**Date: 20090203**

**Docket: A-262-08**

**Citation: 2009 FCA 29**

**CORAM:** **LÉTOURNEAU J.A.**
**NOËL J.A.**
**BLAIS J.A.**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**Appellant**

**and**

**DENNIS MANUGE**

**Respondent**

Hearing held at Toronto, Ontario, on December 16, 2008.

Judgement delivered at Ottawa, Ontario, on February 3,2009.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: NOËL J.A.
BLAIS J.A.

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**REASONS FOR JUDGMENT**

**LÉTOURNEAU J.A.**

**Issues**

[1] The procedure used by the respondent in this case, which is the subject of the appeal, runs directly counter to two legal maxims: one cannot do indirectly what one is prohibited from doing directly, and no one may take the law into his or her own hands.

[2] This appeal from a decision of the Federal Court raises the following three procedural issues. They do not concern the merits of the case. Could the respondent proceed by way of action rather than by application for judicial review to challenge the lawfulness of section 24 of Part III(B) of insurance policy SISIP901102 (hereafter SISIP), its constitutional validity and the fact that it infringes his right to equality under section 15 of the *Charter of Rights and Freedoms* (Charter)? Part III(B) of the SISIP governs the payment of long-term disability benefits for members of the Canadian Forces who took out this policy and who were released from the Forces after November 30, 1999.

[3] Was the respondent then entitled, with the blessing of a judge of the Federal Court, to transform his action into a class proceeding?

[4] Finally, assuming that the respondent had to proceed by judicial review, which he did not do, could the judge fictitiously transform the respondent's action into a judicial review and then transform it once again into an action before finally transforming it into a class proceeding? As we will see, this is in practice what the judge did in his alternative approach to resolving the problem that was submitted to him. I think that to ask the question is to answer it. However, I will give some additional explanations for this answer.

[5] To complete the picture, I would add that the respondent complains that the appellant did not fulfil her obligations under public law, breached her fiduciary duty toward the respondent, acted in bad faith and was unjustly enriched by her conduct.

[6] On the basis of this series of alleged infringements, the respondent claims reimbursement of the amounts that were deducted from his SISIP income and seeks general, punitive, exemplary and enhanced damages, plus interest and costs.

[7] The judge of the Federal Court asked himself the question that was submitted to him and which he summarized as follows: should the respondent's action be converted into a class proceeding under Rule 334.16 of the *Federal Courts Rules*? This explains the procedural issues raised in this appeal that I identified and defined above.

**The disposition at issue**

[8] For a better understanding of this case, I reproduce section 24 of Part III(B).

> **24. Other Relevant Sources of Income**
>
> a. The monthly benefit payable at Section 23 shall be reduced by the sum of:
>
> (i) the monthly income benefits payable to the member under the Canadian Forces Superannuation Act; and
> (ii) the Primary monthly income benefits payable to the member under the Canada or Quebec Pension Plans (including retroactive payments covering the period during which such benefits were prefunded under this Division 2); and
> (iii) the employment income of the member unless the member is participating in a rehabilitation program approved by the Insurer in which case the monthly benefit will be reduced in accordance with Section 28; and
> (iv) the total monthly income benefits payable to the member under the Pension Act (including dependant benefits and retroactive payments covering the period during which such benefits were prefunded under this Division 2).
>
> [Emphasis added]

[9] Before dealing with the crux of the issue in this appeal, a brief summary of the facts and the history of the proceedings is necessary.

**Facts, Origins of the SISIP and the New Veterans Charter, and Procedural History**

a) The facts and the origins of the SISIP and the New Veterans Charter

[10] The respondent was a member of the Canadian Forces until his compulsory release for medical reasons. The respondent's period of service extended over more than nine years, from September 9, 1994, to December 29, 2003.

[11] In 2002, before his service was terminated, the respondent received a disability pension under the *Pension Act*, R.S.C. 1985, c. P-6 (*Pension Act*), applicable to certain members of the Canadian naval, land and air forces. The monthly pension was in the amount of $386.28. This was in addition to the monthly salary of $3,942 that the respondent was receiving.

[12] When he was released from the Canadian Forces, the respondent qualified for a long-term disability pension under the SISIP.

[13] Participation in the SISIP was mandatory. Farther on I will give an account of its origins and evolution. For now, suffice it to say that section 24 of the SISIP refers to section 23 and stipulates

that the monthly benefits payable to the respondent are 75% of his gross monthly pay, less the monthly benefits payable to the respondent under the *Pension Act*. Accordingly, because of this deduction, the respondent receives 59% of his income before his release from the Canadian Forces, which I note was the sum of 75% of his monthly income and the amount of the benefits paid under the *Pension Act*. It is this deduction that he considers to be unlawful, unfair and discriminatory for himself and possibly for some 4,260 other comrades in arms who belong to the same plan.

[14] I consider that it is appropriate at this stage to explain the origins of the SISIP and the 2006 New Veterans Charter.

[15] In the 1960s, it was estimated that more than 50% of military personnel received insufficient income once their service was terminated. This income came from benefits under the *Pension Act* and the *Canadian Forces Superannuation Act*, R.S.C. 1985, c. C-17. Even if the benefits under the *Canada Pension Plan* (R.S.C. 1985, c. C-8) or the *Québec Pension Plan* (R.S.Q., c. R-9) were added, the income of members released for medical reasons was often insufficient.

[16] A study of the situation resulted in the establishment of the SISIP under section 39 of the *National Defence Act*, R.S.C. 1985, c. N-5 (NDA). The SISIP was conceived and implemented by the Chief of the Defence Staff. Initially, participation in the SISIP was voluntary. The fund was constituted solely by premiums paid by the members, without any contribution from the government.

[17] In 1969, insurance policy SISIP 901102 was issued. It provided for the payment of long-term disability benefits but only covered disabilities not attributable to military service. However, benefits paid under the *Pension Act* did cover disabilities related to military service. Therefore, beneficiaries under the *Pension Act* could not receive benefits under the SISIP.

[18] To keep SISIP participants' premiums as low as possible, the insurance policy had a clause stipulating that benefits paid under that policy had to be reduced by the amount of the benefits paid under other plans, such as those governed by the *Canadian Forces Superannuation Act* and the *Canada Pension Plan*. This is a fairly usual practice under private or public insurance plans.

[19] The Treasury Board gradually began to finance the cost of the SISIP. Government contributions to the cost of premiums rose from 50% in 1971 to 85% in 1993. This level of contribution is still paid to this day.

[20] During the same period, changes were made to the amounts of the benefits paid. They were increased to 75% of the income received by a beneficiary before his or her release.

[21] In addition, coverage under the SISIP was enhanced in 1976 to include persons suffering from a disability resulting from injuries sustained during their military service. The extended coverage was designed to compensate for the insufficient coverage extended to members of the Canadian Forces under the *Pension Act*.

[22] It was at this moment that the source of this dispute arose. Since as a result of these changes beneficiaries could now cumulate benefits under the SISIP and the *Pension Act*, section 24 of the SISIP was amended to add sub-paragraph (iv), to avoid double indemnity. This sub-paragraph results in a reduction in the amount of monthly benefits payable under the SISIP by the amount of the monthly benefits paid under the *Pension Act.*

[23] Sub-paragraph (iv) thus complemented sub-paragraphs (i), (ii) and (iii), which also were designed to prevent double indemnity. From the amount of monthly benefits under the SISIP, those other sub-paragraphs respectively subtracted the monthly benefits received under the *Canadian Forces Superannuation Act*, those payable under the *Canada* or *Québec Pension Plans* and, finally, the beneficiary's employment income (with one exception that is not relevant to this case).

[24] In 1982, participation in the SISIP became mandatory for all members of the Canadian Forces.

[25] On October 20, 2000, the *Act to amend statute law in relation to veterans' benefits*, S.C. 2000, c. 34, received Royal Assent. It brought about changes regarding membership in the Canadian Forces and entitlement to benefits. Members of the Canadian Forces who, in spite of a disability resulting from their military service, were fit to continue their service could now remain members of the Canadian Forces. Likewise, from that time on they could cumulate employment income and disability benefits received under the *Pension Act*. Because these persons work and do

not receive any SISIP benefits, sub-paragraph 24(*a*)(iv) of policy SISIP 901102 does not apply, such that the specified deduction for benefits under the *Pension Act* need not be made.

[26] In addition, in 2006, the *Canadian Forces Members and Veterans Re-establishment and Compensation Act*, S.C. 2005, c. 21 (hereafter the New Veterans Charter) was enacted. The New Veterans Charter replaced monthly benefits under the *Pension Act* with a lump-sum payment. Since this meant that the payment was no longer a monthly benefit within the meaning of sub-paragraph 24(*a*)(iv) of the SISIP, the lump sum is not, in the case of new beneficiaries, deducted from the disability benefits they receive under the SISIP. However, the New Veterans Charter did not in any way affect the application of sub-paragraph 24(*a*)(iv) to old beneficiaries, who continued to have amounts received under the *Pension Act* deducted from their benefits.

[27] This apparent difference in treatment between new and old beneficiaries could not go unnoticed. In fact, this situation attracted the attention of the Canadian Forces Ombudsman. In a report dated October 2003, he concluded that the deduction of benefits under the *Pension Act* from SISIP benefits was unfair to old members such as the respondent. He reiterated his conclusion in two letters sent to the Minister of National Defence in October 2005 and March 2007 respectively.

b) Procedural history

[28] Tired of battling the administration, the respondent turned to the courts and submitted his claims.

[29] On March 15, 2007, he filed an action with the Registry of the Federal Court in Halifax, Nova Scotia. On April 17, 2007, he brought a motion under Rule 334.12 of the *Federal Courts Rules* for the certification of his proceeding as a class proceeding and for the appointment of himself as representative of the group.

[30] The respondent subsequently made some amendments to his statement of claim in support of his action. An amended statement of claim was filed in the Registry of the Federal Court in Halifax on December 19, 2007.

[31] The hearing of the application for certification of a class proceeding was held from February 12 to 14, 2008. Judgment was rendered on May 20, 2008. It is from that judgment that the present appeal is brought. I will therefore give an overview of its main points for the purposes of this appeal.

**Decision of the Federal Court**

[32] Before the Federal Court, the appellant raised two objections to the process chosen by the respondent. First, the appellant objected to the fact that the respondent proceeded by action under section 17 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (Act). Second, the appellant therefore objected to the certification of this action as a class proceeding.

[33] The appellant submitted to the judge of the Federal Court that the respondent should have instead proceeded under section 18 of the Act, by way of judicial review. In support of her arguments, the appellant relied on the judgment of our Court in *Canada v. Grenier*, 2005 FCA 348.

[34] I will return to this judgment when analyzing the decision of the Federal Court. Suffice it to say for now that *Grenier* establishes the principle that challenges of decisions of a federal board, commission or other tribunal must be made by way of judicial review pursuant to sections 18, 18.1 and 28 of the Act. Under sections 18 and 28, the Federal Court or the Federal Court of Appeal, as the case may be, has exclusive jurisdiction in those matters.

[35] The judge of the Federal Court concluded that the consequences of sub-paragraph 24(*a*)(iv) of the SISIP, of which the respondent complained, did not result from a decision of a federal board, commission or other tribunal. According to him, the respondent was instead contesting a government policy set out in section 24. On the basis of this conclusion, he ruled that the principles in *Grenier* did not apply.

[36] However, pushing his consideration of the issue further, he expresses the opinion that if, contrary to what he had decided, this was in fact a decision subject to judicial review under section 18, it would then be appropriate to convert it into an action rather than to ask the respondent to start his proceedings over again: see paragraph 20 of the reasons for judgment. I will return to the justification for his reasoning and conclusion later on.

[37] He then took the additional step of determining whether the action should be transformed into a class proceeding, which he did in the end. Considering the conclusion I reach on the merits of the Federal Court's decision, there is no need to wax eloquent on the reasons which led the judge to allow the application for certification of the action as a class proceeding.

**Analysis of the decision of the Federal Court judge**

[38] The first step in the analysis of the issue at hand consists in determining the nature and the subject of the respondent's challenge. Does it involve a government policy, a decision of a federal board, commission or other tribunal or, pursuant to subsection 18.1(1) of the Act, a matter that "directly affects" the respondent:

| | |
|---|---|
| **18.1** (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought. | **18.1** (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande. |

**Government policy, decision of a federal board, commission or other tribunal or a matter that directly affects the plaintiff?**

[39] As already mentioned, the SISIP is an insurance policy benefiting members of the Canadian Forces. The Chief of the Defence Staff is the policy holder. This situation is actually quite special and unique.

[40] Under section 18 of the *National Defence Act*, the Chief of the Defence Staff is charged with the control and administration of the Canadian Forces. He is legally responsible for the Forces.

[41] Section 39 of that same Act states that non-public property acquired by contribution shall vest in the Chief of the Defence Staff. Except where the bequest includes restrictions, the property may be disposed of at the discretion and direction of the Chief of the Defence Staff for the benefit of the members of the Canadian Forces or their dependents. I reproduce subsection 39(1):

| | |
|---|---|
| **39.** (1) Non-public property acquired by contribution but not contributed to any specific unit or other element of the Canadian Forces shall vest in the Chief of the Defence Staff and, subject to any specific directions by the contributor as to its disposal, may be disposed of at the discretion and direction of the Chief of the Defence Staff for the benefit of all or any officers and non-commissioned members or former officers and non-commissioned members, or their dependants. | **39.** (1) Les biens non publics reçus en don sans être spécifiquement attribués à une unité ou un autre élément des Forces canadiennes sont dévolus au chef d'état-major de la défense; sous réserve de toute instruction expresse du donateur quant à leur destination, celui-ci peut, à son appréciation, ordonner qu'il en soit disposé au profit de l'ensemble ou d'une partie des officiers et militaires du rang, anciens ou en poste, ou des personnes à leur charge. |

[42] It was under section 39 that , the Honourable Léo Cadieux, Minister of National Defence, following the recommendation of the Chief of the Defence Staff at the time, created the SISIP: see the affidavit of André Bouchard, Appeal Book, tab 6, page 92, paragraph 14. The control and administration of the insurance plan were entrusted to the Director of Personnel at the Department of National Defence: *ibidem*, at page 101.

[43] The implementation of the SISIP is the result of a joint decision of the Minister of National Defence and the Chief of the Defence Staff. The statutory basis for the SISIP is found in section 39

of the *National Defence Act*. Under the circumstances, on the basis of the uncontradicted evidence on record, it is difficult to conclude that the SISIP and its section 24 are not the result of a decision of a federal board, commission or other tribunal as defined in section 2 of the Act, that is, a decision made by a person or group of persons (Minister and Chief of the Defence Staff) exercising a jurisdiction or authority under a federal statute (the *National Defence Act*).

[44] I admit that I do not truly understand the distinction made by the judge of the Federal Court, who held that this is not a decision, but a policy, and thus exempted from judicial review. Policies or programs in the public service are regularly implemented through ministerial or governmental decisions that are subject to judicial review. Even if we admit that this is a policy or program for compensating members of the Canadian Armed Forces with disabilities, the decisions made by the federal public administration in managing the policy or program, be it in terms of decisions regarding eligibility for benefits or, as in this case, the amount of those benefits, not to mention the duration of insurance coverage, are still decisions of a federal board, commission or other tribunal that are subject to judicial review.

[45] In addition, the respondent complains that he is directly affected by section 24 of the SISIP and by the reduction in benefits required under sub-paragraph (iv). He is making section 24 the very matter of his claim for relief. Under subsection 18.1(1) of the Act, this matter is subject to judicial review: see *Krause v. Canada*, [1999] 2 F.C. 476 (F.C.A.), in which it was agreed that the word “matter” is not restricted to a decision or an order and embraces a variety of administrative actions and activities.

[46] With respect, the judge erred in the analysis of the matter of the respondent's claim for relief. He also erred in refusing to apply the principles in *Grenier* on the ground that the concerns expressed in *Grenier* about the finality of the decisions, collateral attacks on those decisions and the deference that administrative decision-makers should be shown apply were mostly if not entirely absent here: see paragraph 21 of the reasons for his decision. As we will see, these considerations, especially those concerning collateral attacks and deference, are relevant in this case.

**Judicial review or action in damages?**

[47] It is important to revisit *Grenier* and Parliament's intention as regards federal administrative law.

a) Parliament's intention and the *Grenier* judgment

[48] As *Grenier* demonstrates, Parliament's intention in enacting the *Federal Courts Act* and creating the Federal Court and the Federal Court of Appeal was clear and unequivocal. It intended to entrust these two courts with the exclusive authority to oversee and review the lawfulness of decisions and activities of the federal administration.

[49] Parliament made this choice to ensure consistency, efficiency, expeditiousness, fairness, legal security and the finality of decisions made by the administration in the public interest. I take the liberty of reproducing paragraphs 21 to 29 and 31 and 32 of *Grenier*:

> [21] Under section 17 of the *Federal Courts Act*, the Federal Court has concurrent jurisdiction with the courts of the provinces to try a claim for damages under the *Crown Liability and Proceedings Act*. Section 17 is reproduced in part:
>
> | | |
> |---|---|
> | **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. | **17.** (1) Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, la Cour fédérale a compétence concurrente, en première instance, dans les cas de demande de réparation contre la Couronne. |
> | (2) Without restricting the generality of subsection (1), the Federal Court has concurrent original jurisdiction, except as otherwise provided, in all cases in which | (2) Elle a notamment compétence concurrente en première instance, sauf disposition contraire, dans les cas de demande motivés par : |
> | (*a*) the land, goods or money of any person is in the possession of the Crown; | *a*) la possession par la Couronne de terres, biens ou sommes d'argent appartenant à autrui; |
> | (*b*) the claim arises out of a contract entered into by or on behalf of the Crown; | *b*) un contrat conclu par ou pour la Couronne; |
> | (*c*) there is a claim against the Crown for injurious affection; or | *c*) un trouble de jouissance dont la Couronne se rend coupable; |
> | (*d*) the claim is for damages under the Crown Liability and Proceedings Act. | *d*) une demande en dommages-intérêts formée au titre de la Loi sur la responsabilité civile de l'État et le contentieux administratif. |
>
> (Emphasis added)
>
> [22] However, Parliament thought it was appropriate to grant and reserve the Federal Court exclusive jurisdiction to review the lawfulness of the decisions made by any federal board, commission or other tribunal:
>
> | | |
> |---|---|
> | **18.** (1) Subject to section 28, the Federal Court has exclusive original jurisdiction | **18.** (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en |

| | |
|---|---|
| (*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 | première instance, pour :<br><br>*a*) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral; |
| (*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. | *b*) connaître de toute demande de réparation de la nature visée par l'alinéa *a*), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral. |
| (2) The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of *habeas corpus ad subjiciendum*, writ of *certiorari*, writ of prohibition or writ of *mandamus* in relation to any member of the Canadian Forces serving outside Canada. | (2) Elle a compétence exclusive, en première instance, dans le cas des demandes suivantes visant un membre des Forces canadiennes en poste à l'étranger : bref *d'habeas corpus ad subjiciendum*, de *certiorari*, de prohibition ou de *mandamus*. |
| (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. | (3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire. |

(Emphasis added)

[23] In *Canada v. Capobianco*, [2005] J.Q. No. 1155, 2005 QCCA 209, the Quebec Court of Appeal acknowledged this exclusive jurisdiction and held that the action for damages brought in the Superior Court of Québec was premature since the plaintiff's claim was essentially based on the premise that the decisions made in relation to him by the federal tribunals from which his damage resulted were illegal: only the Federal Court had jurisdiction to condemn this illegality which, under subsection 18(3), is exercised through the judicial review procedure provided by Parliament.

[24] In creating the Federal Court and in enacting section 18, Parliament sought to put an end to the existing division in the review of the lawfulness of the decisions made by federal agencies. At the time, this review was performed by the courts of the provinces: see Patrice Garant, *Droit administratif*, 4th ed., vol. 2 (Les Éditions Yvon Blais Inc., 1996), at pages 11 to 15. Harmonization of disparities in judicial decisions had to be achieved at the level of the Supreme Court of Canada. In the interests of justice, equity and efficiency, subject to the exceptions in section 28, Parliament assigned the exercise of reviewing the lawfulness of the decisions of federal agencies to a single court, the Federal Court. This review must be exercised under section 18, and only by filing an application for judicial review. The Federal

Court of Appeal is the court assigned to ensure harmonization in the case of conflicting decisions, thereby relieving the Supreme Court of Canada of a substantial volume of work, while reserving it the option to intervene in those cases that it considers of national interest.

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

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

Compromising of legal security

[27] To allow a proceeding under section 17, whether in the Federal Court or in the provincial courts, in order to have decisions of federal agencies declared invalid, is also to allow an infringement of the principle of finality of decisions and the legal security that this entails.

[28] I need not expound at length on the importance of the principles of *res judicata* and the finality of decisions. Similarly, I need not say much about the abundant case law that recognizes and promotes these principles. I will confine myself to saying that these principles exist in the public interest and that Parliament's intention to protect that interest is illustrated by the short time limit allowed for challenging an administrative decision.

[29] Parliament has provided, in subsection 18.1(2), that the time for filing an application for judicial review is 30 days from the time the impugned decision of the federal agency was communicated to the applicant (subject to any extension of the periods allowed by the Court). Concerning this time limit, this Court writes in *Berhad, supra*, at paragraph 60:

> [60] In my view, the most important reason why a shipowner who is aggrieved by the result of a ship safety inspection ought to exhaust the statutory remedies before asserting a tort claim is the public interest in the finality of inspection decisions. The importance of that public interest is reflected in the relatively short time limits for the commencement of challenges to administrative decisions - within 30 days from the date on which the decision is communicated, or such further time as the Court may allow on a motion for an extension of time. That time limit is not

> whimsical. It exists in the public interest, in order to bring finality to administrative decisions so as to ensure their effective implementation without delay and to provide security to those who comply with the decision or enforce compliance with it, often at considerable expense. In this case, the decision of the Chairman was not challenged until, a year and a half after it was made, the respondents filed their claim for damages.

…

Promotion of indirect challenges

[31] The principle of the finality of decisions likewise requires that in the public interest, the possibilities for indirect challenges of an administrative decision be limited and circumscribed, especially when Parliament has opted for a procedure for direct challenge of the decision within defined parameters.

[32] In *Berhad*, *supra*, the owners of a vessel were suing the Crown following an administrative decision by two inspectors to order the seizure of their vessel. This Court restated, at paragraphs 61, 62, 65 and 66, the applicable principle in such matters:

> [61] There is also a public interest in precluding the use of tort claims to engage in collateral attacks on decisions that are, or should be, final. The case of *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, is instructive because, not unlike the present instance, it relates to a collateral attack on an order requiring that certain measures be taken to protect the environment while direct review proceedings were available under the *Environmental Protection Act*. In our case, the detention order requiring that certain repairs be done was not only aimed at protecting the marine environment, but also at ensuring the safety of human lives.
>
> [62] In *Maybrun*, the Supreme Court undertook a review of the statute and of the legislative intent behind it and concluded that persons charged with failing to comply with an order under that statute "cannot attack the validity of the order by way of defence after failing to avail themselves of the appeal mechanisms available under the [statute]": *ibidem*, at paragraph 65. In the Court's view, to permit such a collateral attack would encourage conduct contrary to the statute's objectives and would tend to undermine its effectiveness: *ibidem*, at paragraph 60. Although the circumstances of that case differ slightly from those in the case at bar, the conclusions reached by the Supreme Court are nevertheless relevant to the present issue. If an accused, who has a right to full answer and defence, is not permitted in a penal proceeding to use as a shield a collateral challenge to the administrative order that is the basis for the charge that he faces, it seems to me that, in similar circumstances, a party should be discouraged from employing a collateral attack as a sword in a civil proceeding of the kind that the respondents initiated
>
> …

> [65] The Supreme Court has clearly indicated that review of all administrative decision-making by a court, whether by way of judicial review or by appeal, requires the determination of the appropriate standard of review by means of a pragmatic and functional analysis. It is the fact that the decision under review originates with an administrative body that is determinative of the approach required, not the procedure by which the decision is attacked and reviewed by the courts. Any doubt on this issue was dispelled by the Supreme Court in its reasons in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, where McLachlin C.J., writing for the Court, indicated at paragraphs 21 and 25:
>
> The term "judicial review" embraces review of administrative decisions by way of both application for judicial review and statutory rights of appeal. In every case where a statute delegates power to an administrative decision-maker, the reviewing judge must begin by determining the standard of review on the pragmatic and functional approach.
>
> …
>
> Review of the conclusions of an administrative decision-maker must begin by applying the pragmatic and functional approach.
>
> [66] In my view, the same principle applies when the attack on the decision, as in this instance, takes the form of an action for damages flowing from the decision rather than an application for judicial review of the decision. To suggest otherwise would be to increase the likelihood of attempted collateral attacks as a means of circumventing the deference which often results from a pragmatic and functional analysis. Such a result would run directly counter to Parliament's intent and to the message sent by the Supreme Court in *Dr. Q, supra*, which was to bring a more nuanced and contextual approach to the issue of curial deference towards administrative decision-making. While the courts must maintain the rule of law, their reviewing power should not be employed unnecessarily: see *Dr. Q, supra*, at paragraphs 21 and 26.
>
> …
>
> (Emphasis added)

[50] It is obvious that Parliament did not intend to absolve the federal administration of liability where its actions may cause prejudice or damage. Section 3 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, cannot be any clearer on this point.

[51] It is also obvious that Parliament intended to make a procedural distinction between the lawfulness of a decision or an administrative activity and the liability resulting therefrom. Lawfulness is verified by a low-cost process of judicial review, designed to proceed in a timely manner so as to offer security to citizens and the administration and avoid administrative paralysis. Liability is punished by legal action, generally by suing for damages to repair the prejudice caused by the administrative decision or activity. One of the means chosen by Parliament, judicial review, is a summary, thorough and expeditious proceeding. As stated and required under section 18.4 of the Act, an application or reference "shall be heard and determined without delay and in a summary way" by the Federal Court. The other means, legal action, is elaborate and slow, given the compensation sought.

[52] *Grenier* and *Berhad* (*Her Majesty the Queen in the Right of Canada, B.S. Warna and D.A. Hall v. Budisukma Puncak Sendirian Berhad, Maritime Consortium Management Sendirian Berhad*, 2005 FCA 267, leave to appeal to the Supreme Court of Canada denied with costs on May 25, 2006) illustrate the procedural conflict and the respective consequences of each way of proceeding.

[53] For committing an act that was perceived as a threat and an attempt to strike a correctional services officer, Mr. Grenier was placed in administrative segregation for a period of fourteen (14) days following a decision by the warden of the penitentiary where Mr. Grenier was incarcerated.

[54] Mr. Grenier did not challenge the lawfulness of the decision of the warden of the penitentiary. Nearly three years later, he brought an action in damages against the federal Crown, claiming that the warden's decision was unlawful.

[55] In *Berhad*, a ship was inspected upon arrival in Vancouver and, by order of the inspectors, was detained because it was so rusty that it was deemed to be unseaworthy, unless certain repairs, including some structural ones, were made to restore its seaworthiness. The lawfulness of the detention order was challenged by reference under subsection 307(1) of the *Canada Shipping Act*, R.S.C. 1985, c. S-9. Following this referral, the Director General of Marine Safety for Transport Canada and Chairman of the Board of Steamship Inspection upheld the decision of the inspectors while easing some of the repair measures ordered.

[56] This second decision was not appealed to the Minister as could have been done under section 307. The ordered repairs were made to the ship, and it set sail for China.

[57] Nearly a year and a half later, the owners of the ship filed an action in tort against the Federal Crown and the two inspectors behind the detention order. The owners claimed approximately $4,350,000 in damages. This claim was based on the lawfulness of the inspectors' decision concerning the seaworthiness of the ship and the lawfulness of their detention order.

[58] It is possible that a perfectly lawful administrative decision or activity may be carried out in a negligent or abusive manner, thus giving rise to liability on the part of the federal administration.

In other words, even though a decision or an activity is lawful, its execution may be negligent or wrongful. In such a case, bringing an action in liability based not on the lawfulness of the decision or activity, but on its negligent performance, is appropriate. In those circumstances, the Federal Court shares its jurisdiction *ratione materiae* with the provincial Superior Courts. The Quebec Court of Appeal recently dealt with this issue in *Agence canadienne d'inspection des aliments c. Institut professionnel de la Fonction publique du Canada et autres*, [2008] J.Q. No. 8906, J.E. 2008-1865. It reached the following conclusions at paragraphs 37 and 58:

> [TRANSLATION]
> **37** Just as in the case of municipal by-laws, where "invalidity is not the test of fault and it should not be the test of liability", until recently, it was understood that a decision or measures validly taken by an organization acting within its jurisdiction may give rise to fault in case of error or negligence. From this point of view, only an activity conducted with care and diligence is covered by the immunity from civil suits that protects certain decisions of public bodies. Accordingly, an organization may incur civil liability in spite of the lawfulness of the action where damage is caused by the flawed exercise of granted authority.
>
> **58** In this case, the respondents do not claim that the decisions and measures taken by the Agency are unlawful, nor do they indirectly seek to quash them. At this preliminary stage, they submit that even if the decisions and measures are presumed to be lawful, they may nevertheless constitute wrongful acts giving rise to civil liability. In this context, there would be no risk of contradictory judgments.

[59] However, when the challenge concerns the very lawfulness of the decision or administrative activity, as a general rule, Parliament intended that priority be given to the issue for reasons of public interest so that doubts may be eliminated and decisions or government policies may be enforced or amended if they turned out to be illegal. It should also not be forgotten that decisions or government policies often result in costs for those who have to abide by them. For example, one can think of inspectors' or minister's decisions in environmental matters which compel industries to put

in place costly de-polluting or anti-pollution measures. Hence, the importance of having final decisions and government policies.

b) Degree of flexibility provided for by Parliament

[60] I say "as a general rule" because at subsection 18.4(2) of the Act, Parliament provided for an exception to the process it established. The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action, in other words, that such an application be converted into an action. In *Macinnis v. Canada*, [1994] 2 F.C. 464, Justice Décary, on behalf of a unanimous Court of Appeal, noted the exceptional nature of subsection 18.4(2). He wrote the following at pages 470, 471 and 472:

> One should not lose sight of the clear intention of Parliament to have applications for judicial review determined whenever possible with as much speed and as little encumbrances and delays of the kind associated with trials as are possible.
>
> …
>
> [B]ut the key test is whether the judge can see that affidavit evidence will be inadequate, not that trial evidence might be superior.

[61] Although the conversion of an application for judicial review into an action is not limited to evidentiary issues (see *Drapeau v. Canada (Minister of National Defence)* (1995), 179 N.R. 398), it is nevertheless exceptional.

[62] This procedural exception under subsection 18.4(2) of the Act does not adversely affect the integrity of the judicial review process for the federal administration envisioned by Parliament, which intended that the Federal Courts have exclusive jurisdiction in that area.

[63] By requiring that a litigant proceed by way of judicial review, Parliament upholds the exclusive jurisdiction of the Federal Courts. Any conversion application is heard by the Federal Court. Once conversion is authorized, the action will proceed in Federal Court and, according to *Berhad*, the Court must give the administrative decision or activity whose lawfulness is impugned the deference required by law, if any.

[64] Conversion into an action is not possible where a judicial review must be conducted by the Federal Court of Appeal, as Parliament has preferred to provide for a summary and expeditious procedure, without exception: see subsection 28(2) of the Act.

c) Appropriate remedy in the case at bar

[65] Counsel for the respondent readily admits that if section 24 of the SISIP and in particular sub-paragraph (iv) are lawful and not discriminatory, his client is not entitled to a reimbursement or damages. In other words, damages and reimbursements are conditional on and incidental to the unlawfulness of the provision in question, or its being declared to be of no force or effect. In procedural terms, emphasizing damages and reimbursement rather than the lawfulness of the

provision, as the respondent did in this case, amounts to putting the cart before the horse. Basically, the tail is wagging the dog.

[66] In this case, we are dealing with a well-defined question of law that requires little evidence to decide. In fact, it may well proceed on the merits on the basis of a mere admission of facts.

[67] As the appellant so rightfully mentioned, if the respondent had proceeded by judicial review rather than by action as he did, he would have already obtained the Court's answer as to the lawfulness of the provision in question.

[68] Although the provision in question has existed for several years, there were no time barriers preventing the respondent from proceeding by judicial review. He is not challenging the initial decision to add sub-paragraph (iv) to section 24 of the SISIP. Instead, he is challenging the monthly decision to reduce the benefits he receives by the amounts received under the *Pension Act*, so the time limit of thirty (30) days to apply for judicial review, as specified at subsection 18.1(2) of the Act, does not apply in practice. The deduction made under sub-paragraph 24(*a*)(iv) is an "act of a federal board, commission or other tribunal" which, on judicial review, the Federal Court may declare invalid or unlawful: see sub-paragraph 18(3)(*b*) of the Act and *Krause v. Canada*, cited above at paragraph 23.

[69] To justify the procedure he chose, the respondent invoked the fear that other players involved in managing the SISIP, such as the Treasury Board, would not be bound by a judgment of the Federal Court on judicial review.

[70] With respect, I do not see any reasonable basis for such fear. Should the Federal Court declare sub-paragraph 24(*a*)(iv) of the SISIP to be invalid *ab initio* or unlawful, it goes without saying that the deductions would cease and that reimbursements would be in order.

[71] Finally, the respondent relied on the following justification for his way of proceeding. He wanted to proceed by class action because he claims to be afraid that other members of the Forces who, like him, are subject to deductions would not be reimbursed and that deductions would continue to be made from their benefits.

[72] Once again, I firmly believe that this fear is unfounded because the very basis for the deduction would be eliminated.

[73] Finally, without ruling on this point, I note that as of December 13, 2007, rules 334.1 and 334.12 of the *Federal Courts Rules* now allow an application for judicial review (except for an application under section 28 of the Act) to be brought by a member of a class of persons on behalf of the members of that class. The applicant may then ask that the Federal Court certify his application for judicial review as a class proceeding. It is therefore not necessary to convert the

judicial review procedure, as was the case under the former rules governing class proceedings, which was then limited to actions.

**Procedural history of the case at bar**

[74] I note that the respondent instituted proceedings by way of an action and that he asked the Federal Court convert the action into a class proceeding. The Federal Court judge allowed this application.

[75] In proceeding by action as he did, the respondent took the law into his own hands and presented the Federal Court with a *fait accompli*. Faced with the appellant's objection to the effect that he should have proceeded by way of judicial review, he sought and obtained the indulgence of the Federal Court.

[76] In fact, the Federal Court judge considered the action as an application for judicial review and then went ahead with the conversion process: see paragraphs 19 *et seq.* of his reasons for judgment. However, this was not a judicial review, so he could not use his discretion to convert pursuant to subsection 18.4(2) of the Act.

[77] The respondent had to follow the procedure provided under the Act. To allow a litigant to choose to proceed by action rather than by judicial review, as required by Parliament, could allow that litigant to completely oust the jurisdiction of the Federal Court over the federal administration,

as well as that of the Federal Court of Appeal under section 28 of the Act: see for example paragraph 13 of the reasons in *Parrish & Heimbecker Ltd. v. Canada (Minister of Agriculture and Agri-Food)* 2008 FCA 362, in which Justice Pelletier writes the following:

> **13** This case falls squarely within the principle stated in *Grenier* and illustrates its underlying rationale. Presumably, P&H could have brought its claim in any of the provincial superior courts and, on the basis of the allegations in its pleadings, asked that court to determine the legality of the revocation of the original permits and the issuance of the replacement permits. Had another shipper encountered the same problem, it could have chosen to proceed in another of the provincial superior courts and asked for a determination of the same issue. Different cases could yield different conclusions leading to an unraveling of the fabric of consistency in the judicial review of federal administrative action.

[Emphasis added]

[78] The appellant is entitled to expect and demand from the respondent that he follows the procedure. In converting the respondent's action into an application for judicial review, the judge created a legal fiction that deprives the appellant of the right and ability to properly understand the whys and wherefores of the respondent's position on the unlawfulness of the provision in question. As a result, it also deprives the appellant of the ability to contest a conversion application effectively. It definitively deprives the appellant of the benefit of a compulsory procedural process, established by Parliament, from which the *Federal Courts Rules* do not allow a respondent or judge to derogate: *Dawe v. M.N.R. (Customs & Excise)* (1994), 174 N.R. 1 (F.C.A.); *Brandlake Products Ltd. v. Adidas (Can) Ltd.*, [1983] 1 F.C. 197 (C.A.). I cannot subscribe to this way of proceeding. The determination of the appropriate procedure to be followed in this case involves a question of law subject to the correctness standard: see *The Minister of Citizenship & Immigration v. Hinton & Hinton*, 2008 FCA 215, at paragraph 35.

**Recent decision of the Court of Appeal for Ontario in *TeleZone Inc.***

[79] While these reasons were being translated, the Court of Appeal for Ontario handed down its decision in *TeleZone Inc. v. Canada (Attorney General)*, [2008] O.J. No. 5291, 2008 ONCA 892, in which it concluded that the judgment of our Court in *Grenier* was erroneous. I would have been content to remain silent on the divergent views expressed by the Ontario Court of Appeal were it not for the fact that, at the level of principles, this judgment raises three problems I must point out. Accordingly, I will take care not to rule on the specific cases that were submitted to it and that it decided.

[80] First of all, the judgment departs from the basic rule of modern statutory interpretation to the effect that a statute and its provisions must be interpreted in contextual way, that is, in relation to each other, in the context of Parliament's legislative purpose, in a manner consistent with the promotion of that purpose.

[81] Instead, the Court of Appeal for Ontario resorted to a literal interpretation of section 18 of the Act, and thus of section 28 of that same Act, by limiting their scope to a codification of the former common law remedies, namely prerogative writs.

[82] However, sections 18 and 28 and the Act itself are more than a mere codification of remedies. These provisions and the Act itself constitute a policy on the judicial review of the

lawfulness of federal administrative activity by the Federal Court and the Federal Court of Appeal (emphasis added). This is the conclusion our Court reached in *Grenier* after a contextual analysis of these provisions, the Act and the events surrounding their enactment.

[83] Secondly, in failing to give a contextual interpretation of the provisions and the Act in question, which are the product of a reform of federal administrative law, the Court of Appeal for Ontario ignored Parliament's intention. Far from taking us back to the Dickensian era, sections 18 and 28 of the Act, as well as the spirit of the Act, are part of the modern reality of a federal state, as opposed to a simply unitary one, where Parliament intended that, in the national public interest, the federal state could and should receive a timely answer as to the lawfulness of the decisions made and the policies adopted, by means of centralized, timely and unified judicial review rather than by means of a piecemeal judicial process resulting, as history has shown, in contradictory decisions by different jurisdictions.

[84] Finally, the Court of Appeal for Ontario considered whether the Superior Court had jurisdiction to hear actions in damages instituted by litigants. Of course the Superior Court has this jurisdiction, and no one questions that. However, what must be asked is whether a litigant may at his or her own choice, challenge the lawfulness of a decision by means of an action when the unlawfulness of that decision is, in whole or in part, a pre-requisite (*sine qua non*) to a remedy in damages. In my opinion, sections 18 and 28 of the Act, the rationale for and legislative history of the Act itself and the objectives sought by Parliament unequivocally answer this question in the negative.

**Conclusion**

[85] For these reasons, I would allow the appeal and set aside the decision of the Federal Court certifying the respondent's action as a class proceeding. Considering the appellant's consent, I would grant the respondent thirty (30) days from the date of this judgment to serve and file an application for judicial review. I would suspend the action brought by the respondent until a final decision has been made on the application for judicial review. Since the appellant did not claim costs, I would not award any.

"Gilles Létourneau"
J.A.

"I agree
Marc Noël J.A."

"I agree
Pierre Blais J.A."

Certified true translation
Michael Palles

**FEDERAL COURT OF APPEAL**

**SOLICITORS OF RECORD**

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| **CONCURRED IN BY:** | NOËL J.A.<br>BLAIS J.A. |
| **DATED:** | February 3, 2009 |

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