

Litigation - Canada

Jurisdictional Issues Affecting Claims against the Federal Government

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In June 2009 the Supreme Court of Canada granted leave to appeal the decision of the Ontario Court of Appeal in *TeleZone Inc v Canada (Attorney General)*.⁽¹⁾ The proceedings began in the Ontario Superior Court with motions by the federal government⁽²⁾ to dismiss TeleZone's action and three unrelated actions on the principal ground that the Federal Court - not the Ontario court - has jurisdiction over claims against the crown for damages.⁽³⁾ The crown was unsuccessful in two of the four cases, including *TeleZone*. All four cases were appealed to the Ontario Court of Appeal, which found that the Ontario Superior Court has jurisdiction. The Supreme Court's decision is expected to have a profound impact on the rights of persons claiming damages against the crown.

Facts

TeleZone's action

TeleZone was incorporated for the purpose of obtaining a personal communications services (PCS) licence from Industry Canada, a federal government ministry. After receiving positive feedback from Industry Canada on its efforts to launch a PCS business, TeleZone prepared and submitted an application for a PCS licence at significant cost to itself. Despite fulfilling the necessary criteria in its application for a PCS licence, TeleZone was not among the successful bidders.

TeleZone brought an action against the crown in the Ontario Superior Court of Justice for damages of C\$250 million for breach of contract and negligence as a result of Industry Canada's decision. TeleZone's position was that the terms and conditions of the call for applications from Industry Canada created a contract which was breached when Industry Canada failed to award TeleZone one of the PCS licences. Notably, TeleZone did not challenge the validity of Industry Canada's decision with respect to the PCS licences that it had awarded, which is relevant to the discussion below.

Motion to dismiss TeleZone's action

The crown brought a pre-trial motion to dismiss TeleZone's action on the grounds that the superior court did not have jurisdiction over the subject matter of the action, as exclusive jurisdiction lay with the Federal Court under Section 18(1) of the Federal Courts Act.⁽⁴⁾ The motion was dismissed.⁽⁵⁾

The motion judge found that Section 18(1) of the act excludes jurisdiction of provincial courts over the explicit prerogative remedies set out under that subsection.⁽⁶⁾ However, the judge further found that this exclusion does not extend to claims for damages against the crown flowing from civil causes of action. The motion judge's analysis was as follows:

"Section 18(1) of the [Federal Courts Act] 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 licencing process by the [Rural Cellular Association] and therefore fell within the definition of 'federal board, commission, or other tribunal' in s. 2(1) of the [Federal Courts Act]. However, damages

Authors

[Michael D Schafler](#)



[Douglas BB Stewart](#)



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."

The crown also argued that TeleZone's claim was a collateral attack on Industry Canada's decision and should not be permitted to continue before judicial review proceedings in the Federal Court had been completed. The motion judge dismissed that argument and found that TeleZone's claim was permissible as it had an independent cause of action that did not impugn the legal validity of Industry Canada's decision.⁽⁷⁾ The crown appealed the motion judge's decision to the Ontario Court of Appeal.

Court of Appeal Decision

The issues before the court of appeal were whether: (i) the Federal Court had exclusive jurisdiction over the subject matter of TeleZone's action on the basis of Section 18 of the Federal Courts Act; and (ii) TeleZone's action constituted an impermissible collateral attack on Industry Canada's decision. The court of appeal unanimously dismissed the crown's appeal.

Jurisdictional issue

On the jurisdictional issue, the court of appeal formulated and applied the following legal test.⁽⁸⁾ First, does the superior court have jurisdiction to adjudicate the plaintiff's claim? If it does, is there legislation or an arbitral agreement that clearly and unequivocally removes that jurisdiction?

Applying this test, the court of appeal found that as a court of general jurisdiction, the superior court has jurisdiction over all claims that constitute a reasonable cause of action.⁽⁹⁾ When considering the effect of legislation, the court of appeal found that Section 18 of the Federal Courts Act granted the Federal Court exclusive jurisdiction only in respect of the specific remedies which may be claimed against the crown that are listed under that section.⁽¹⁰⁾ These Section 18 remedies are extraordinary and do not extend to civil claims for damages based in contract and tort in which the plaintiff is not impugning the legal validity of an administrative decision. The remedies being sought in TeleZone's case were for such damages and its claim did not seek to challenge or change Industry Canada's decision on the PCS licences. Accordingly, the court of appeal found that there was no jurisdictional issue in respect of TeleZone's right to bring its claim in the superior court of justice.⁽¹¹⁾

The court of appeal considered the old rule that gave the Federal Court exclusive jurisdiction over all claims against the crown.⁽¹²⁾ The court of appeal noted that during the first 20 years of the Federal Court's existence, this old rule put up significant hurdles for claimants that wanted to join the crown in an action that had been brought in the provincial courts. This resulted in split or multiple proceedings which wasted both parties' and judicial resources.⁽¹³⁾ The court of appeal further noted that several amendments were made to the Federal Courts Act in 1990 to address these difficulties, in particular to Section 17,⁽¹⁴⁾ which made it clear that provincial courts had concurrent jurisdiction over actions against the crown.

The court of appeal appears to have been concerned that a finding in favour of the crown in *TeleZone* would have been contrary to legislative intent and could have breathed life back into archaic rules regarding jurisdictional exclusivity in the Federal Court.

Collateral attack

The court of appeal agreed with the motion judge that the collateral attack doctrine applies only when a litigant challenges the legal force of an administrative decision in subsequent proceedings.⁽¹⁵⁾ As TeleZone's action did not challenge the legal validity of Industry Canada's decision, the action was not a collateral attack that would render it impermissible. The court of appeal's reasoning here is consistent with its findings on the jurisdictional issue.

In its reasons the court of appeal rejected the application of the Federal Court of Appeal's earlier decision in *Grenier v Canada (Attorney General)*,⁽¹⁶⁾ on which the crown relied.⁽¹⁷⁾ In *Grenier* an inmate sued the crown for damages arising from an administrative decision which placed him in solitary confinement. The Federal Court of Appeal dismissed the plaintiff's claim on the basis that it was first necessary to challenge the administrative decision by judicial review under Section 18 of the Federal Courts Act.

The court of appeal went further than simply distinguishing *Grenier*, indicating that it "was not correctly decided".⁽¹⁸⁾ The court of appeal was concerned that if *Grenier* were applied, it would have far-reaching implications for litigants and noted that: "[t]he procedures 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".⁽¹⁹⁾

The court of appeal found that in any event it was not bound by the decision in *Grenier*.⁽²⁰⁾ The court instead followed a line of cases that have permitted actions for damages

against the crown in the superior court where there are no prior judicial review proceedings.⁽²¹⁾

In its final determination on this issue the court of appeal did not accept that the superior court could have "conditional jurisdiction" that was dependent on the result of a judicial review application. The court of appeal concluded simply that either there is jurisdiction or there is not.⁽²²⁾

Comment

In Ontario, claims for damages against the crown may now be safely brought in the superior court, provided that there is an independent and reasonable cause of action that does not rely on a challenge to the legal validity of an administrator's decision that would require a remedy provided for under Section 18(1) of the Federal Courts Act.

This 'new regime' - at least in Ontario - has effectively dealt away with what some commentators described as archaic rules that no longer reflected modern Canadian legal thinking.

When the Supreme Court hears the crown's appeal in *TeleZone*, there will be an opportunity to confirm on a national basis, not simply in Ontario, that the old rules on jurisdiction are truly a thing of the past.

For further information on this topic please contact [Michael D Schafler](#) or [Douglas BB Stewart](#) at Fraser Milner Casgrain LLP by telephone (+1 416 863 4511), fax (+1 416 863 4592) or email (michael.schafler@fmc-law.com or douglas.stewart@fmc-law.com).

Endnotes

(1) [2008] OJ No 5291, 94 OR (3d) 91 (Ont CA).

(2) Actions against the Canadian federal government are usually styled as against 'Canada (Attorney General)' or 'Her Majesty the Queen'. In proceedings and written decisions of courts in Canada, the federal government is often simply referred to as the 'crown', which reflects recognition of the queen (or king) as the formal head of state.

(3) As a federal state, there is a division of power between the federal and provincial governments in Canada that has been in place since Confederation in 1867. Separate federal and provincial courts have developed as a result of this division. Provincial courts have general jurisdiction to address all issues, including issues arising from federal laws, unless legislation puts a specific subject matter or remedy exclusively within the Federal Court's domain. The Federal Court has no inherent jurisdiction; its power is confined to subject matters conferred upon it by the Federal Courts Act or other federal legislation. Issues between the federal and provincial governments in respect of division of power have existed for decades. Similar tensions exist between the federal and provincial courts in the form of jurisdictional issues. For a more detailed discussion on Canadian federalism, please see PW Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) at Chapters 5 and 7.

(4) RS, 1985, c F-7.

(5) *TeleZone Inc v Canada (Attorney General)*, [2007] OJ No 4766, 88 OR (3d) 173 (Ont SCJ).

(6) Section 18(1) of the act reads as follows:

"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."

(7) *Supra* endnote 5 at paragraph 82.

(8) *Supra* endnote 1 at paragraph 92.

(9) *Ibid* paragraph 92.

(10) *Ibid* paragraphs 92 and 94.

(11) *Ibid* paragraphs 92 and 95.

(12) *Ibid* paragraph 93.

(13) See the Supreme Court's decision in *R v Thomas Fuller Construction*, [1980] 1 SCR 695, which provides an example of this problem. In *Fuller* an action was brought

against the crown in the Federal Court as required under the old rule, but it was found that a third-party proceeding in that action was to have been brought in the Ontario court. See PW Hogg, *supra* endnote 3 at pages 731-734, for a discussion of this case and other examples of cases that demonstrate this problem of multiple proceedings.

(14) Section 17(1) of the act reads as follows: "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".

(15) *Supra* endnote 1 at paragraph 98.

(16) (2005), 262 DLR (4th) 337 (FCA).

(17) *Supra* endnote 1 at paragraphs 94 and 100.

(18) *Ibid* paragraphs 94 and 100.

(19) *Ibid* paragraph 100.

(20) *Ibid* paragraphs 94 and 100.

(21) *Ibid* paragraphs 101-107.

(22) *Ibid* paragraph 112.

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