challenge the underlying facts of a conviction of one of its members for sexual assault. Arbour J. reasoned that the Union's argument was “an implicit attack on the correctness of the factual basis of the decision, not a contest about whether that decision has legal force, as clearly it does” (para. 34).

[66] Thirdly, the Attorney General's argument fails even if one takes a more expansive view of the doctrine of collateral attack, as does Professor David Mullan:

The cause of action [in *Garland*] depended necessarily on establishing the invalidity of the Board's order on which the utility was relying in collecting interest. If the order had been valid, there would have been no cause of action. This was in every sense a collateral attack on the Board's orders. Collateral attack is not and never has been confined to situations where the challenge is by way of resistance to the enforcement of an order. It is also implicated in situations where someone, in asserting a civil claim for

monetary or other relief, needs to attack a law or order that the defendant is advancing as justification for the actions on which the plaintiff's claim is based. . . . [Emphasis added.]

(D. J. Mullan, “Administrative Law Update — 2008-2009”, prepared for the Continuing Legal Education conference, *Administrative Law Conference—2009*, October 2009, at p. 1.1.22.)

In Professor Mullan's view, the Court in *Garland* should have taken what he sees as the more principled route of applying the factors in *Consolidated Maybrun* to determine whether the collateral attack was of a permissible variety. In that case, as set out in the judgment of L'Heureux-Dubé J., the appropriate factors to apply in determining whether the Court is confronted with an impermissible collateral attack on an administrative order are (1) the wording of the statute from which the power to issue the order derives; (2) the purpose of the legislation; (3) the availability of an appeal; (4) the nature of the collateral attack in light of the tribunal's expertise and *raison d'être* (including whether “the legislature intended to confer jurisdiction to hear and determine the question raised”); and (5) the penalty on a conviction for failing to comply with the order (paras. 45, 50-51 and 62). These factors have also been applied in the civil context; see, generally, K. Horsman and G. Morley, eds., *Government Liability: Law and Practice* (loose-leaf), at p. 11-9.

[67] Judicial doctrine necessarily yields to a contrary statutory enactment. Accepting, as Professor Mullan puts it, at p. 1.1.22, that the rule against collateral attack may be “implicated in situations where someone, in asserting a civil claim for monetary or other relief, needs to attack a law or order that the defendant is advancing as justification for the actions on which the plaintiff's claim is based”, the s. 17 statutory grant of concurrent jurisdiction again defeats the Attorney General's submission. This is because the claimant's “need to attack a law or order” is essential to its cause of action, and adjudication of that allegation (even if raised by way of reply) is a necessary step in disposing of the claim. Parliament has stated that provincial superior courts possess the concurrent necessary jurisdiction to dispose of the whole of such a claim, not just part of it.

[68] In summary, I agree with Borins J.A. that the *Grenier* approach cannot be justified by the rule against collateral attack.

G. *The Defence of Statutory Authority*

[69] It would also be open to the Crown, by way of defence to a damages action, to argue that the government decision maker was acting under a statutory authority which precludes compensation for consequent losses. This, again, is a matter of defence, not jurisdiction. It is a hurdle facing any claimant. Governments make discretionary decisions all the time which will inflict losses on people or businesses without conferring any cause of action known to the law.

[70] In a case of nuisance, for example, the claimant property owner may have all the elements of a good common law action in nuisance yet be defeated by the defence that the government was authorized to do what it did and that collateral damage to the claimant was an inevitable result of the authority so provided. See, e.g., P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000), at p. 139, and Horsman and Morley, at p. 6-41.

[71] However, as stated earlier, the defence of “statutory authority” will not always provide a complete answer to a damages claim. In some cases, the outcome may depend on whether the statute either explicitly or implicitly authorized the act that caused the harm. In *Tock v. St. John's Metropolitan Area Board*, 1989 CanLII 15 (SCC), [1989] 2 S.C.R. 1181, Sopinka J. pointed out, referring to the dictum of Viscount Dunedin in *City of Manchester v. Farnworth*, [1930] A.C. 171 (H.L.), that there may be “alternate methods of carrying out the work [that would have avoided the loss]. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance” (p. 1226). Reference should also be made to the qualifying observation of what is “practically impossible” made by Viscount Dunedin and quoted by Sopinka J., at p. 1224:

The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense. [Emphasis added.]

This caveat, also quoted by Wilson J., at p. 1213 of *Tock*, was the subject of some disagreement on the Court, an issue that need not detain us. The issue of statutory authority does not go to the jurisdiction of the provincial superior courts. That is all that needs to be decided here.

[72] It is sufficient to say that it is always open to the Crown to argue the defence of statutory authority; see, e.g., in s. 8 of the *Crown Liability and Proceedings Act*:

Nothing in [sections 3 to 7](#) makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority that, if those sections had not been passed, would have been exercisable by virtue of the prerogative of the Crown, or any power or authority conferred on the Crown by any statute

The defence of statutory authority is regularly interpreted and applied by the provincial superior courts: see, e.g., *Sutherland v. Canada (Attorney General)*, [2002 BCCA 416](#), [2002] 10 W.W.R. 1, leave to appeal refused, [2003] 1 S.C.R. xi (*sub nom. Jones v. Attorney General of Canada*); *Lake v. St. John's (City)*, 2000 NFCA 48, [192 Nfld. & P.E.I.R. 84](#); *Neuman v. Parkland (County)*, [2004 ABPC 58](#), 36 Alta. L.R. (4th) 161; *Danco v. Thunder Bay (City)* (2000), 13 M.P.L.R. (3d) 130 (Ont. S.C.J.); *Landry v. Moncton (City)*, [2008 NBCA 32](#), 329 N.B.R. (2d) 212.

[73] I give an example. In *Ryan v. Victoria (City)*, the “inevitable result” defence was tested in a claim for damages arising out of road works. Mr. Ryan, a motorcyclist, sued the municipality and a railway for negligence and nuisance after he was injured while crossing tracks in an urban area. The front wheel of the plaintiff's motorcycle got caught in the flangeway gap of the rail whose width was at the upper end of the allowed range set by the applicable regulation. The defence argued statutory authority. Writing for a unanimous Court, Major J. noted that “[s]tatutory authority provides, at best, a narrow defence to nuisance” (para. 54), and rejected it on the facts of the case.

[74] For present purposes, we need go no further than to repeat that “statutory authority” is an argument that goes to defence, not jurisdiction. If the provincial superior court (or the Federal Court under [s. 17](#)) finds that the government has a good defence based on statutory authority, it will simply dismiss the claimant's action.

H. The Concern About “Artful Pleading”

[75] The Crown contends that TeleZone's argument would risk putting judicial review of federal decision makers back in the provincial superior courts dressed up as damages claims. On this view the “artful pleader” will forum-shop by the way the case is framed. Of course, “artful pleaders” exist and they will formulate a claim in a way that best suits their clients' interests. However, no amount of artful pleading in a damages case will succeed in setting aside the order said to have harmed the claimant or enjoin its enforcement. Such relief is not available in the provincial superior court. The claimant must, as here, be content to take its money (if successful) and walk away leaving the order standing.

[76] Where a plaintiff's pleading alleges the elements of a private cause of action, I think the provincial superior court should not in general decline jurisdiction on the basis that the claim looks like a case that should be pursued on judicial review. If the plaintiff has a valid cause of action for damages, he or she is normally entitled to pursue it.

[77] In the U.K., a similar position has been expressed by the House of Lords in *Roy v. Kensington and Chelsea and Westminster Family Practitioner Committee*, [1992] 1 A.C. 624, *per* Lord Bridge, at pp. 628-29:

. . . where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him.

It is generally true here, as it is in the U.K., that a plaintiff is not required to bring an application for judicial review so long as private rights are legitimately engaged by the action. Under the English authorities, as in Canada, there is a special concern where the availability of judicial review depends on special leave, or is restricted by an abbreviated limitation period, or where the relief available on judicial review is discretionary (*Roy*, *per* Lord Lowry, at p. 654). See also P. P. Craig, *Administrative Law* (6th ed. 2008), at p. 869. These considerations echo the concerns already canvassed in rejecting the *Grenier* approach.

[78] To this discussion, I would add a minor *caveat*. There is always a residual discretion in the inherent jurisdiction of the provincial superior court (as well as in the Federal Court under s. 50(1) of its Act), to stay the damages claim because in its essential character, it is a claim for judicial review with only a thin pretence to a private wrong. Generally speaking the fundamental issue will always be whether the claimant has pleaded a reasonable private cause of action for damages. If so, he or she should generally be allowed to get on with it.

I. *Application to the Facts*

[79] TeleZone is not attempting to nullify or set aside the Minister's order. Its case is that the Minister, in deciding not to issue a licence to TeleZone, acted in breach of his contractual and equitable duties or in breach of a duty of care. TeleZone does not say that the Minister's decision should be quashed. On the contrary, TeleZone's causes of action in contract, tort and equity are predicated on the finality of that decision excluding TeleZone from participation in the telecommunications market, thereby (it says) causing it financial loss. Nor does TeleZone seek to deprive the Minister's decision of any legal effect. It does not challenge the licences issued to its competitors. It does not seek to undo what was done. It complains about what was *not* done, namely fulfilment by Industry Canada of its alleged contractual and equitable duties and its duty of care towards TeleZone itself.

[80] To the extent that TeleZone's claim can be characterized as a collateral attack on the Minister's order (i.e., because the order failed to include TeleZone), I conclude, for the reasons discussed, that the grant of concurrent jurisdiction to determine claims against the Crown to the provincial superior courts negates any inference the Crown seeks to draw that Parliament intended the detour to the Federal Court advocated by *Grenier*. The TeleZone claim as pleaded is dominated by private law considerations. In a different case, on different facts, the Attorney General is free to raise "collateral attack" as a defence and the superior court will consider and deal with it.

V. Disposition

[81] The Superior Court of Ontario has jurisdiction over the parties and the subject matter, and has the power to grant the remedy of damages. There is nothing in the *Federal Courts Act* to prevent the Ontario Superior Court from adjudicating this claim. I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: Attorney General of Canada, Ottawa.

Solicitors for the respondent: Stikeman Elliott, Toronto.

[1] The Attorney General's principal argument was filed in the companion case of *Canada (Attorney General) v. McArthur*, 2010 SCC 63, [2010] 3 S.C.R. 626, and references herein are to that factum unless otherwise noted.