

**SUPREME COURT OF CANADA**

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| **Citation:** Canada (Attorney General) *v.* McArthur,  2010 SCC 63, [2010] 3 S.C.R. 626 | **Date:** 20101223  **Docket:** 33043 |

**Between:**

**Attorney General of Canada and James Blackler,**

**also known as Jim Blackler**

Appellants

and

**Michiel McArthur**

Respondent

- and -

**Attorney General of British Columbia, Roland Anglehart Sr. et al.**

Interveners

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

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| **Reasons for Judgment:**  (paras. 1 to 18) | Binnie J. (LeBel, Deschamps, Abella, Charron, Rothstein and Cromwell JJ. concurring) |

Canada (Attorney General) *v.* McArthur, 2010 SCC 63, [2010] 3 S.C.R. 626

**Attorney General of Canada and**

**James Blackler also known as Jim Blackler** *Appellants*

*v.*

**Michiel McArthur** *Respondent*

and

**Attorney General of British Columbia,**

**Roland Anglehart Sr., Roland Anglehart Jr.,**

**Bernard Arseneault, Héliodore Aucoin, Albert Benoît,**

**Robert Boucher, Elide Bulger, Gérard Cassivi,**

**Jean-Gilles Chiasson, Ludger Chiasson,**

**Martin M. Chiasson, Rémi Chiasson,**

**2973-0819 Québec inc., 2973-1288 Québec inc.,**

**3087-5199 Québec inc., Robert Collin, Roméo G. Cormier,**

**Marc Couture, Les Crustacées de Gaspé ltée,**

**Lino Desbois, Randy Deveau, Carol Duguay,**

**Charles-Aimé Duguay, Denis Duguay, Donald Duguay,**

**Marius Duguay, Edgar Ferron, Armand Fiset,**

**Livain Foulem, Claude Gionest, Jocelyn Gionet,**

**Simon J. Gionet, Aurèle Godin, Valois Goupil,**

**Aurélien Haché, Donald R. Haché, Gaëtan Haché,**

**Guy Haché, Jacques E. Haché, Jason-Sylvain Haché,**

**Jean-Pierre Haché, Jacques A. Haché, René Haché,**

**Rhéal Haché, Robert F. Haché, Alban Hautcœur,**

**Fernand Hautcœur, Jean-Claude Hautcœur,**

**Gregg Hinkley, Jean-Pierre Huard, Réjean Leblanc,**

**Christian Lelièvre, Elphège Lelièvre, Jean-Elie Lelièvre,**

**Jules Lelièvre, Dassise Mallet, Delphis Mallet, Francis Mallet,**

**Jean-Marc Marcoux, André Mazerolle, Eddy Mazerolle,**

**Gilles A. Noël, Lévis Noël, Martin Noël, Nicolas Noël,**

**Onésime Noël, Raymond Noël, Francis Parisé, Domitien Paulin,**

**Sylvain Paulin, Pêcheries Denise Quinn Syvrais inc.,**

**Pêcheries François inc., Pêcheries Jean-Yan II inc.,**

**Pêcheries Jimmy L. ltée, Pêcheries J.V.L. ltée,**

**Pêcheries Ray-L. inc., Les Pêcheries Serge-Luc inc.,**

**Roger Pinel, Claude Poirier, Produits Belle Baie ltée,**

**Adrien Roussel, Jean-Camille Roussel, Mathias Roussel,**

**Steven Roussy, Mario Savoie, Succession of Jean-Pierre Robichaud,**

**Succession of Lucien Chiasson, Succession of Sylva Haché,**

**Jean-Marc Sweeney, Michel Turbide, Réal Turbide,**

**Donat Vienneau, Fernand Vienneau, Livain Vienneau**

**and Rhéal Vienneau** *Interveners*

**Indexed as:  Canada (**Attorney General) ***v.*** McArthur

2010 SCC 63

File No.:  33043.

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 Crown and federal official in Superior Court of Ontario seeking constitutional remedies and damages for wrongful or false imprisonment and for intentional or negligent infliction of emotional and mental distress — Whether plaintiff entitled to proceed by way of action in Superior Court of Ontario 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.*

Between 1994 and 1999, M spent approximately four years and six months in solitary confinement, segregation or in a special handling unit on instructions of B or other federal employees for whom the Crown is responsible. He did not seek to set aside the prison orders, but some years later filed a statement of claim in the Ontario Superior Court seeking damages and alleging that his detention had been arbitrary and constituted cruel and unusual punishment, contrary to the *Canadian Charter of Rights and Freedoms*. He claimed to have suffered severe emotional and psychological injury and harm. He also alleged that the decisions to place him in solitary confinement were made deliberately and maliciously or negligently. The Superior Court dismissed the claim on the basis of *Canada v. Grenier*, 2005 FCA 348, [2006] 2 F.C.R. 287, but the Court of Appeal overturned the decision on the ground that relief by way of damages was available in the superior court.

Held: The appeal should be dismissed.

For the reasons set out in *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585, a textual, contextual and purposive interpretation of the *Federal Courts Act* does not support the view that a plaintiff who claims to have suffered compensable loss as a result of an administrative decision must first have the lawfulness of the decision determined by the Federal Court. Further, the *Federal Courts Act* does not prevent provincial superior court scrutiny of the constitutionality of the conduct of federal officials. Here, the Superior Court is authorized to consider the validity of M’s detention in the context of his damages claim, as well as the impact, if any, of any valid detention orders on Crown liability. The collateral attack doctrine does not support the Attorney General’s jurisdictional challenge in light of the explicit statutory grant of jurisdiction to the provincial superior courts in the *Federal Courts Act* where “relief is claimed against the [federal] Crown” as well as the provisions of the *Crown Liability and Proceedings Act*.

**Cases Cited**

**Applied:** *Canada (Attorney General) v.* *TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585; **overruled:** *Canada v. Grenier*, 2005 FCA 348, [2006] 2 F.C.R. 287; **referred to:** *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *R. v. Morgentaler* (1984), 41 C.R. (3d) 262; *R. v.* *Rahey*, [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.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*,ss. 9, 12, 24(1).

*Constitution Act, 1867*, s. 101.

*Corrections and Conditional Release Act*, S.C. 1992, c. 20, ss. 3, 31, 32, 33.

*Corrections and Conditional Release Regulations*, SOR/92-620, ss. 21, 22.

*Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, s. 21.

*Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 17, 18.

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, setting aside a decision of Pedlar J., 2006 CarswellOnt 9820. Appeal dismissed.

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

John A. Ryder-Burbidge, for the respondent.

Written submissions only for the intervener the Attorney General of British Columbia.

Patrick Ferland and David Quesnel, for the interveners Roland Anglehart Sr. et al.

The judgment of the Court was delivered by

1. Binnie J. — The question raised by this appeal is whether a prison inmate who seeks damages in the Ontario Superior Court of Justice against federal prison authorities for arbitrary detention and alleged mistreatment over a decade ago must first seek judicial review in the Federal Court to quash the segregation orders that are the basis of his claim.
2. As in the companion case of *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585, released concurrently, the Attorney General of Canada characterizes the damages claim as a collateral attack on an administrative decision, here the segregation orders, and contests the jurisdiction of the provincial superior court to proceed unless and until the orders are set aside by the Federal Court. Until that happens, he says, the Crown and its servants are fully protected from liability by the statutory authority granted by the *Corrections and Conditional Release Act*, S.C. 1992, c. 20. For the reasons given in *TeleZone*, I believe this objection to provincial superior court jurisdiction is not well founded. The Ontario Court of Appeal so held. I agree with that decision. I would dismiss the appeal.

I. Facts

1. In October 1994, while on parole in respect of a previous conviction, Mr. McArthur was arrested and charged with numerous offences including robbery, kidnapping, attempted murder and assault causing bodily harm. He was brought to Millhaven, a federal institution, to await trial. The appellant James Blackler was the warden of Millhaven at that time. According to the allegations in the amended statement of claim, which for present purposes are to be taken as capable of proof, Mr. McArthur was kept in solitary confinement for approximately 18 months at Millhaven on the instructions of Mr. Blackler or other federal employees for whom the Crown is responsible.
2. In May 1996, Mr. McArthur was voluntarily transferred from Millhaven to the Kingston Penitentiary. Just prior to Mr. McArthur’s arrival there, Mr. Blackler became the warden of the penitentiary and, so it is alleged in the amended statement of claim, caused Mr. McArthur to be placed in solitary confinement for another 14 months. This was all done, it is alleged, with “animus and malicious ill-will (*sic*)” (para. 24).
3. Subsequently, the Correctional Service of Canada (“CSC”) transferred Mr. McArthur to the Special Handling Unit at Ste-Anne-des-Plaines, where he was again put in solitary confinement, this time for four months. In total, Mr. McArthur spent approximately four years and six months in solitary confinement, segregation or in a special handling unit between 1994 and 1999.
4. Mr. McArthur alleges that he suffered losses as a result of four years and six months of involuntary solitary confinement in the form of “severe emotional and psychological *injury and* harm” (para. 26 (emphasis in original)). He was denied private family visits “routinely granted to other inmates whose circumstances [were] similar” (para. 24) as well as schooling, rehabilitation programs and “inmate leisure activities” (para. 25). Moreover, he says the same actions caused his wife and his daughter to suffer severe emotional and psychological harm, as “they were denied contacts and visits with [him] routinely granted to other inmates” (para. 26).
5. Mr. McArthur insists that his detention in solitary confinement (sometimes referred to as a “prison within a prison”) was arbitrary and constituted cruel and unusual punishment, contrary to ss. 9 and 12 of the *Canadian Charter of Rights and Freedoms*. He further alleges that the respondents failed to comply with the *Corrections and Conditional Release Act*, which, together with its regulations and the directives of the Commissioner of Corrections, governs the circumstances in which an inmate may be placed in solitary confinement. Mr. McArthur alleges the series of decisions to place and retain him in solitary confinement for such an extensive period of time was made deliberately and maliciously, or, in the alternative, negligently. He seeks damages for wrongful or false imprisonment, and for the intentional or negligent infliction of emotional and mental distress. Mr. McArthur does not seek to set aside the segregation orders, whose practical effects were exhausted over 10 years ago when he was eventually released from solitary confinement.

II. Judicial History

A. *Superior Court of Ontario (Pedlar J.), 2006 CarswellOnt 9820*

1. The motions judge accepted the Attorney General’s argument based on the decision of the Federal Court of Appeal in *Canada v. Grenier*, 2005 FCA 348, [2006] 2 F.C.R. 287, which was decided on similar facts. He concluded that to permit the damages action to proceed in the Superior Court would disregard or deny the intention clearly expressed by Parliament in the *Federal Courts Act*, R.S.C. 1985, c. F-7, to grant the Federal Court *exclusive* jurisdiction in matters of judicial review. Accordingly, a plaintiff who claims to have suffered compensable loss as a result of an administrative decision must first have the lawfulness of the decision determined by the Federal Court. The motions judge stated, “I don’t think the Ontario Superior Court has jurisdiction until that’s done” (para. 8).

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

1. In a unanimous decision authored by Borins J.A., the court concluded that “*Grenier* was not correctly decided” (para. 100). The Attorney General had not established that the plaintiff’s claims fit “squarely within s. 18(1)” (para. 94) of the *Federal Courts Act* which, in the court’s view, is concerned with remedies:

In none of the cases is a remedy sought that comes within the prerogative writs or extraordinary remedies of s. 18. Section 18 does not empower the Federal Court to award damages, which are sought [here]. . . .

. . . Causes of action in contract or tort are distinct from the prerogative writs and extraordinary remedies described in s. 18. Shortly put, relief by way of damages is not a form of relief contemplated by s. 18. [paras. 94-95]

Accordingly, the appeal was allowed.

III. Relevant Provisions

1. *Corrections and* Conditional *Release Act*, S.C. 1992, c. 20

**3.** [Purpose of correctional system] The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by

(*a*) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and

(*b*) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

*Administrative Segregation*

**31.** (1) [Purpose] The purpose of administrative segregation is to keep an inmate from associating with the general inmate population.

(2) [Duration] Where an inmate is in administrative segregation in a penitentiary, the Service shall endeavour to return the inmate to the general inmate population, either of that penitentiary or of another penitentiary, at the earliest appropriate time.

(3) [Grounds for confining inmate in administrative segregation] The institutional head may order that an inmate be confined in administrative segregation if the institutional head believes on reasonable grounds

(*a*) that

(i) the inmate has acted, has attempted to act or intends to act in a manner that jeopardizes the security of the penitentiary or the safety of any person, and

(ii) the continued presence of the inmate in the general inmate population would jeopardize the security of the penitentiary or the safety of any person,

(*b*) that the continued presence of the inmate in the general inmate population would interfere with an investigation that could lead to a criminal charge or a charge under subsection 41(2) of a serious disciplinary offence, or

(*c*) that the continued presence of the inmate in the general inmate population would jeopardize the inmate’s own safety,

and the institutional head is satisfied that there is no reasonable alternative to administrative segregation.

**32.** [Considerations governing release] All recommendations to the institutional head referred to in paragraph 33(1)(*c*) and all decisions by the institutional head to release or not to release an inmate from administrative segregation shall be based on the considerations set out in section 31.

**33.** (1) [Case to be reviewed] Where an inmate is involuntarily confined in administrative segregation, a person or persons designated by the institutional head shall

(*a*) conduct, at the prescribed time and in the prescribed manner, a hearing to review the inmate’s case;

(*b*) conduct, at prescribed times and in the prescribed manner, further regular hearings to review the inmate’s case; and

(*c*) recommend to the institutional head, after the hearing mentioned in paragraph (*a*) and after each hearing mentioned in paragraph (*b*), whether or not the inmate should be released from administrative segregation.

*Corrections and Conditional Release Regulations*, SOR/92-620

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

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

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

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

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

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

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

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

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

IV. Analysis

1. The important principle at stake in this appeal, as in *TeleZone*, is access to justice. With some notable exceptions, prison inmates are not rich people. Few can afford the luxury of a front-end judicial review procedure to argue about the validity of a segregation order already served where quashing the order is no longer of practical interest. Mr. McArthur may have some interest in the good governance of the prison system but at the moment he is looking for compensation. He may not get it, of course, but he ought to be given his day in court without being put through unnecessary and unproductive proceedings unless the applicable statutes clearly and explicitly compel him to detour to the Federal Court.
2. For the reasons set out in the companion case of *TeleZone*, I believe that the Attorney General’s argument exaggerates the legal effect of the grant in s. 18 of the *Federal Courts Act* of exclusive judicial review jurisdiction over federal decision makers. A textual, contextual and purposive interpretation of the *Federal Courts Act* does not support his case.
3. As noted by the motions judge, the facts of this case closely resemble *Grenier*. In his amended statement of claim, Mr. McArthur pleads that the segregation orders were made “without just cause or excuse” (para. 12) and lacked “the reasonable grounds required under subsection 31(3) of the Act to justify placing [him] in involuntary administrative segregation” (para. 15). Clearly, he is putting in issue the lawfulness or validity of the segregation orders, but he does so as an element of a private law cause of action over which the provincial superior court has jurisdiction. There is nothing in the federal legislation that says the provincial courts can only determine some — but not all — elements of his monetary claims against the Crown.
4. Moreover, the provincial superior court clearly has jurisdiction to hear Mr. McArthur’s claim for compensation under s. 24(1) of the *Charter*. In *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, an argument was made on behalf of the federal Crown that because constitutional relief was sought against federal officials (including the Director of Investigation and Research under the federal *Combines Investigation Act*, R.S.C. 1970, c. C-23, now repealed), all of whom fell within the definition of “federal board, commission or other tribunal”, the *Federal Courts Act* (at the time titled *Federal Court Act*) had successfully ousted the jurisdiction of the British Columbia Supreme Court. This Court concluded that Parliament could not, by giving exclusive jurisdiction to the Federal Court over federal officials, deny the provincial superior courts their traditional subject matter jurisdiction over constitutional issues. In my opinion, the *Federal Courts Act* equally cannot operate to prevent provincial superior court scrutiny of the constitutionality of the conduct of federal officials. Section 101 of the *Constitution Act, 1867*, authorizes the creation of “additional Courts for the better Administration of the Laws of Canada”. The provincial superior courts retain their historic jurisdiction over the Constitution. This does not preclude concurrent jurisdiction over constitutional subject matters in the Federal Court, of course, but it is not and cannot be made exclusive. Accordingly, quite apart from s. 17 of the *Federal Courts Act*, the Ontario Superior Court had jurisdiction to deal with Mr. McArthur’s *Charter* claim.
5. Clearly, an issue before the Superior Court is whether the Crown defendants are covered by a defence of statutory authority, i.e., that the administrative segregation orders were lawfully made and that the emotional and psychological trauma allegedly suffered by Mr. McArthur were an inevitable risk of his lawful detention in solitary confinement. Since this is the case, the Attorney General argues, the claimed losses are not actionable. However, with respect, the Superior Court can readily consider the validity of Mr. McArthur’s detention in the context of a damages claim, as well as the impact, if any, of a *valid* order on Crown liability.
6. While Mr. McArthur’s damages claim could be characterized in some sense as a “collateral attack” on the segregation orders, I do not believe that such an “attack” is precluded by the *Federal Courts Act*. Government decision making lies at the heart of many, if not most claims to recover financial loss from the Crown. For the reasons outlined in *TeleZone*, I believe that the explicit statutory grant of jurisdiction to the provincial superior courts in respect of claims against the Crown in s. 17 of the *Federal Courts Act* and s. 21 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, renders the collateral attack doctrine inapplicable here.
7. The Superior Court has jurisdiction to entertain Mr. McArthur’s damages claim (both in its tort and constitutional aspects) because its authority extends to “the person and the subject matter in question and, in addition, [because it] has authority to make the order sought”: *Mills v. The Queen*, [1986] 1 S.C.R. 863, *per* McIntyre J., at p. 960, quoting Brooke J.A. in *R. v. Morgentaler* (1984), 41 C.R. (3d) 262, at p. 271, and *per* Lamer J. (as he then was), at p. 890. See also *R. v. Rahey*, [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. There is nothing in the *Federal Courts Act* to give the Federal Court the exclusive jurisdiction to determine the lawfulness or validity of the order of a “federal board, commission or other tribunal” when Mr. McArthur does not seek any of the remedies listed in s. 18 of the *Federal Courts Act*, and when the practical effects of the segregation orders he complains of are spent, and such orders are now simply one element in a private law cause of action against the Crown and a federal official. To hold otherwise would undermine an explicit statutory grant of jurisdiction to the superior courts of the provinces and would be for formalistic reasons that are neither compelling nor consistent with promotion of access to justice in a direct and cost efficient manner.

V. Conclusion

1. I would dismiss the appeal with costs throughout to Mr. McArthur and order that the Superior Court has jurisdiction over his claim.

*Appeal dismissed with costs.*

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

Solicitors for the respondent: Ryder-Burbidge Hurley Fasano, Kingston.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitors for the interveners Roland Anglehart Sr. et al.: Heenan Blaikie, Montréal.