Date: 20060215

Docket: T-2071-04

Citation: 2006 FC 198

Ottawa, Ontario, February 15, 2006

PRESENT: THE HONOURABLE MR. JUSTICE MOSLEY

BETWEEN:

ELZBIETA PASZKOWSKI

Plaintiff

and

**THE ATTORNEY GENERAL OF CANADA,
THE MINISTER OF CITIZENSHIP AND IMMIGRATION,
HUGH LOVEKIN, RANDY GURLOCK, and ROBERT FERGUSON**

Defendants

REASONS FOR ORDER AND ORDER

[1] The defendants have moved for summary judgment to dismiss the plaintiff's action. The plaintiff claims that Citizenship and Immigration Canada (CIC) officials, the named individual defendants, committed torts of public misfeasance and malfeasance by delaying the processing of her June 5, 1990 permanent residence application and that her rights under the *Canadian Charter of Rights and Freedoms* were violated. As a result, the plaintiff claims she was deprived of opportunities to become a Canadian citizen, to travel abroad, to continue her education, to earn a living and to have more children.

BACKGROUND

[2] There is a lengthy history behind the plaintiff's action stemming from the claims of her husband, Ryszard Paszkowski, that he worked for Canadian security and intelligence agencies and was denied admission to Canada when that relationship went sour. As stated by Justice James Hugessen in proceedings brought by the husband, *Paszkowski v. Canada* (2001), 11 Imm. L.R. (3d) 28, 103 A.C.W.S. (3d) 400 (F.C.T.D.) at paragraph 1, the elements of that story "make at least as good reading as a great many of the spy novels which one encounters nowadays." On this motion, the parties have filed a considerable amount of material relating to Mr. Paszkowski's immigration proceedings and litigation before the courts.

[3] In those proceedings, Ryszard Paszkowski said he had been a member of the intelligence service in cold war Poland, his native country, and that he quit the service when martial law was imposed in that country. In August, 1982 Paszkowski hijacked an airplane from Hungary to Munich, West Germany. He requested and was granted asylum in West Germany. On February 14, 1983, he was convicted of the offence of "air traffic attack" and sentenced to a term of imprisonment of four and one half years by a West German court. He was pardoned for this offence in 1997. While in prison, Paszkowski renounced his Polish citizenship and became a stateless person.

[4] Mr. Paszkowski escaped from a German prison in July, 1984 and, after a brief sojourn in France, managed to get himself to a refugee camp in Italy. In affidavits filed in his litigation which form part of the record on this motion, he claims to have approached the Canadian Embassy in

Rome and offered to supply intelligence to the Royal Canadian Mounted Police ("R.C.M.P."), in return for which he was to be resettled in Canada. That claim has not been admitted by the defendants and has been denied by Crown witnesses in the litigation involving Mr. Paszkowski.

[5] What is undisputed, however, is that while in the camp Paszkowski applied to become a permanent resident of Canada under the name "Robert Fisher" and was issued a visa as a government sponsored refugee. Paszkowski arrived in Canada on December 11, 1984 and was given a record of landing under the name of Fisher. As Fisher, he took up residence in Edmonton. In 1985, he approached the Canadian Security Intelligence Service ("CSIS") and offered to obtain and provide information with respect to the activities of the Polish intelligence service in Canada.

[6] The R.C.M.P. had taken Fisher's fingerprints in Italy in November 1984 for the purpose of his visa application. It is not clear from the record whether they determined his actual identity at that time. However, a telex dated August 18, 1986 indicates that immigration officials had by then become aware of Fisher's dual identity and were considering an inquiry into his admissibility. But Paszkowski /Fisher, the month previously, had returned to Europe. Paszkowski was arrested in Rome on August 19th by the Italian police and extradited to Germany to serve the remainder of his prison sentence.

[7] Paszkowski was released on parole in November, 1987 and remained in Germany for two years. During that period he was joined by the plaintiff, then Elzbieta Perlinska, the daughter of friends in Poland with whom he had corresponded. Ms. Perlinska testified in 1989 that she was encouraged

by the Polish Security Service to visit Paszkowski to collect information about his activities. Upon arrival in Germany she claimed refugee status.

[8] During the two years he remained in Germany, Paszkowski applied for and was refused a returning resident permit by Canada.

[9] On October 4, 1989, Mr. Paszkowski and Ms. Perlinska travelled to Canada using false travel documents. Both claimed refugee status upon arrival at Edmonton International Airport.

[10] Mr. Paszkowski was refused entry, detained and reported for a hearing under s. 20 of the *Immigration Act, 1976*, R.S.C. 1985, c. I-2 ("the former Act") as to his admissibility. The immigration officer relied on three grounds: 1) that he did not have proper travel documents; 2) that he had not obtained a visa and was thereby inadmissible under paragraph 19(2)(d) of the former Act; and 3) that his conviction in Germany made him a member of a class of persons inadmissible to Canada by reason of paragraph 19(1)(c) of the former Act.

[11] On October 12, 1989 an immigration adjudicator issued Mr. Paszkowski conditional deportation and exclusion orders but found a credible basis for his refugee claim and referred the claim to the Immigration and Refugee Board, Convention Refugee Division for determination. During the admissibility hearing, an immigration officer testified as to Paszkowski's dual identity, 1984 visa and entry into Canada. Ms. Perlinska testified on his behalf.

[12] Paszkowski's application for permanent residence and record of landing in 1984 under the name of Robert Fisher was entered into evidence at the refugee hearing. Conflicting testimony, was heard about Mr. Paszkowski's claim to have been a Polish agent and with respect to the nature and extent of his involvement with CSIS. Paszkowski was found not to be a credible witness and on June 6, 1990, his refugee claim was denied. The conditional deportation orders then became executable.

[13] CIC's subsequent efforts to deport Mr. Paszkowski were unsuccessful as Germany refused to receive him and he could not be returned to Poland. Between 1990 and November 1996, Paszkowski brought a series of ultimately unsuccessful applications and appeals in the Federal Court and the Alberta Court of Queen's Bench in an effort to overturn the refugee determination and remain in this country. Despite Paszkowski's lack of legitimate travel documents, he periodically left Canada and re-entered, seemingly at will. In 1992, for example, he appears to have travelled to the Netherlands from which he sent CIC officials a post-card.

[14] In January 1997, when his challenges against the deportation orders had finally been exhausted, Mr. Paszkowski sought refugee status in the United States, was refused and was deported to Poland. A few months later Paszkowski returned to Canada, again using false documents. He sought and received sanctuary in an Ottawa church and filed an action against the Queen, the Minister of Citizenship and Immigration and the Attorney General of Canada in the Federal Court, Trial Division, as this court then was, seeking injunctive and declaratory relief.

[15] In their statement of defence to the 1997 action, the defendants acknowledged that Mr. Paszkowski was given assignments in Canada by the Canadian Security Intelligence Service during 1985 and 1986 but asserted that he had at all material times represented himself to be Robert Fisher. The defendants denied that he was entitled to enter into or remain in Canada.

[16] The 1997 action, in Court file IMM-5510-97, was discontinued by consent of the parties on September 24, 2002. The following day Mr. Paszkowski filed a further action against the Crown which resulted in a consent order issued on November 22, 2002. (See *Ryszard Paszkowski v. Her Majesty the Queen*, unreported, docket T-1622-02).

[17] It was conceded by the Crown in an Agreed Statement of Facts dated October 1, 2002 that the immigration officer had erred in October, 1989 by reporting Ryszard Paszkowski under s.20 of the former Act as that provision applied only to persons who were not citizens or permanent residents. The parties agreed that he could have been reported under subsection 27(1) of the former Act for deemed abandonment of his status of permanent resident or on the ground that obtaining a visa in 1984 under an assumed name vitiated his landing at that time, however, that was not done.

[18] In the result, the parties agreed that the adjudicator did not have jurisdiction to conduct the s.20 hearing and that the exclusion and deportation orders were invalid. The officer's error, the Agreed Statement says, stemmed largely from the fact that Mr. Paszkowski did not claim to be a returning resident and rather chose to claim refugee status with his fiancé.

[19] On the strength of the agreed statement, a joint memorandum of fact and law and a draft order submitted by the parties, the Court declared that Ryszard Paszkowski had been a permanent resident of Canada from and after the 11th day of December, 1984 and had the right to enter and remain in Canada pursuant to s.27(1) of the *Immigration and Refugee Protection Act*, S.C.2001, c.27.

[20] Further, the Court declared that the exclusion and deportation orders dated October, 12, 1989 were void, of no effect and unenforceable in law. No costs were awarded to the successful party. I was advised during the hearing of this motion that Mr. Paszkowski had released the Crown from any liability for damages or costs in return for its consent to the order. That waiver does not apply to any claim that his wife might have against the Crown as she was not a party to her husband's action.

The Plaintiff's Claim to Refugee Status and Permanent Residence in Canada

[21] The plaintiff's claim to refugee status was dealt with on a separate track from that of Mr. Paszkowski following their arrival at Edmonton on October 4, 1989. On January 15, 1990 the plaintiff was determined to be a Convention refugee. On January 19, 1990 she married Mr. Paszkowski. The couple have two sons born in Canada, on March 2, 1990 and August 27, 1992.

[22] On June 5, 1990 the plaintiff applied for permanent residence in Canada under section 46.04 of the *Immigration Act* as it read at that time. She sought landing only for herself, though her

application identified Mr. Paszkowski as her husband and closest relative in Canada, as she was required to do by the statute.

[23] By a letter dated June 4, 1991, signed by the defendant Robert Ferguson, the plaintiff was notified that her permanent residence application could not be processed by reason of the operation of subsection 46.04(3) of the *Immigration Act*, as her husband was criminally inadmissible, and that no further action would be taken on her application until her husband left Canada.

[24] As subsection 46.04(3) read in 1991 (S.C. 1988 c.35), an immigration officer considering an application for permanent residence had no discretion to grant landing if he or she was satisfied that any member of the applicant's family, present in Canada, was inadmissible for criminality whether or not that family member was listed as a dependant by the applicant.

[25] The plaintiff did not seek judicial review of Mr. Ferguson's decision or of any subsequent actions taken by immigration officials. Her explanation, on cross-examination of her affidavit, as to why she did not seek a judicial remedy, in light of her husband's litigious history, was that she had never thought of taking such action and, in any event, her refugee status guaranteed that she would remain in Canada.

[26] Education and employment permits were issued so Mrs. Paszkowski was able to work and study although there is some evidence that these were not always issued in a timely manner. Without permanent residence status, the plaintiff was not eligible for student loans although the

record indicates that a CIC official wrote to Alberta Student Finance in an effort to assist her in that regard.

[27] By an enactment, S.C. 1992, c.49 s.38 (3), which came in to force early in 1993, subsection 46.04(3) was repealed and re-enacted without the reference to an inadmissible non-dependant family member present in Canada. It is common ground between the parties that the practical effect of the amendment for the plaintiff was that so long as her husband was not listed as a dependant, his inadmissible status (by reason of the criminal record in Germany) would not serve as a bar to her application for landing whether or not he was present in Canada.

[28] The evidence indicates that the significance of this change did not become apparent to the plaintiff, her husband or to the immigration officers familiar with her case, until long after the amendment was made as they continued to operate on the assumption that so long as Mr. Paszkowski remained in Canada, his wife would be ineligible for landing.

[29] As noted above, Mr. Paszkowski left Canada in January 1997 for the United States, ostensibly to facilitate his wife's landing. On February 22, 1997 the plaintiff, with encouragement from Randy Gurlock, then Assistant Manager of CIC Edmonton, re-applied for permanent residence for herself and listed only her two sons, both Canadian citizens, as dependents. This application was provisionally accepted on May 8, 1997.

[30] Following Mr. Paszkowski's return to Canada later that year, there was some discussion within CIC as to whether they could continue to process the plaintiff's application. On January 7,

1998, Gurlock, wrote to Hugh Lovekin, a case management analyst at CIC headquarters in Ottawa, seeking advice and referencing the current wording of subsection 46.04(3). The next day, Lovekin instructed Gurlock to continue to process the plaintiff's application notwithstanding Paszkowski's presence in the country.

[31] The record indicates that among CIC officials there continued to be doubts as to the proper interpretation of subsection 46.04(3) and whether the plaintiff's application could proceed in light of her husband's uncertain status. I am satisfied, however, from a close review of the affidavits and documentary evidence filed that they continued to process the application and that the primary reason for subsequent delay was the backlog for security clearances that had accumulated in the late 1990s. The plaintiff was granted permanent residence on April 10, 2001. On April 29, 2004 Mrs. Paszkowski obtained her Canadian citizenship.

THE CLAIMS

[32] The plaintiff alleges that throughout the material times the defendants knew that Robert Fisher and Ryszard Paszkowski were one and the same person and that Robert Fisher was a permanent resident of Canada.

[33] The plaintiff claims that each defendant owed her a duty to process her application for permanent residence in good faith and in a manner consistent with the legislation and applicable law. The plaintiff alleges that each defendant breached that duty and caused her damages. Further, or in the alternative, the plaintiff alleges that each defendant in exercising their statutory or

prerogative power abused their public office, committed the tort of misfeasance in public office and caused her damages.

[34] The plaintiff further alleges that her rights under sections 1, 7 and 15 of the *Canadian Charter of Rights and Freedoms* were violated. In particular, the plaintiff claims that each defendant denied her section 7 rights to liberty and security of the person based on a deprivation of psychological security during the 11 years when she was "in limbo". She seeks damages pursuant to section 24(1) of the *Charter*. She claims against each defendant, jointly or severally, damages in the amount of $2.5 million, $1 million in punitive damages, interest and costs.

SUMMARY JUDGMENT PRINCIPLES

[35] Before defining the issues, it is helpful to review the principles applicable to summary judgment. Rule 213(2) of the *Federal Court Rules, 1998* allows a defendant to bring such a motion. The Rule states:

> A defendant may, after serving and filing a defence and at any time before the time and place for trial are fixed, bring a motion for summary judgment dismissing all or part of the claim set out in the statement of claim.

[36] The general principles applicable to the disposition of summary judgment motions in the Federal Court were set out by Madam Justice Danièle Tremblay-Lamer in *Granville Shipping Co v. Pegasus Lines Ltd. S.A.*, [1996] 2 F.C. 853, 111 F.T.R. 189 [*Granville Shipping*]:

a) the rules are intended to summarily dispense of cases that present no genuine issue for trial;

b) the test is whether the case is so doubtful it deserves no further consideration;

c) each case must be interpreted in its own context;

d) provincial practice can aid in the interpretation of the Federal Court's rules;

e) questions of fact and law may be determined on the motion;

f) summary judgment cannot be granted if necessary facts cannot be found; and

g) where there are serious issues of credibility the matter should go to trial.

[37] Under Rule 215 the obligations on the responding party are as follows:

> A response to a motion for summary judgment shall not rest merely on allegations or denials of the pleadings of the moving party, but must set out specific facts showing that there is a genuine issue for trial.

[38] Parties responding to a summary judgment motion do not have to prove all the facts of their case, rather the evidentiary burden is to put forward evidence that shows there is a genuine issue for trial. The burden rests with the party putting forward the motion but all parties must put their best foot forward: *MacNeil Estate v. Canada (Department of Indian and Northern Affairs)* (2004), 316 N.R. 349, 2004 FCA 50.

[39] Summary judgment is not restricted to the clearest of cases. The correct standard, enunciated in *Granville Shipping* is whether the case is so doubtful it deserves no further consideration: *ITV Technologies Inc. v. WIC Television Ltd.* (2001), 199 F.T.R. 319, 2001 FCA 11. Even where a case is doubtful, if it turns on the credibility of witnesses that can only be tested through direct and cross-examination, it should go to trial.

[40] In my view, there are no serious issues of credibility in this matter that can only be tested at trial. The central witnesses have provided affidavits and have been cross-examined upon their affidavits. In addition, there is considerable material on the record from the proceedings involving Mr. Paszkowski.

ISSUES

[41] The questions to be addressed in these proceedings are whether the facts raise a genuine issue for trial, or, in the alternative, whether the Court should find, on the whole of the evidence, the facts necessary to decide the questions of fact and law and grant summary judgment under Rule 216(3). On the submissions of the parties, there are three sub-issues to be addressed in these reasons:

1. Is the action statute-barred?

2. Is the plaintiff precluded from bringing an action for failing to pursue judicial remedies that were available and required by the governing legislation?

3. Did the defendants owe any duty of care to the plaintiff and did they breach that duty?

[42] As a preliminary matter, the plaintiff has sued the Attorney General and the Minister of Citizenship and Immigration solely in their representative capacities. The law is clear that Ministers of the Crown may not be sued as such: *Cairns v. Farm Credit Corp.* (1991), 49 F.T.R. 308, [1992] 2 F.C. 115 (F.C.T.D.); *Canada (Conseil des Ports Nationaux) v. Langelier*, [1969] S.C.R. 60, (1968) 2 D.L.R. (3d) 81; *Dix v. Canada* (2001), 290 A.R. 281, 2001 ABQB 256.

[43] When suing in Federal Court, the *Federal Courts Act*, R.S.C. 1985, c. F-7, section 48 and Schedule specify that the claim is to name Her Majesty the Queen as the defendant to engage the vicarious liability of the Crown for the alleged actions of Crown servants. Only the Crown is vicariously liable for torts committed by a Crown servant. No Crown servant, including a Minister or the Attorney General in their roles as department heads, is vicariously liable for torts committed by another Crown servant.

[44] The plaintiff seeks leave of the Court under rules 76 and 77 to amend the style of cause in the action and substitute Her Majesty the Queen for the Attorney General of Canada and the Minister of Citizenship and Immigration as defendants. I am satisfied that there is no prejudice and the Crown is not misled. Accordingly, the plaintiff's request in this respect will be granted.

ARGUMENT & ANALYSIS

1. Is the action statute-barred?

[45] Section 32 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 provides that provincial limitation laws apply to actions involving the Crown where the cause of action arises in a province. Under section 39 of the *Federal Courts Act*, provincial limitation laws apply to actions in Federal Court where the cause of action arises in a province. In essence, the cause of action claimed by the plaintiff relates to alleged public office misfeasance and malfeasance occurring between 1989 and 2001 in Alberta and Ontario.

[46] The applicable limitations statutes in both provinces provide for a general limitation period for remedies for injuries resulting from acts, omissions or a breach of duty of two years: see section 3(1) of the Alberta *Limitations Act*, R.S.A. 2000 C.L-12 and section 4 of the Ontario *Limitations Act, 2002*, S.O. 2002, c.24, Schedule B. The defendant also relies upon section 7 of the Ontario *Public Authorities Protection Act*, R.S.O. 1990, c. P.38 which has a six month limitation period, and is applicable to proceedings in this Court by the operation of section 32 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50: see *Farzam v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 140, [2003] F.C.J. No. 203 (QL); *Marshall v. Canada*, 2005 FC 257, [2005] F.C.J. No. 292 (QL).

[47] The bases of the plaintiff's claims that the defendants are liable in damages for misfeasance, malice and abuse of trust are not entirely clear from her pleadings as she has made sweeping allegations without specifying the material facts upon which they are founded. A motion for particulars on behalf of the defendants was met with a list of documents and not by reference to specific facts that would support the plaintiff's claims.

[48] However, to the extent that it can be discerned from the pleadings and the submissions of counsel at the hearing of this motion, the plaintiff's claims appear to be based on two theories of liability. The first is that the defendants knew that the plaintiff's husband had been landed in Canada under the name of Robert Fisher in 1984 and deliberately concealed that knowledge from the adjudicator who found him to be inadmissible in 1990. Had that information not been concealed, the plaintiff contends that her husband would not have been declared inadmissible and that her June 5, 1990 application for landing would not have been rejected. The result of the

concealment, the plaintiff argues, is that her status in Canada was not resolved for over a decade and she suffered the claimed damages.

[49] Alternatively, the plaintiff alleges that the defendants were under a duty to inform her of the change in the *Immigration Act* which took effect February 1, 1993 and to promptly process her application for permanent residence after that date without considering her husband's status as an inadmissible convicted criminal.

[50] Any discussion of the time limitations on actions must begin with consideration of the principle that the applicable prescription periods begin to run when the material facts underlying a cause of action became reasonably known to the plaintiff: *Peixeiro v. Haberman,* [1997] 3 S.C.R. 549, 151 D.L.R. (4th) 429.

[51] The defendants submit that the plaintiff knew or should have known the material facts underlying the alleged cause of action on June 4, 1991 when she received written notice that her application for permanent residence could not be processed and that no further action would be taken on her application until her husband left Canada. The plaintiff did nothing about the matter at that time and cannot now rely upon her failure to act and wilful blindness of the facts to establish a later discoverability date: *Marshall v. Canada* (2005), 137 A.C.W.S. (3d) 522, 2005 FC 257 at para. 29.

[52] In these proceedings, the plaintiff has relied upon the affidavit of Lovett Winchester, a retired member of the Department of Citizenship and Immigration, sworn on October 17, 1996 for

the purposes of an application for judicial review then pending before the Federal Court. Mr. Winchester attests, among other things, that he was aware of Mr. Paszkowski's status as a landed immigrant at the time of the 1989 hearing but that he was instructed to pursue the matter under s.19 and not under s.27 of the former Act.

[53] One might conclude from Mr. Winchester's affidavit that the fact that Mr. Paszkowski and Mr. Fisher were one and the same was concealed from the adjudicator in 1989 and, indeed, that was the inference I was invited to draw by counsel during oral argument in these proceedings. Mr. Winchester states for example in paragraph 4 that "it appears that the immigration authorities have likely known all along that "Fisher" and "Paszkowski" were one and the same person and that he had been convicted of a criminal offence in Germany."

[54] The transcript of the hearing conducted at Edmonton on October 6, 1989, filed as part of the defendants' record, makes it clear that Winchester, the case presenting officer at the hearing, informed the adjudicator of the salient facts respecting the Fisher alias, Paszkowski's claimed association with Polish security, the aircraft hijacking, prosecution in Germany, subsequent visa application and arrival in Canada in 1984 in his opening statement. The adjudicator appears to have been provided with sufficient information to conclude, if he had directed his mind to it, that the s. 20 hearing was not properly constituted. Paszkowski's counsel did not take issue with the adjudicator's jurisdiction either then or on October 12th, 1989 when the hearing resumed.

[55] On October 12th, Paszkowski was sworn in and advised by the adjudicator that he had the burden of showing that he had a right to enter Canada or was otherwise admissible. When asked

directly, he denied being a permanent resident of Canada and denied being in possession of a visa. The remainder of the hearing focused on whether Paszkowski was inadmissible to Canada as a danger to the public by reason of his criminal history. That was the conclusion ultimately reached, subject to the determination of his refugee claim which, as noted above, was decided against him in June 1990.

[56] With respect to the plaintiff's first theory of liability, the defendants vigorously dispute the plaintiff's claim to have been ignorant of the facts concerning her husband's history until March 2003. Indeed it is hard to understand how the plaintiff could not have been aware of those facts prior to that date given the extensive coverage they had received in the media and the details disclosed in his litigation.

[57] In argument, the plaintiff has submitted that she could not have had any reason to believe that an action for her claimed injuries was warranted until November 22, 2002, the date of the Court order resolving her husband's action against the Crown. Her action was filed on November 19, 2004 within two years from the date of that Court order. She alleges further that not until March 2003 when her husband obtained a copy of her Edmonton immigration file on her behalf, did she know what the Crown is alleged to have known throughout, namely that Ryszard Paszkowski, her husband, was also Robert Fisher, and had been landed in 1984.

[58] The defendants submit that even if these assertions are to be taken at face value, which they contest, the agreed statement of facts upon which the November 22, 2002 order was based was filed on October 1, 2002 and was thereafter publicly available. The plaintiff did not file this suit until

November 19, 2004, over a month and a half after the expiry of the two year prescription period. The plaintiff submits that there is no evidence in the record as to when she learned of that agreed statement of facts and she should not, therefore, be held to the earlier date.

[59] The plaintiff relies upon subsection 4(1) of the Alberta *Limitations Act*, S.A. 1996, c. L-15.1 which provides that the running of time is suspended during any period in which the defendant fraudulently conceals the fact that "the injury for which a remedial order is sought has occurred". The burden of establishing fraudulent concealment is on the claimant and there is, the defendants submit, no evidence on the record that any of them concealed "the injury." Moreover, the defendants contend, the Alberta statute expressly excludes judicial review of administrative action from the definition of "remedial order," precisely what the plaintiff is seeking to achieve through this action.

[60] The leading modern authority on the meaning of fraudulent concealment is *Kitchen v. Royal Air Forces Association*, [1958] 2 All E.R. 241 (C.A.), where Lord Evershed, M.R. stated, at page 249, that the phrase covers conduct which, having regard to the special relationship between the two parties concerned, is an unconscionable thing for the one to do to the other. The Supreme Court of Canada adopted this formulation in the context of the fiduciary relationship between the Crown and First Nations in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 and parent-child abuse cases in *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289.

[61] In this case, the plaintiff asserts that the duty arises from a "special relationship" between immigration officers and those applying for permanent residence in Canada. The defendants deny

that any such special relationship exists and contend that it would be incompatible with the duties of an immigration officer to act in the public interest.

[62] In my view, the plaintiff's claim of fraudulent concealment does not rest on a solid foundation. Where a "special relationship" exists, such as in the case of the fiduciary relationship between the Crown and First Nations, the withholding of information may constitute fraudulent concealment: *Kruger v. The Queen*, [1986] 1 F.C. 3, 17 D.L.R. (4th) 591 (F.C.A.). But as I conclude below, there was no fiduciary relationship between the parties in this case, there was no duty owed to the plaintiff and the defendants could not, therefore, be in breach for withholding information. Thus, I do not find that the running of the prescription period is suspended by reason of fraudulent concealment.

[63] From the record before me, the significance of the 1989-1990 proceedings did not become apparent until the matter was thoroughly reviewed by the counsel who negotiated the 2002 settlement. They concluded that the immigration officer at the port of entry had erred in reporting Ryszard Paszkowski for an admissibility hearing rather than for a determination of whether he had lost his resident status. That error was compounded by the adjudicator and by Paszkowski's false testimony. But the error was one of law. The material facts were known and were presented to the adjudicator by Lovett Winchester in 1989. The plaintiff cannot now claim that they were discovered only in 2002.

[64] I am unable to accept the plaintiff's assertion that she was not aware of her husband's history prior to the release of her immigration file in March 2003. Her husband had litigated the

matter extensively and his story had been published and broadcast widely. Indeed, a book had been written about it by a Member of Parliament. Moreover, she had attended and given evidence at the 1989 hearing at which the facts were disclosed to the immigration adjudicator.

[65] If the plaintiff had a cause of action for the defendants' failure to treat her 1990 application for landing as that of the spouse of a returned permanent resident, the action should have been brought within two years of the decision to reject the application, that is by June 4, 1993.

[66] To the extent that the plaintiff's claims are dependent upon the failure of the defendants to notify her of the change in the law and to then process her prior application, they are, in my view, also statute-barred. The plaintiff contends that she did not learn that the law had changed in 1993 until March 2003 when she gained access to her immigration file. Thus, she submits, the discoverability date for prescription purposes should be the date of the release of that information to her.

[67] There are two difficulties with this contention. The first is that parties are presumed to know the state of the law and to govern themselves accordingly: *Beauregard v. Canada*, [1986] 2 S.C.R. 56, 30 D.L.R. (4th) 481 at para. 86. This view of the law has been held to apply in a number of contexts including the prosecution of regulatory offences (*Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 at para. 54, [1995] S.C.J. No. 62 (QL)), criminal law (*R. v. Chaulk*, [1990] 3 S.C.R. 1303 at para 236, [1990] S.C.J. No. 139 (QL)) and contracts (*Nepean (Township) Hydro Electric Commission v. Ontario Hydro*, [1982] 1 S.C.R. 347; *Thompson and Alix Ltd. v. Smith*, [1933] S.C.R. 172).

[68] The general rule is that a plaintiff is expected to bring a cause of action as soon as reasonably possible. As stated by the Supreme Court in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at para. 24, 96 D.L.R. (4th) 289 "…plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion."

[69] The discoverability principle was articulated by the Supreme Court in *Central Trust Company v. Rafuse*, [1986] 2 S.C.R. 147 31 D.L.R. (4th) 481. The Court stated at paragraph 77:

> …a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence.

This statement has been adopted by this court in a number of decisions: *McFarlane v. Canada*, [1997] F.C.J. No. 1559 at para. 5 (F.C.T.D.) (QL); *Baron v. Canada* (2000), 95 A.C.W.S. (3d) 655 at para. 15, [2000] F.C.J. No. 263 (F.C.T.D.) (QL). Parties can, with minimal diligence, ascertain what the statute law is at any particular point in time. In this case the plaintiff is presumed to have known the state of the law and therefore should have acted more diligently in bringing forward her cause of action within the prescribed period.

[70] The second difficulty is that the plaintiff's contention is predicated upon the existence of duties on the part of the defendants to inform her of the change in the law in 1993 and to then actively process her 1991 application. As I will discuss further below, I have concluded that the defendants owed no duty to the plaintiff to inform her of the amendment or to reprocess her application after February 1, 1993.

[71] The plaintiff's remedies, following February 1, 1993, were to either bring an application for judicial review and an order of mandamus to compel the defendants to deal with her application or, alternatively, as she ultimately did, to file a fresh landing application. To the extent that her action is based on this theory of liability, it cannot proceed as the clock has long run out.

2. Failure to pursue judicial review remedies

[72] The defendants submit that the plaintiff could have sought leave for judicial review of Mr. Ferguson's June 4, 1991 decision but she did not. Instead, almost 14 years later, over 7 years after her second permanent residence application was provisionally accepted, and over 3.5 years after she was actually landed, she has sued for damages.

[73] Even without the statutory limitation bar, the defendants submit, the plaintiff cannot proceed by way of action because section 18(3) of the *Federal Courts Act* provides exclusively for relief by way of judicial review when impugning a decision by a federal board, commission or other tribunal: *Tremblay v. Canada*, [2004] 4 F.C.R. 165 , 244 D.L.R. (4th) 422 (F.C.A.) (leave to appeal to the Supreme Court of Canada denied with costs on December 16, 2004, [2004] S.C.C.A. No. 307).

[74] The invalidity of the June 4, 1991 decision is at the heart of the plaintiff's claim and the relief she seeks depends on the alleged invalidity of that decision, the defendants submit. She can only claim damages if the decision is declared invalid and set aside. The plaintiff cannot circumvent the judicial review process by way of a disguised action.

[75] There is no reasonable explanation for the plaintiff's delay in requesting her immigration file or for her failure to seek judicial review and no evidence supporting her plea that she could not discern the facts supporting her cause of action because of her psychological state and claimed "vulnerable position", the defendants argue.

[76] Further, the defendants submit, there is no merit to the plaintiff's assertion that limitations do not apply to *Charter* claims. There is no *Charter*-based entitlement to Canadian citizenship and the *Charter* does not operate retroactively: *Ding et al v. Her Majesty the Queen*, 2005 FC 442 at para. 25, 138 A.C.W.S. (3d) 667; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R 519, 107 D.L.R. (4th) 342; *Veleta et al v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 572 at para. 72, 254 D.L.R. (4th) 484.

[77] The plaintiff submits that she is not required to seek judicial review before making a claim for damages: *Szebenyi v. Canada* (1999), 247 N.R. 290, 91 A.C.W.S. (3d) 936 (F.C.A.). She is not seeking to impugn the validity of the 1991 decision. Rather, her claim is based in damages for the mishandling of her application for landing. She alleges Crown servants wrongly tied her husband's situation to her application.

[78] In *Szebenyi*, the plaintiffs pleaded that the officer had been negligent in handling the application for landing. The Federal Court of Appeal allowed the case to proceed by way of an action. However, the fact that the plaintiffs were seeking damages for mishandling of their file was

only one of the considerations. More important, the Court noted, was that no decision had actually been made that could be the subject of judicial review.

[79] The Federal Court of Appeal has recently had occasion to revisit the conclusions it expressed in *Tremblay*, above, in *Her Majesty the Queen v. Grenier*, 2005 FCA 348, [2005] F.C.J. No. 1778 (QL)**.** In *Tremblay*, the Court had indicated that, in cases in which the decision giving rise to the harm is still operative at the time the remedy is sought, the aggrieved party cannot make use of an action but must proceed by way of judicial review. Conversely, where the decision which gave rise to the alleged harm is no longer effective at the time, it is possible for the applicant to bring an action claiming damages. Under that theory, the plaintiff could bring an action for damages in this case as the June 5, 1991 decision is no longer operative.

[80] In *Grenier*, above, the Court of Appeal concluded that this distinction was not what had been contemplated by Parliament in giving exclusive jurisdiction to the Federal Court to review the decisions of any federal board, commission or tribunal. Accordingly, a litigant who seeks to impugn a federal agency's decision is not free to choose between a judicial review proceeding and an action in damages; he must proceed by judicial review in order to have the decision invalidated.

[81] In my view, this action for damages is in the nature of a collateral attack on the decision of Mr. Ferguson on June 4, 1991 to deny the plaintiff’s application for landing. To succeed in her action, she must establish that this decision was incorrectly made or that the continuing decision not to land her was wrong. Between 1991 and 2001 the plaintiff never sought to challenge the validity of the earlier decisions. Having failed to ask a court to invalidate those decisions by way of

applications for judicial review within the time limits fixed by the statute, it would be inappropriate now to allow her to circumvent those requirements by bringing an action for damages.

3. Did the defendants owe the plaintiff a duty of care and did they breach that duty?

[82] The defendants submit that the plaintiff's allegations of public misfeasance and malfeasance are neither proven nor capable of being proved. The defendant Robert Ferguson had no statutory alternative but to refuse to process the plaintiff's June 5, 1990 application in light of the adjudicator's determination that the husband was criminally inadmissible and the indisputable fact that he was at the material time "present in Canada". The statutory precondition to the plaintiff's admissibility in section 46.04(3) of the former *Immigration Act* was not met. At the time of his return to Canada in 1989, Ryszard Paszkowski remained a convicted criminal who was inadmissible under the terms of the statute. He did not then advance a claim to be entitled to return as a landed immigrant known as Robert Fisher.

[83] Mr. Paszkowski was at all relevant times the plaintiff's spouse and Mr. Ferguson correctly concluded from her application that he was a member of her family in Canada within the meaning of sections 46.04(3) and 46.04(8) of the Act. He was similarly satisfied that Mr. Paszkowski was inadmissible for reasons of criminality.

[84] The defendants further submit that the November 22, 2002 Court order is not relevant to this action because the plaintiff was not a party to that proceeding. The plaintiff is attempting to use the

Order to impose a private law duty of care upon the defendants where their duties were public and statutory.

[85] As articulated by the Supreme Court in *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79, the test for establishing a duty of care involves two stages. At the first stage, the question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a *prima facie* duty of care. The question at the second stage is whether there exist residual policy considerations which justify denying liability.

[86] Even if foreseeability has been adequately pleaded by the plaintiff, there must be something additional to establish the requisite proximity of relationship: *Anns v. Merton London Borough Council*, [1978] A.C. 728; *Kamloops (City) v. Nielson*, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641. An examination of the policy of the statute under which officers of the Crown are appointed is to be conducted to determine whether there is the required proximity of relationship to create a statutory duty of care.

[87] In *Premakumaran v. Canada* (2005), 33 C.C.L.T. (3d) 307, 2005 FC 1131 Justice Konrad W. von Finckenstein granted summary judgment in favour of the Crown in part because proximity had not been established in the immigration context. Justice von Finckenstein said at paragraph 25:

> In light of the foregoing facts and jurisprudence, I find that nothing would be gained by allowing this issue to proceed to trial. The Defendant owes a duty of care to the public as a whole and not to the individual Plaintiffs. The Plaintiffs cannot be considered a "neighbour" for these purposes and no such relationship should be created between the Defendant and individual members of the public. The concept of proximity cannot be interpreted as meaning that

> everyone who picks up a brochure or reads a poster at the High Commission is a "neighbour".

[88] In this case, the defendants submit, proximity cannot mean that Crown servants are in a special relationship with Convention refugees applying for landing akin to the concept of "neighbour" referred to by Justice von Finckenstein. The duty of an immigration officer under section 46.04(3) of the former *Immigration Act* was to grant landing if the officer was satisfied that neither the applicant nor any of her family in Canada was inadmissible. Based on the evidence before him, Mr. Ferguson's public statutory duty was to refuse the plaintiff's June 1990 application.

[89] In *Karim Benaissa v. Canada (Attorney General)*, 2005 FC 1220, [2005] F.C.J. No. 1487 (QL), Prothonotary Roger R. Lafrenière dealt with the question of a delay in processing an application for permanent residence in the context of an application to strike the statement of claim. He concluded that, absent evidence of bad faith, gross negligence or undue delay, it would not be just, fair and reasonable for the law to impose a duty of care on those responsible for the administrative implementation of immigration decisions. Imposing a duty of care would hamper the effective performance of the system of immigration control.

[90] This question has recently been thoroughly canvassed by my colleague Justice Luc Martineau in *Farzam v. Her Majesty the Queen in Right of the Minister of Citizenship and Immigration*, 2005 FC 1659, [2005] F.C.J. No. 2035 (QL) with respect to a claimed duty of care owed by the Crown to an applicant who applied to sponsor his wife to come to Canada from Iran. Due to a series of problems, including errors made by immigration officers abroad, the processing of the application was unduly delayed. The wife ultimately decided to divorce the plaintiff and

married another man. Mr. Farzam sued for damages arising from the delay and the alienation of his wife's affections. Justice Martineau found no duty of care existed between the plaintiff and defendant applying the two-step approach articulated by the Supreme Court in *Cooper,* above.

[91] Justice Martineau began from the assumption that at the first stage of the test, the starting point is to determine whether there are any analogous categories of cases in which proximity has previously been recognized: see *Cooper,* above, at para. 36. In that matter, as in this, counsel were unable to provide the Court with any case in which the Crown had been held liable in negligence on facts comparable to the plaintiff's claim. In *Farzam*, the plaintiff's claim rested largely on the foreseeability of nervous shock allegedly caused by the negligence of the Crown's servants. At para. 93 Justice Martineau said:

> …While proximity has been recognized in cases where the nervous shock was the foreseeable consequence of an accident caused by the negligence of a defendant, in the present case, it was not reasonably foreseeable that the Plaintiff would be harmed in the way he alleges. [t]he damages allegedly suffered by the Plaintiff from the processing of his wife's file are simply too remote to give rise to the existence of any reasonably foreseeable harm…

[92] Justice Martineau went on to say that even if foreseeability could be established, "some further ingredient is invariably needed to establish the requisite proximity of relationship between the plaintiff and the defendant" (at para. 93). Any relationship between the plaintiff and defendant arose from the implementation of the Canadian immigration policy recognized by statute. He concluded that the *Immigration Act* did not create a strict liability to perform the functions and duties authorized by the statute. A consideration of the statutory framework makes it clear that the

requisite proximity in the relationship between the plaintiff and the Crown had not been established so as to give rise to a private law duty of care.

[93] Even if a *prima facie* duty of care had been established by the plaintiff, Justice Martineau found that at the second stage of the analysis, compelling residual policy considerations justify the denial of liability. In Justice Martineau's view, it would not be just, fair and reasonable for the law to impose a duty of care on those responsible for the administrative implementation of immigration policies, absent evidence of bad faith, misfeasance or abuse of process (para. 102).

[94] Moreover, Justice Martineau determined that if the decision whether to grant a permanent resident visa to the plaintiff's wife was improperly delayed, the remedy was to make an application for judicial review seeking the issuance of a writ of mandamus with leave of a judge of the Federal Court under section 82.1 of the *Immigration Act* : see *Dragan v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 211, [2003] 4 F.C. 189 (F.C.T.D.); *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 315, 35 A.C.W.S. (2d) 253 (F.C.T.D.).

[95] In this case, I am satisfied that the plaintiff has not established, *prima facie*, that she was owed a duty of care by the immigration officials who dealt with her application for permanent residence. First, it was not reasonably foreseeable that the plaintiff would be harmed in the ways she alleges by the denial of her claim. At the material times, her husband was subject to an enforceable deportation order. Had he been deported, the obstacle to the plaintiff's application would have been removed. The defendants cannot be presumed to have known in 1991 how long it would take to resolve his status. In any event, the plaintiff was free to conduct her affairs as she

wished as a Convention refugee under the protection of Canada and was able to continue her education, seek employment and expand her family. The only restriction she faced was the freedom to travel abroad with Canadian travel documents.

[96] The necessary proximity required by the *Anns* test and *Cooper* was not established. At its essence, the relationship between the plaintiff and the defendants arose from the implementation of the immigration policy imposed by the statute and not as a result of any misfeasance committed by the defendants. At the time the decision was made to deny her application, the statute precluded the admissibility of the plaintiff by reason of her husband's criminal conviction. Neither the statute nor common law imposed any duty on the defendants to inform the plaintiff when the law was changed such as to allow her first application to be processed or to file a fresh application.

[97] While the plaintiff has alleged bad faith and misfeasance on the part of the immigration officers, she has not put forward facts upon which the Court could reasonably conclude that there is a triable issue to determine those allegations. It is unquestionable that an error was committed in 1989 when the plaintiff's husband was reported for a hearing under the incorrect provision of the former Act but that error stemmed largely from the choice Ryszard Paszkowski made to stake his claim as a refugee rather than a returning permanent resident. The officers who subsequently dealt with the plaintiff's application for landing did so, in my view, in good faith based on their understanding that Ryszard Paszkowski was an inadmissible convicted criminal.

[98] With regard to the plaintiff's allegations of infringement of her rights under the *Canadian Charter of Rights and Freedoms,* the plaintiff's material filed on this motion and the Statement of

Claim do not plead sufficient facts regarding the alleged *Charter* infringements. With respect to section 15 of the *Charter*, there are no facts pleaded to support a claim of discrimination based on marital status or gender. All the plaintiff asserts is that she was denied the right to equal benefit of the law because the defendants would not process her application separate from and without considering, the circumstances of her husband. The plaintiff has failed to show how section 15(1) of the *Charter* has been infringed by the application of the statutory provision governing permanent residence applications.

[99] Similarly, the plaintiff has not pleaded facts to establish that any of her section 7 rights were infringed in a manner not in accordance with the principles of fundamental justice. There is insufficient evidence before me from which to conclude that the *Charter* rights of the plaintiff have been engaged and are triable issues. The plaintiff has not established a sufficient factual foundation to demonstrate that she could recover damages under s.24: *Chrispen v. Prince Albert (City) Police Department* (1997), 148 D.L.R. (4th) 720, [1997] 8 W.W.R. 190 (Sask. Q.B.); *Alford v. Canada (Attorney General)*, (1997) 31 B.C.L.R. (3d) 228, 68 A.C.W.S. (3d) 826 (B.C. Sup. Ct.).

CONCLUSION

[100] I am satisfied that there is no genuine issue for trial of the plaintiff's claims within the meaning of Rule 216(1).

[101] Alternatively, applying the test set out in *Granville Shipping*, above, that the plaintiff's case is so doubtful that it deserves no further consideration, I find that on the whole of the evidence submitted the defendants have established that summary judgment should be granted under Rule 216(3). I am satisfied that the claimed damages were not reasonably foreseeable and that the required proximity of relationship necessary for a duty of care was not established. The defendants were under no obligation to process the plaintiff's application for permanent residence more expeditiously or separate from consideration of her husband's status. The refusal of the plaintiff's application prior to February 1, 1993 was required by operation of law. The plaintiff's remedy after that date was to either file a fresh application for landing or to seek judicial review and mandamus. There are no serious issues of credibility that require that this matter go to trial.

[102] In light of the history of this matter and the delays in the processing of the plaintiff's application, I will exercise my discretion to make no order as to costs in favour of the successful parties. Each party shall bear their own costs.

ORDER

THIS COURT ORDERS that:

1. The style of cause is amended to substitute Her Majesty the Queen for the Attorney General of Canada and the Minister of Citizenship and Immigration as defendant.

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2. The plaintiff's action is dismissed.

3. Each party shall bear their own costs.

" Richard G. Mosley "
JUDGE

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2071-04
STYLE OF CAUSE:	ELZBIETA PASZKOWSKI and THE ATTORNEY GENERAL OF CANADA, THE MINISTER OF CITIZENSHIP AND IMMIGRATION, HUGH LOVEKIN, RANDY GURLOCK, and ROBERT FERGUSON
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	November 15, 2005
REASONS FOR ORDER:	MOSLEY J.
DATED:	February 15, 2006

APPEARANCES:

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