Date: 20051103

Docket: IMM-1669-05

Citation: 2005 FC 1484

BETWEEN:

BAZ SINGH MOMI; DR. PARVEZ ALI KHAN;
DR. ARCHANA PARIKH; PAIMAN HAIBODI;
N. MAGPOC RAMOS; PANKAJ SHARMA;
JIGNESH T. SHAH; VA VING TENG;
CHENCG HUA CHU; HSUEH WEI PAN
HUNG CHIH CHEN

Plaintiffs

and

HER MAJESTY THE QUEEN AS REPRESENTED BY HER AGENT, THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Defendant

REASONS FOR ORDER

HARRINGTON J.

[1] Baz Singh Momi and the other 10 named plaintiffs each submitted an application after 31 March 1994 to permanently reside in Canada and paid the prescribed fees. They think the fees were excessive and propose a class action on behalf of all those during the same period who either applied for permanent resident visas, for work permits, student permits, temporary resident visas or to renew temporary status. Each member of the proposed class paid a service fee.

[2] It is alleged that, based on annual reports submitted to Parliament by the Department of Citizenship and Immigration, the fees generated exceeded cost by not less than 711.3 million dollars.

[3] They not only allege that the fees were excessive, but also that Her Majesty had no legal authority to charge them to the extent she did because section 19(2) of the *Financial Administration Act* provides that a service fee may not exceed its cost.

[4] They seek restitution based on unjust enrichment or alternatively, on the basis of mutual mistake, money had and received, or negligence.

[5] The defendant, whom I shall call "the Minister", has moved to strike out the entire statement of claim and to have the action dismissed on the grounds that the claim is without legal foundation because the fees were validly levied and collected in virtue of *Regulations* enacted under the *Immigration Act* and, since its repeal in 2002, under the *Immigration and Refugee Protection Act (IRPA)*. Even if those regulations were invalid, Federal law does not entitle the plaintiffs to a refund. He also moved that the statement of claim be struck on the grounds of time bar and because it is an abuse of process of the Court as it attempts to relitigate an issue which the Federal Court has already determined.

ISSUES

[6] The issues are:

a. Were the *Regulations* under which the fees were prescribed and collected valid? If so, it is plain and obvious that no plaintiff can succeed and the entire statement of claim should be struck with an attendant dismissal of the action.

b. If the *Regulations* were invalid, does Federal law nevertheless bar recovery?

c. If it is not plain and obvious that the *Regulations* were valid, or that recovery of the fees is nevertheless barred, then the four alleged causes of action must be analysed to ascertain whether it is plain and obvious that they cannot succeed.

d. To the extent one or more causes of action still survive, is the statement of claim an abuse of process of the Court because it attempts to relitigate an issue which this Court has already determined?

e. Alternatively, or in any event, should some individual claims be struck on the grounds that the governing Statute of Limitations is six years as set out in section 39 of the *Federal Courts Act*?

MOTION TO STRIKE PLEADINGS

[7] Rule 221 of the *Federal Courts Rules* provides:

221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	221. (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
(*a*) discloses no reasonable cause of action or defence, as the case may be,	*a*) qu'il ne révèle aucune cause d'action ou de défense valable;
(*b*) is immaterial or redundant,	*b*) qu'il n'est pas pertinent ou qu'il est redondant;
(c) is scandalous, frivolous or vexatious,	*c*) qu'il est scandaleux, frivole ou vexatoire;
(*d*) may prejudice or delay the fair trial of the action,	*d*) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;
(*e*) constitutes a departure from a	

previous pleading, or	*e*) qu'il diverge d'un acte de procédure antérieur;
(*f*) is otherwise an abuse of the process of the Court,	*f*) qu'il constitue autrement un abus de procédure.
and may order the action be dismissed or judgment entered accordingly.	Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.
Evidence	Preuve
(2) No evidence shall be heard on a motion for an order under paragraph (1)(*a*).	(2) Aucune preuve n'est admissible dans le cadre d'une requête invoquant le motif visé à l'alinéa (1)*a*).

[8] The leading case on whether a statement of claim fails to disclose a reasonable cause of action is *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, on appeal from the Court of Appeal for British Columbia. The rule of Court in that case, like Federal Court Rule 221, allowed the Court to strike out a pleading "on the ground that it discloses no reasonable claim or defence, as the case may be…" Nothing turns on the fact that the Federal Court Rule speaks to a reasonable cause of action while the B.C. rule under consideration in *Hunt* spoke to a "reasonable claim". The Supreme Court held that the test to be applied was whether it was "plain and obvious" that the statement of claim disclosed no reasonable claim. "… If there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat"." It is certainly not for the Court at this stage to weigh the plaintiffs' chances of success.

[9] The allegations in the statement of claim are disarmingly simple. Based on annual reports submitted to Parliament by the Department of Citizenship and Immigration, over the timeframe in question, it is alleged that the fees paid by the proposed plaintiff class to the defendant exceeded the defendant's costs by not less than 711.3 million dollars. This constituted an unjust enrichment in favour of the defendant and a corresponding deprivation to the plaintiff class. There is no juristic

reason for this enrichment because subsections 19(1) and (2) of the *Financial Administration Act* provide:

19. (1) The Governor in Council may, on the recommendation of the Treasury Board,	**19.** (1) Sur recommandation du Conseil du Trésor, le gouverneur en conseil peut :
(*a*) by regulation prescribe the fees or charges to be paid for a service or the use of a facility provided by or on behalf of Her Majesty in right of Canada by the users or classes of users of the service or facility; or	*a*) fixer par règlement, pour la prestation de services ou la mise à disposition d'installations par Sa Majesté du chef du Canada ou en son nom, le prix à payer, individuellement ou par catégorie, par les bénéficiaires des services ou les usagers des installations;
(*b*) authorize the appropriate Minister to prescribe by order those fees or charges, subject to such terms and conditions as may be specified by the Governor in Council.	*b*) autoriser le ministre compétent à fixer ce prix par arrêté et assortir son autorisation des conditions qu'il juge indiquées.
(2) Fees and charges for a service or the use of a facility provided by or on behalf of Her Majesty in right of Canada that are prescribed under subsection (1) or the amount of which is adjusted under section 19.2 may not exceed the cost to Her Majesty in right of Canada of providing the service or the use of the facility to the users or class of users.	(2) Le prix fixé en vertu du paragraphe (1) ou rajusté conformément à l'article 19.2 ne peut excéder les coûts supportés par Sa Majesté du chef du Canada pour la prestation des services aux bénéficiaires ou usagers, ou à une catégorie de ceux-ci, ou la mise à leur disposition des installations.
R.S., 1985, c. F-11, s. 19; 1991, c. 24, s. 6.	L.R. (1985), ch. F-11, art. 19; 1991, ch. 24, art. 6.

[10] The documents referred to in the statement of claim were not attached thereto. Indeed, there is no need therefore. However, Rule 206 provides that documents referred to shall be served with the pleading or within 10 days thereafter unless waived, or the Court orders otherwise. Whether or not the Minister waived service of documents generated by his own department is not clear. What the Minister did do was by way of affidavit file in Court the documents in question, which he says read in their entirety establish that the services in question were actually provided at a loss. It is not

necessary to decide whether this tactic was a roundabout way to avoid the rule that no evidence shall be heard on a motion to strike a statement of claim because it discloses no reasonable cause of action. At this stage, the allegations of fact are taken to be true. In any event, the reports give no detail of what is included in cost and what is included in expenses, or whether expenses primarily incurred by other departments, such as in maintaining embassies and consular offices, are shared by Citizenship and Immigration Canada. These are matters for a statement of defence and discovery; not matters relevant on a motion to strike. The main thrust of the motion to strike is that the fees were validly levied and collected in virtue of various Immigration Regulations, which prevail over the *Financial Administration Act*.

VALIDITY OF THE REGULATIONS

[11] Some of the plaintiffs paid fees in specific dollar amounts as set out in the *Immigration and Refugee Protection Regulations SOR/2002-227* published in the Canada Gazette in June 2002. The registration provides:

> Her Excellency the Governor General in Council, on the recommendation of the Minister of Citizenship and Immigration and the Treasury Board, pursuant to section 5(1) of the *Immigration and Refugee Protection Act* and paragraphs 19(1)(a) and 19.1(a) and subsection 20(2) of the *Financial Administration Act*, and, considering that it is in the public interest to do so, subsection 23(2.1) of that Act, hereby makes the annexed *Immigration and Refugee Protection Regulations.*

[12] Section 19.1(a) of the *Financial Administration Act* states:

19.1 The Governor in Council may, on the recommendation of the Treasury Board,	**19.1** Sur recommandation du Conseil du Trésor, le gouverneur en conseil peut :
(*a*) by regulation prescribe the fees or charges to be paid for a right or privilege conferred by or on behalf of Her Majesty in right of Canada, by means of a licence, permit or other authorization, by the persons or classes of persons	*a*) fixer par règlement, pour l'octroi par licence, permis ou autre forme d'autorisation d'un droit ou avantage par Sa Majesté du chef du Canada ou en son nom, le prix à payer, individuellement ou par catégorie, par les attributaires du

on whom the right or privilege is conferred; or	droit ou de l'avantage;

The government could charge what it likes for a privilege. However, at least at this stage, the Minister does not contest the plaintiffs' characterization of the fees as service fees, not privileges.

[13] It should be noted that section 19(2) of the *Financial Administration Act*, the subsection which limits service fees to the cost thereof was not cited in the *Regulation.*

[14] Other proposed plaintiffs paid fees under the former *Act* and *Regulations*. Although the language is slightly different, nothing turns thereon.

[15] According to section 5(1) of *IRPA:*

5. (1) Except as otherwise provided, the Governor in Council may make any regulation that is referred to in this Act or that prescribes any matter whose prescription is referred to in this Act.	**5.** (1) Le gouverneur en conseil peut, sous réserve des autres dispositions de la présente loi, prendre les règlements d'application de la présente loi et toute autre mesure d'ordre réglementaire qu'elle prévoit.

[16] Section 89 of *IRPA* specifically allows that the *Regulations* "may govern fees for services provided in the administration of this *Act*…"

[17] The Minister submits that even if the service fees exceeded the cost, which is denied, section 5 of IRPA permits the enactment of *Regulations* contrary to section 19(2) of the *Financial Administration Act,* particularly since section 10(e) of the latter provides:

10. Subject to any other Act of Parliament, the Treasury Board may	**10.** Sous réserve des autres lois fédérales, le Conseil du Trésor peut

make regulations	prendre des règlements :
…	(…)
(*e*) for the purposes of any provision of this Act that contemplates regulations of the Treasury Board;	*e*) en vue de procéder à toute autre mesure d'ordre réglementaire prévue par la présente loi;
[Emphasis added]	(je souligne)

[18] The plaintiffs for their part, in essence, submit that *IRPA* and the *Financial Administration Act* can and must be read together. *IRPA* permits *Regulations*, but any regulation relating to a service fee cannot exceed the cost thereof.

[19] Although "subject to" normally means "subordinate to", it is not plain and obvious to me that, by permitting fees under IRPA to be fixed by regulations, Parliament intended that services fees could exceed cost, the whole in violation of section 19(2) of the *Financial Administration Act*. If section 89 of *IRPA* said something like "notwithstanding paragraph 19(2) of the *Financial Administration* Act", the *Regulations* "may govern fees for services provided" the matter would be quite different.

[20] *IRPA* and the *Regulations* thereunder are to be interpreted in context. In *Glykis v. Hydro-Québec*, [2004] 3 S.C.R. 285, Deschamps J. said at paragraph 5:

> The approach to statutory interpretation is well-known (*Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42). A statutory provision must be read in its entire context, taking into consideration not only the ordinary and grammatical sense of the words, but also the scheme and object of the statute, and the intention of the legislature. This approach to statutory interpretation must also be followed, with necessary adaptations, in interpreting regulations.

[21] The long title of *IRPA* is "An *Act* respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger". It is not plain and obvious that Parliament intended necessary services to be provided on more than a cost recovery basis. More explicit language is necessary. The *Financial Administration Act* is "an *Act* to provide for the financial administration of the Government of Canada, the establishment and maintenance of the accounts in Canada and the control of Crown corporations." It is a multipurpose Statute. I am not prepared to accept on a motion to strike that section 19(2) of the *Act* can be circumvented by a regulation under another Act, unless Parliament specifically so provided. The general principle is that Statutes should, if possible, be read together. The recent decision of the Manitoba Court of Appeal in *Menzies v. Manitoba Insurance Corp. (*2005) M.B.C.A. 97, 2005 M.J. No. 313 (QL), which commented on the decision of the Supreme Court of Canada in *Murphy v. Welsh; Stoddard v. Watson,* [1993] 2 S.C.R. 1069, illustrates the interplay between subordination and coordination. Freedman J.A. said at paragraphs 41-44:

> ¶41 Stoddard was an appeal from the Ontario Court of Appeal decision in Murphy v. Welsh; Stoddard v. Watson (1991), 81 D.L.R. (4th) 475. The Court of Appeal had to determine whether s. 180(1) of the Ontario Highway Traffic Act (the H.T.A.), R.S.O. 1980, c. 198 required an action to be brought within two years of the accident or whether, because the injured party was an infant, the action was permitted by s. 47 of the Limitations Act, R.S.O. 1980, c. 240 to be brought within two years of his attaining majority. The H.T.A. provision then read:
>
> > 180(1) Subject to subsections (2) and (3), no action shall be brought ... after the expiration of two years ...
>
> The Limitations Act provision read:
>
> > 47. Where a person ... is ... a minor, ... the period within which the action may be brought shall be reckoned from the date when such person became of full age ...
>
> ¶ 42 The appellate court said that the question was whether the only exceptions to the two-year limitation in s. 180(1) were those in subs. (2) and (3). In construing "subject to," the court said (at pp. 481-82):
>
> > The meaning of the expression "subject to" in statutes was, in my opinion, correctly stated by the late Professor Driedger in The Composition of Legislation, 2nd ed. (1976), at pp. 139-40, as follows:

> > Subject to - Used to assign a subordinate position to an enactment, or to pave the way for qualifications.
> >
> > Where two sections conflict, and one is not merely an exception to the other, the subordinate one should be preceded by subject to; this reconciles the conflict and serves as a warning that there is more to come.
>
> The phrase "subject to" always has a counterpart. In other words, the section containing the phrase will always specify the enactment or qualification to which it is subordinate. In s. 180(1), the words "subject to" are followed only by a reference to s-ss. (2) and (3). In my opinion, the ordinary interpretation of this provision is that s. 180(1) is subordinate only to s-ss. (2) and (3). Had the legislature intended to restrict the operation of s. 180(1) further, it could have included s. 47 of the Limitations Act or any other statutory provision in the exceptions named after the words "subject to": see Hinton Electric Co. v. Bank of Montreal (1903), 9 B.C.R. 545 at p. 550. It did not do so and, therefore, I find that the operation of s. 180(1) is not subject to s. 47 of the Limitations Act.
>
> [Emphasis added]

¶ 43 The court struck out the infant's claim which had been filed after two years after the accident (but within two years of attaining majority). The Supreme Court reversed this decision.

¶ 44 Framing the issue as whether s. 47 postpones the s. 180(1) limitation period, the Supreme Court said (at pp. 1078-79):

> .... The respondents argue that the opening words of s. 180(1) define this relationship and exclude the application of s. 47: "Subject to subsections (2) and (3), no action shall be brought....". However, to find that subsections (2) and (3) are the sole exceptions to s. 180(1) means reading s. 180(1) as "subject only to subsections (2) and (3)". Statutory interpretation presumes against adding words unless the addition gives voice to the legislator's implicit intention. ....
>
> In determining the legislator's intention there is a presumption of coherence between related statutes. Provisions are only deemed inconsistent where they cannot stand together. Sections 180(1) and 47 are not prima facie inconsistent. Section 180(1) sets the length of the limitation period. Section 47 states when the limitation period begins to run. Their co-existence does not lead to absurd results. ....

[22] Applying *Murphy*, *supra*, I have come to the view that absent statutory language to the contrary, the *Regulations* must conform to the requirements of the *Financial Administration Act*.

[23] The plaintiffs suggest that the *Regulation* be read down so as to reflect the actual cost. Logically, if the service fees exceeded the cost thereof, contrary to the provisions of the *Financial Administration Act*, then the “constitutional validity, applicability or operability” of a regulation made under an *Act* of Parliament is in question. Section 57 of the *Federal Courts Act* stipulates that

such a regulation shall not be judged to be invalid, inapplicable or inoperable until notices have been served on the Attorney General of Canada and the Attorney General of each province. That notice needs not to be given in the statement of claim, but must be given before the constitutional question is to be argued.

REFUND OF FEES INVALIDLY COLLECTED

[24] The Minister goes on to submit that even if the *Regulations* were invalid, the plaintiffs are not entitled to a refund. He cites a number of cases, the lynchpin being *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161. That case dealt with whether a provincial tax first levied on an original purchaser of gasoline and then amended to apply to the ultimate consumer was *ultra vires*. The case is to be considered with some care as only six judges participated in the judgment. After deciding that the original statute was *ultra vires*, the Court then had to deal with taxes invalidly collected. La Forest, with whom Lamer and L'Heureux-Dubé J.J. concurred, disposed of the unjust enrichment argument advanced by *Air Canada* on the grounds that the airlines had suffered no loss because the burden of the tax was passed on to their customers: "The law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss. Its function is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him…This alone is sufficient to deny the airlines' claim." (pp. 1202-1203).

[25] However, he went on to say that even if the airlines could show that they suffered the burden of the tax, he would deny recovery on principles of public policy. He concluded at pages 1206 and 1207:

> All and all, I have become persuaded that the rule should be against recovery of *ultra vires* taxes, at least in the case of unconstitutional statutes… This rule against the recovery of unconstitutional and *ultra vires* levies is an exceptional rule, and should not be construed more widely than is necessary to fulfill the values which support it. Chief among these are the protection of the treasury, and a recognition of the reality that if the tax were refunded, modern government would be driven to the inefficient course of reimposing it either on the same, or on a new generation of taxpayers, to finance the operations of government. Though the drawing of lines is always difficult, I am persuaded that this rule should not apply where a tax is extracted from a taxpayer through a misapplication of the law. [Emphasis added]

[26] It appears to be common ground that the service fees in question were not taxes, and I am not prepared to extend the principle to other moneys collected and paid into the public treasury, at least not on a motion to strike. Furthermore, Beetz J. and McIntyre expressly refrained from opining on this point, and Wilson J., dissenting in part, was of the view that payments paid under a statute subsequently found to be unconstitutional should be recoverable.

[27] The Minister further submits that the opinion of La Forest J. in *Air Canada, supra*, has been extended to cover any funds collected under regulation. Reliance was placed on the decision of the Quebec Court of Appeal on *Télébec ltée v. Québec (Régie des télécommunications)*, [1999] J.Q. No. 756. The Court followed La Forest in *Air Canada, supra*, and did not allow the recovery of monies received. However the fees in question were held to be taxes.

[28] The Supreme Court decision in *Gladstone v. Canada (Attorney General)*, [2005] 1 S.C.R. 325 is not applicable either. Fisheries and Oceans had seized and sold herring spawn which the respondents had allegedly harvested in violation of the *Fisheries Act*. Proceedings against the respondents, who were of the First Nations, were ultimately stayed and the net proceeds of the sale of the herring spawn paid over to them. The issue was whether or not the Crown was also obliged to

pay interest. The Court held the Crown did not owe interest. The *Fisheries Act* was a complete code dealing with the disposition and return of seized property, and imposed no obligation to pay interest.

[29] I have already expressed the view that the *IRPA* and the *Regulations* thereunder are not a complete code. This is not to say that if the plaintiffs succeed on the merits their recovery might be limited to principal, without interest.

[30] We must now turn to the alleged causes of action.

ALLEGED CAUSES OF ACTION

1. Unjust Enrichment

[31] This issue was recently canvassed by the Supreme Court in *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629. There are three elements to an unjust enrichment claim:

a. Enrichment of the defendant,

b. A corresponding deprivation of the plaintiff,

c. An absence of juristic reason for the enrichment.

[32] The defendant may have been enriched out of the pockets of the plaintiffs. However, the plaintiffs must show that there is no juristic reason to deny recovery. Established categories include a contract, a disposition of law, a donative intent and other valid common-law equitable or statutory obligations. As it is not plain and obvious that there was a juristic reason, then the plaintiffs have made out a *prima facie* case. However, the Minister as defendant can rebut by showing there are

other juristic reasons such as reasonable expectations of the parties or public policy. The minister has not yet filed a statement of defence, and so it can hardly be said has rebutted a *prima facie* case.

[33] Let it be clear that I am only referring to a "*prima faice*" case in the context of unjust enrichment and the burden of proof should the case proceed. At this stage, it is not necessary to go beyond the "plain and obvious" test in *Hunt v. Carey, supra*

2. Money had and received and 3. Mutual mistake

[34] The purpose of pleadings is to set out the facts, not to argue law. I do not think it is desirable on a motion to strike to engage in an overall review of the law of restitution, mistake of fact, mistake of law or money had and received, as they all may bear some semblance to unjust enrichment.

[35] Sufficient facts have been alleged. If there is a defect in the form of pleading, it can be cured. As Lord Denning M.R. said in *Letang v. Cooper*, [1964] 2 All E.R. 929 at p. 932:

> I must decline, therefore, to go back to the old forms of action in order to construe this statute. I know that in the last century MAITLAND said "the forms of action we have buried but they still rule us from their graves." But we have in this Century shaken off their trammels. These forms of action have served their day. They did at one time form a guide to substantive rights; but they do so no longer. Lord Atkin told us what to do about them:
>
> > "When these ghosts of the past stand in the path of justice, clanking their medieval chains, the proper course for the judge is to pass through them undeterred. See *United Australia, Ltd. v. Barclays Bank Ltd.* [1940] 4 All E.R. 20 at p. 37"

4. Negligence

[36] However, quite different considerations come into play in paragraphs 8 and 14 of the statement of claim, which allege that the defendant owed, and breached, a duty of care to avoid charging and collecting service fees in excess of cost.

[37] There are two classes of persons who could be covered by those allegations, those who played a role in enacting the *Regulation* and those who played a role in administering the *Regulation* by collecting the fees before processing the applications.

[38] The claim as thus framed is one in tort for pure economic loss. Furthermore, under section 10 of the *Crown Liability and Proceedings Act,* no action lies against the Crown unless it would also have given rise to a cause of action for liability against a Crown servant.

[39] To first deal with those involved in the collection of the fees, fees which may or may not have exceeded cost, I cannot possibly imagine that the collection clerk owed a duty to inquire into the validity of *Regulations* promulgated under *IRPA* and its predecessor Statute.

[40] The broader submission is that the *Regulation* would not have been enacted in the first place had the Governor in Council paid closer attention to section 19(2) of the *Financial Administration Act*.

[41] Liability in negligence of public authorities, as well as liability in negligence for pure economic loss, is subject to the test set out by the House of Lords in *Anns v. Merton London Borough Council*, [1978] AC 728 and applied in Canada in such cases as *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2. The Court must first determine whether there is sufficient proximity to give rise to a duty of care, and then, if so, whether there are policy considerations which negate that duty.

[42] In *A.O. Farms Inc. v. Canada* (2000), 28 Admin. L.R. (3d) 315; [2000] F.C.J. No. 1771 (QL), the plaintiff had entered into a number of contracts for the sale of barley while certain amendments to the *Canadian Wheat Board Regulations* were in force. They were subsequently struck down as *ultra vires*. The plaintiff could only fulfil its contracts at greater cost than if the *Regulations* had not been struck down. It took action against the Crown for enacting *ultra vires Regulations*. The Crown moved on summary judgment to have the action dismissed. Hugessen J., after referring to *Anns* and *Kamloops, supra*, said:

> [11] Here it seems to me that on both branches of the test the action must fail. The relationship between the government and the governed is not one of individual proximity. Any, perhaps most, government actions are likely to cause harm to some members of the public. That is why government is not an easy matter. Of course, the government owes a duty to the public but it is a duty owed to the public collectively and not individually. The remedy for those who think that duty has not been fulfilled is at the polls and not before the Courts.
>
> [12] Very similar considerations, it seems to me, apply to the second branch of the test. A public authority must be free to make its choices with an eye only to their political consequences, not to the possibility of being sued for damages. That is the primary policy consideration underlying the Welbridge and Guimond decisions with which I started these Reasons and they are equally applicable here. Government, when it legislates, even wrongly, incompetently, stupidly, or misguidedly is not liable in damages. That, in essence, is what the plaintiff has alleged and it discloses, in my view, no cause of action for trial.
>
> [13] Accordingly, I conclude that the motion must succeed and an Order will go dismissing the action with costs.

[43] *A.O. Farms, supra*, was applied by von Finckenstein J. recently in *Premakumaran v. Canada*, [2005] FC 1131, [2005] F.C.J. No. 1388 (QL).

[44] To conclude on this point, it is plain and obvious that an action sounding in negligence cannot succeed.

VEXATIOUS PROCEEDINGS

[45] None of the plaintiffs actually named, but ten other individuals who would fall within the proposed class action, filed actions in 2001 on the grounds that the actual costs of the services were less than the fees charged. In some, for instance *Gin* T-1546-01, Her Majesty pleaded that the costs alleged did not include, amongst other things, costs incurred by other federal government departments in providing immigration related services. Motions were brought to strike for failing to disclose a cause of action. There were discontinuances in some cases without a disposition by the Court on the merits. Other actions were dismissed by Prothonotary Hargrave by reason of the plaintiff failing to respond to Her Majesty's motion record. These were not dismissals on the merits.

[46] The principle of *res judicata* does not apply to preclude these ten individuals from instituting fresh proceedings. However, their circumstances may require special consideration when determining whether a class action should go forward and whether these claims should be included.

TIME BAR

[47] There is no indication in the pleadings that the eleven named plaintiffs paid their fees more than six years ago. However, since the proposed class action purports to extend to those who paid fees as long ago as 1994, time bar is certainly a live issue. However, the effect of a statute of limitations cannot be established at this stage (*Kibale v. Canada* (1991) 123 N.R. 153 (F.C.A.)). There is a complete lack of factual background. Even in the case of fees paid in 1994, when was the rendering of service complete? It would be completely inappropriate to deal with this defence at this stage. However, as aforesaid, possible time bar may be relevant when it comes to determining whether or not there should be a class action, and whether there should be more than one class.

CONCLUSION

[48] The motion is granted in part. Paragraphs 8 and 14 and conclusionary paragraph D of the statement of claim are struck pursuant to Federal Courts Rule 221(1)(a) as disclosing no reasonable cause of action. Costs shall be in the cause.

"Sean Harrington"

JUDGE

Ottawa, Ontario
November 3, 2005

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-1669-05
STYLE OF CAUSE:	*Baz Singh Momi; et al v. Her Majesty the Queen As Represented By Her Agent, the Minister of Citizenship and Immigration*
PLACE OF HEARING:	Vancouver, B.C.
DATE OF HEARING:	October 6, 2005
REASONS FOR ORDER:	HARRINGTON J.
DATED:	November 3, 2005

APPEARANCES:

Mr. Gerald A. Cuttler Mr. Richard T. Kurland	FOR THE PLAINTIFFS
Ms. Banafsheh Sokhansanj Mr. R. Keith Reimer	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Getz Prince Wells Barristers & Solicitors Vancouver, B.C.	FOR THE PLAINTIFFS
Kurland Tobe Barristers & Solicitors Vancouver, B.C.	
John H. Sims, Q.C. Deputy Attorney General of Canada Department of Justice Vancouver Regional Office	FOR THE DEFENDANT