Date: 20080613

Docket: A-11-08

Citation: 2008 FCA 215

CORAM: **LINDEN J.A.**
NADON J.A.
SEXTON J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP & IMMIGRATION

Appellant

and

ALAN HINTON and IRINA HINTON

Respondents

Heard at Toronto, Ontario, on May 26, 2008.

Judgment delivered at Ottawa, Ontario, on June 13, 2008.

REASONS FOR JUDGMENT BY: SEXTON J.A.

CONCURRED IN BY: LINDEN J.A.
NADON J.A.

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REASONS FOR JUDGMENT

SEXTON J.A.

Introduction

[1] This is an appeal of the Order of Mr. Justice Harrington (the "Motions Judge") who granted the Motion of Alan and Irina Hinton (the "respondents") to treat their application for judicial review of fees charged by the Minister of Citizenship and Immigration (the "appellant") pursuant to the *Immigration and Refugee Protection Regulations* SOR/2002-227 and formerly enacted Regulations (collectively, the "impugned regulations") as an action and for their action against the appellant to be certified as a class action. The respondents sought to initiate a class action on behalf of those who paid processing fees prescribed by the impugned regulations and thus charged by the Department of

Citizenship and Immigration Canada ("CIC") with respect to various immigration visas. They seek a partial refund and declaratory relief on the basis that Her Majesty the Queen made a profit on the service, rendering the impugned regulations contrary to the provisions of the *Financial Administration Act*, R.S., 1985, c. F-11.

[2] By virtue of section 18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 the Federal Courts have exclusive original jurisdiction to hear and determine challenges of the decisions of federal boards, commissions or other tribunals by way of declaratory relief, *certiorari*, *mandamus*, etc. Pursuant to this Court's decision in *Grenier v. Canada*, 2005 FCA 348 ("*Grenier*"), such challenges must be commenced by way of an application for judicial review, rather than being collaterally attacked by way of an action.

[3] Subsequent to commencing their application for leave and judicial review on September 14, 2006, the respondents moved, in June, 2007, to simultaneously "convert" their application into an action and have such an action certified as a class action. It is this stage of the proceedings that is at issue in this appeal.

[4] The appellant takes the position that: (1) the originating leave application commenced by the respondents pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*"), which only questioned the *vires* of a single regulation, was not sufficiently broad to encompass individuals affected by one of over forty other regulations, (2) a damages claim could not be commenced prior to a final disposition of the application for judicial review, and (3) a class

action was not the preferable procedure for the fair and efficient resolution of the common questions of law and fact in determining the legal validity of the impugned regulations.

[5] For the reasons that follow I agree with the appellant on the first ground, but disagree with respect to the second and third grounds. Thus in the result I would allow the appeal in part by limiting the class of plaintiffs to consist of individuals covered by the leave application, but without prejudice to the right of the respondents or some other person on behalf of the remainder of the proposed class to apply for leave for judicial review and to be added into the certified class as limited by this judgment.

Facts

[6] Since approximately 1986, CIC has charged processing service fees to persons who submit various applications under *IRPA*, including applications to temporarily visit, work or study in Canada, applications to sponsor relatives living abroad wishing to emigrate to Canada, and applications to come to Canada as a permanent resident. Pursuant to the impugned regulations, different service fees are set for each kind of application.

[7] On or about May 30, 2003, Alan Hinton submitted an application to sponsor his wife, who resided in Russia, to come to Canada. A few months after Alan Hinton paid his processing fee, Irina Hinton was notified by the Canadian Embassy in Moscow to pick up her permanent residence visa. There was no immigration interview for either of the respondents. Alan Hinton had paid $75. Based on a draft of an internal CIC report of the costs of delivering immigration services obtained through

an *Access to Information Act* request, the respondents believe that the "unit cost" for sponsorship determinations for spouses (including children) was roughly half of what Mr. Hinton paid.

[8] In March of 2005, a proposed class action, which included the respondents, was filed by way of Statement of Claim against the appellant. That claim challenged the legal validity of more than 40 current (and former) immigration service fees, enacted between 1986 and 2002, on the basis that those fees violated section 19(2) of the *Financial Administration Act*, which provides that the fees charged by the federal government for a service cannot exceed the cost of providing it. On June 26, 2006, because of *Grenier, supra*, the Motions Judge (for clarification, Justice Harrington is the Case Management judge for this entire proceeding and thus has presided over all stages of the proceeding) decided in *Momi v. Canada (MCI)* 2006 FC 738 ("*Momi*") to stay the action so that an application for judicial review could be launched in its place.

[9] In *Momi*, despite staying the class action, the Motions Judge made a number of comments about the appropriateness of certification, and then concluded at paragraphs 81 & 83:

> I have taken into account the matters set out in Rule 299.18(2). Common questions of law or fact predominate. There is not a significant number of members of the class who would have a valid interest in individually controlling their separate actions. It will cost a fortune to advance a claim, whether it is for one visa, or ten million. It is difficult to think any member of the class would want to take his or her separate action. Other possible means of resolving the claims are in my view less practical and less efficient.
>
> […]
>
> Although I am dismissing the motion to certify at this time, the action remains under case management. Nothing further need be done until the delays to appeal have expired. If the Plaintiffs launch an appeal, the issue is whether this action should be stayed and, if so, on what basis. If they do not appeal, the modalities of the application for judicial review contemplated herein should be discussed.

[10] Rather than appeal, the respondents applied for leave to commence an application for judicial review pursuant to section 72(1) of *IRPA*, filed September 14, 2006. The application was to review a decision of Citizenship and Immigration Canada issued on or about May 30, 2003 wherein the Minister charged and Alan Hinton paid $75 to the Receiver General for Canada for the determination of an application for sponsorship for his wife. Unlike *Momi*, the leave application in this case challenged only one CIC fee regulation: section 304 of the *Immigration and Refugee Protection Regulations* which require that a sponsor pay a service fee of $75 to have CIC process an application seeking to be a sponsor for a member of the family class.

[11] Concerned that the application for leave had been out of time, the Court extended the time for commencing the application. The Motions Judge ordered that the proceeding be managed as a specially managed proceeding on November 17, 2006. The Motions Judge ultimately granted the application for leave on April 24, 2007, and ordered the appointment of a case management judge on May 14, 2007.

[12] In June, 2007, the respondents moved to "convert" the application into an action and certify it as a class action. Included in the proposed class were all the people under impugned regulations, despite the application for leave only applying to one regulation, namely section 304 of the current *Immigration and Refugee Protection Regulations*.

Legislation

[13] The substance of the respondents' claim lies in subsection 19(2) of the *Financial Administration Act* which provides:

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.	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.

[14] Section 18 of the *Federal Courts Act* provides, in part:

(1) Subject to section 28, the Federal Court has exclusive original jurisdiction	(1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :
(*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	*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.
…	[…]
(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review	(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

made under section 18.1

[15] The powers of the Federal Court on applications for judicial review are outlined by subsection 18.1(3):

On an application for judicial review, the Federal Court may	Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :
(*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or	*a*) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	*b*) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

[16] In contrast, the Federal Court's concurrent original jurisdiction with respect to actions against the Crown is provided by subsections 17(1) and (2):

(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.	(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 concurrent 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*.

[17] Subsection 18.4(2) of the *Federal Courts Act* provides for the "conversion" of an application into an action:

The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.	Elle peut, si elle l'estime indiqué, ordonner qu'une demande de contrôle judiciaire soit instruite comme s'il s'agissait d'une action.

[18] All decisions arising under *IRPA* can only be judicially reviewed subsequent to the granting of leave, pursuant to section 72 of *IRPA*:

(1) Judicial review by the Federal Court with respect to any matter – a decision, determination or order made, a measure taken or a question raised – under this Act is commenced by making an application for leave to the Court.	(1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
(2) The following provisions govern an application under subsection (1):	(2) Les dispositions suivantes s'appliquent à la demande d'autorisation :
(*a*) the application may not be made until any right of appeal that may be provided by this Act is exhausted;	*a*) elle ne peut être présentée tant que les voies d'appel ne sont pas épuisées;

(*b*) subject to paragraph 169(f), notice of the application shall be served on the other party and the application shall be filed in the Registry of the Federal Court ("the Court") within 15 days, in the case of a matter arising in Canada, or within 60 days, in the case of a matter arising outside Canada, after the day on which the applicant is notified of or otherwise becomes aware of the matter;	*b*) elle doit être signifiée à l'autre partie puis déposée au greffe de la Cour fédérale — la Cour — dans les quinze ou soixante jours, selon que la mesure attaquée a été rendue au Canada ou non, suivant, sous réserve de l'alinéa 169*f*), la date où le demandeur en est avisé ou en a eu connaissance;
(*c*) a judge of the Court may, for special reasons, allow an extended time for filing and serving the application or notice;	*c*) le délai peut toutefois être prorogé, pour motifs valables, par un juge de la Cour;
(*d*) a judge of the Court shall dispose of the application without delay and in a summary way and, unless a judge of the Court directs otherwise, without personal appearance; and	*d*) il est statué sur la demande à bref délai et selon la procédure sommaire et, sauf autorisation d'un juge de la Cour, sans comparution en personne;
(*e*) no appeal lies from the decision of the Court with respect to the application or with respect to an interlocutory judgment.	*e*) le jugement sur la demande et toute décision interlocutoire ne sont pas susceptibles d'appel.

[19] Rule 299 outlines the federal court regime governing class actions that was in force when the respondents' application was commenced. The conditions to certify a class are provided in Rule 299.18:

(1) Subject to subsection (3), a judge shall certify an action as a class action if	(1) Sous réserve du paragraphe (3), le juge autorise une action comme recours collectif si les conditions suivantes sont réunies :
(*a*) the pleadings disclose a reasonable cause of action;	*a*) les actes de procédure révèlent une cause d'action valable;
(*b*) there is an identifiable class of two or more persons;	*b*) il existe un groupe identifiable formé moins d'au moins deux

(*c*) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;

(*d*) a class action is the preferable procedure for the fair and efficient resolution of the common questions of law or fact; and

(*e*) there is a representative plaintiff who

(i) would fairly and adequately represent the interests of the class,

(ii) has prepared a plan for the action that sets out a workable method of advancing the action on behalf of the class and of notifying class members how the proceeding is progressing,

(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and

(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff and the representative plaintiff's solicitor.

(2) All relevant matters shall be considered in a determination of whether a class action is the preferable procedure for the fair and efficient resolution of the common questions of law or fact, including whether

personnes;

c) les réclamations des membres du group soulèvent des points de droit ou de fait collectifs, qu'ils prédominent ou non sur ceux qui ne concernent qu'un membre;

d) le recours collectif est le meilleur moyen de régler de façon équitable et efficace les points de droit ou de fait collectifs;

e) un des membres du groupe peut agir comme représentant demandeur et, à ce titre :

(i) représenterait de façon équitable et appropriée les intérêts du groupe,

(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'action au nom du groupe et tenir les membres du groupe informés du déroulement de l'instance,

(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait collectifs,

(iv) communique un sommaire des ententes relatives aux honoraires et débours qui sont intervenues entre lui et son avocat.

(2) Afin de déterminer si le recours collectif est le meilleur moyen de régler les points de droit ou de fait collectifs de façon équitable et efficace, tous les facteurs pertinents doivent être pris en compte, notamment les facteurs suivants :

(*a*) questions of law or fact common to the members of the class predominate over any questions affecting only individual members;

(*b*) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

(*c*) the class action would involve claims that are or have been the subject of any other action;

(*d*) other means of resolving the claims are less practical or less efficient; and

(*e*) the administration of the class action would create greater difficulties than those likely to be experienced if relief were sought by other means.

a) la prédominance des points de droit ou de fait collectifs sur ceux qui ne concernent que certains membres;

b) le nombre de membres du groupe qui on véritablement intérêt à poursuivre des actions séparées;

c) la question de savoir si le recours collectif comprendrait des réclamations qui ont été ou qui sont l'objet d'autres actions;

d) l'aspect pratique ou l'efficacité des autres moyens de régler les réclamations;

e) la question de savoir si la gestion du recours collectif créerait de plus grandes difficultés que l'adoption d'un autre moyen.

(3) If the judge determines that a class includes a subclass whose members have claims that raise common questions of law or fact not shared by all the class members so that the protection of the interests of the subclass members requires that they be separately represented, the judge shall not certify the action as a class action unless there is a representative plaintiff who

(3) Si le juge constate qu'il existe au sein du groupe un sous-groupe dont les réclamations soulèvent des points de droit ou de fait collectifs que ne partagent pas tous les membres du groupe de sorte que la protection des intérêts des membres du sous-groupe exige qu'ils aient un représentant distinct, il n'autorise l'action comme recours collectif que si un des membres du sous-groupe peut agir comme représentant demandeur et, à ce titre :

(*a*) would fairly and adequately represent the interests of the subclass;

(*b*) has prepared a plan for the action that sets out a workable method of advancing the action on behalf of the subclass and of notifying subclass members how the proceeding is progressing;

(*c*) does not have, on the common questions of law or fact for the

a) représenterait de façon équitable et appropriée les intérêts du sous-groupe;

b) a élaboré un plan qui propose une méthode efficace pour poursuivre l'action au nom du sous-groupe et tenir les membres du sous-groupe informés du déroulement de l'instance;

c) n'a pas de conflit d'intérêts avec d'autres membres du sous-groupe en

subclass, an interest that is in conflict with the interests of other subclass members; and

(*d*) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff and the representative plaintiff's solicitor.

ce qui concerne les points de droit ou de fait collectifs;

d) communique un sommaire des ententes relatives aux honoraires et débours qui sont intervenues entre lui et son avocat.

[20] The contents of the Order for certification are delineated in Rule 299.19:

(1) An order certifying an action as a class action shall

(*a*) describe the class;

(*b*) state the name of the representative plaintiff;

(*c*) state the nature of the claims made on behalf of the class;

(*d*) state the relief claimed by or from the class;

(*e*) set out the common questions of law or fact for the class; and

(*f*) specify the time and manner for members to opt out of the class action.

(1) L'ordonnance d'autorisation de l'action comme recours collectif contient les éléments suivants :

a) la description du groupe;

b) le nom du représentant demandeur;

c) l'énoncé de la nature des réclamations présentées au nom du groupe;

d) l'énoncé des réparations demandées par ou contre le groupe;

e) l'énumération des points de droit et de fait collectifs du groupe;

f) des instructions quant à la façon dont les membres du groupe peuvent s'exclure du recours collectif et la date limite pour le faire.

(2) If the judge determines that a class includes a subclass whose members have claims that raise common questions of law or fact not shared by all class members so that the protection of the interests of the subclass members requires that they be separately represented, the order certifying the action as a class action shall include the information referred to in subsection (1) in respect of the subclass.

(2) Si le juge constate qu'il existe au sein du groupe un sous-groupe dont les réclamations soulèvent des points de droit ou de fait collectifs que ne partagent pas tous les membres du groupe de sorte que la protection des intérêts des membres du sous-groupe exige qu'ils aient un représentant distinct, l'ordonnance d'autorisation de l'action comme recours collectif contient les éléments visés au

paragraphe (1) à l'égard du sous-groupe.

[21] Rule 299.2 provides further guidance with respect to certifying a class:

A judge shall not refuse to certify an action as a class action solely on one or more of the following grounds:	Le juge ne peut refuser d'autoriser une action comme recours collectif en se fondant uniquement sur l'un ou plusieurs des motifs suivants :
(*a*) the relief claimed includes a claim for damages that would require an individual assessment after a determination of the common questions of law or fact;	*a*) les réparations demandées comprennent une réclamation de dommages-intérêts qui exigerait, une fois les points de droit ou de fait collectifs tranchés, une évaluation individuelle;
(*b*) the relief claimed relates to separate contracts involving different class members;	*b*) les réparations demandées portent sur des contrats distincts concernant différents membres du groupe;
(*c*) different remedies are sought for different class members;	*c*) les réparations demandées ne sont pas les mêmes pour tous les membres du groupe;
(*d*) the number of class members or the identify of each class member is not known; or	*d*) le nombre de membres du groupe ou l'identité de chacun des membres est inconnu;
(*e*) the class includes a subclass whose members have claims that raise common questions of law or fact not shared by all class members.	*e*) il existe au sein du groupe un sous-groupe dont les réclamations soulèvent des points de droit ou de fait collectifs que ne partagent pas tous les membres du groupe.

[22] Rule 299.11 envisioned the possibility of a an application for judicial review being treated as a class action in subsection 18.4(2) of the *Federal Courts Act*:

Rules 299.1 and 299.12 to 299.42 also apply to an application for judicial review that is to be treated and proceeded with as an action under subsection 18.4(2) of the	Les règles 299.1 et 299.12 à 299.42 s'appliquent notamment à une demande de contrôle judiciaire dans le cas où la Cour a ordonné, en vertu du paragraphe 18.4(2) de

Act.	la Loi, qu'elle soit instruite comme une action.

[23] Rules 299.1 to 299.42 were repealed effective December 13, 2007 – following the hearing under appeal before the Motions Judge but prior to the release of his decision – and replaced by Class Proceedings Rules 334.1 to 334.4 (as enacted by SOR/2007-301, s.7).

Decision Below

[24] The Motions Judge granted an Order to convert the application for judicial review into an action and certified the class action.

[25] He concluded that this Court's decision in *Grenier* does not stand for the proposition that a judicial review must be completed before an action can be commenced, especially in light of the existence of section 18.4(2) of the *Federal Courts Act*.

[26] He rejected the argument that the class action could not encompass fees chargeable under the regulations which were not attacked in the original application for leave. The Motions Judge said, at paragraphs 18 & 20:

> Although the Minister's proposition may have merit in the abstract, section 19(2) of the *Financial Administration Act* provides that "fees and charges for a service ... may not exceed the cost to Her Majesty -". Notice the singular "service" and the plural "fees". As mentioned in *Momi*, the fee differential for different types of visas may well depend on the amount of time or labour required. There is no real basis at this stage for suggesting that each "fee" is a distinct "service".

> […]
>
> If rule 299.11 has any meaning, a converted judicial review which has been certified if it were a class action must call into question more than one decision. It appears that only one service is in issue. This is not to say that as the case develops, sub-classes may have to be created with respect to specific fees.

[27] The Motions Judge then turned to the five-part test for certification as outlined in Rule 299.18. Given that leave had already been granted for the application for judicial review, the Motions Judge concluded that there was a reasonable cause of action.

[28] Excluding those in the class who may face a six-year time bar defence, the Motions Judge concluded that there was an identifiable class, namely plaintiffs alleging a systemic violation of section 19(2) of the *Financial Administration Act*. The class consists of those persons who, at any time during the period 1 April 1994 to 31 March 2004, paid a fee or charge to Her Majesty in Right of Canada for a determination of any of the applications made pursuant to any one or more of the impugned regulations, and who were informed of determination decisions in respect of such applications on or after September 12, 2000.

[29] There were common questions of law or fact, as allegations of systemic violations of section 19(2) of the *Financial Administration Act* permeated throughout. The Motions Judge acknowledged that some sub-classes might have to be created if it were established that different fees were determined by way of different methodologies. He identified the common question of fact to be whether the fees and charges for the service exceeded the cost to Her Majesty in Right of Canada of

providing the service to the plaintiff class. If that question of fact were answered in the affirmative, the common question of law would be whether the plaintiff class is entitled to recovery.

[30] The Motions Judge considered the factors outlined in Rule 299.18(2) to determine whether or not a class action was the preferable procedure, and decided that inquiry in the affirmative. He found that questions of law or fact common to the members of the class predominated over questions affecting individual members, once those who could face a time bar defence were eliminated from the class. Given the small size of the award per member, he concluded that members did not have a valid interest in individually controlling the prosecution of separate actions.

[31] The Motions Judge did not agree with the appellant that the validity of the impugned regulations were better considered in an ordinary judicial review. He also rejected the appellant's suggestion that the judicial review be converted into an action only after an application for judicial review had been completed. He noted that the validity of the impugned regulations cannot be determined purely as a point of law, as the question was whether or not the appellant received a profit, which is a question of fact. This would need to be determined by expert evidence, he decided. The Motions Judge commented at paragraphs 42-3:

> The question is whether an exchange of affidavits, and cross-examinations thereon, would be sufficient to allow the Court to tote up the expenses, which are the real subject of controversy, and compare them to the revenue generated by the visa program. Barring testimony at the hearing, which is not the standard practice; the Court would be unable to pose questions of its own. Take for example the affidavit of Tom Heinze, a law clerk, filed in opposition to the motion. His assertions were on information and belief, but presumably his affidavit would be replaced when the matter is heard on the merits by those with personal knowledge. Among other things, he set out various expenses which the Minister submits should be taken into account when considering the cost of administering the service. One

> interesting item for the fiscal year commencing 1 April 2004 is the salary of the Federal Court and Federal Court of Appeal judges, of which just over half was attributed to the visa program.
>
> Leaving aside whether the cost to Her Majesty should extend to the cost of maintaining Parliament and judges, the figures raise an almost unlimited number of questions. The *Immigration and Refugee Protection Act* takes less than half of the Federal Court's time, and the vast majority of that time relates to refugee claims, not visa claims. The Court of Appeal only gets involved if a serious question of general importance is certified. How was the percentage determined? The costing is more properly dealt with on an examination for discovery. Plaintiffs' experts should have an opportunity to examine that information before filing their affidavits and testifying in open court.

The Motions Judge also noted that the appellant had not agreed to a test case or to a blanket extension of time: those options could have militated towards preferring an application for judicial review.

[32] Finally, the Motions Judge was satisfied that the respondents would fairly and adequately represent the interests of the class, and that they presented a workable litigation plan.

Issues

[33] Pursuant to subsection 74(*d*) of *IRPA*, the Motions Judge granted leave to appeal by certifying seven serious questions of general importance. They are:

> a) Is leave required to commence an action for judicial review, the purpose of which is to put in issue the *vires* of a regulation issued pursuant to the *Immigration and Refugee Protection Act*?
>
> b) Must claimants who seek recovery of money paid under a regulation alleged to be *ultra vires* commence proceedings by way of judicial review?
>
> c) May a judicial review, which is treated and proceeded with as an action, call into question the *vires* of fee categories not paid by the representative plaintiffs?

d) Since recovery of money is beyond the scope of judicial review, must the claimants await the outcome of judicial review before commencing an action?

e) When the legality of a federal Regulation is properly challenged in a judicial review application in Federal Court, is it premature to "convert" that judicial review into an action (pursuant to s. 18.4(2) of the *Federal Court Act*) before the Federal Court has heard and rendered its decision disposing of the judicial review?

f) When the central legal issue in a proposed class action (launched pursuant to rule 299 of the *Federal Courts Rules*) is the legality of a federal Regulation, does *Grenier* (2005 FCA 348) require that the legality of the federal Regulation first be determined by the Federal Court, through the process of judicial review pursuant to s. 18(1) of the *Federal Courts Act*?

g) Where the central issue in an application for judicial review which is the subject of an application for conversion and certification as a class action involves a mixed question of fact and law in which resolution of disputed facts is critical to the determination of these common questions of fact and law, and where in the exercise of its discretion the Court concludes that it is appropriate to direct that the application for judicial review be treated and proceeded with as an action pursuant to sections 18.2 and 18.4(2) of the *Federal Courts Act* and that the proceeding be converted as a class action pursuant to rule 299, does *Grenier* preclude the Court from making such order and instead require that the validity of the regulation in issue in the judicial review first be determined without conversion or certification pursuant to section 18(1)?

[34] The appellant has framed this appeal in terms of three errors of law by the Motions Judge.

They are:

- He erred in holding that s. 18 of the *Federal Courts Act* and *Grenier* permit a class action to proceed in advance of, and instead of, a decision first being rendered on the validity of the impugned immigration regulation through the outcome of an application for leave and judicial review;

- He erred in defining the class to include persons who paid fees pursuant to the immigration regulations which were not challenged by way of the respondents' application for leave pursuant to s. 72(1) of *IRPA*; and

- He erred in finding that a class action was the preferable procedure to fairly and efficiently determine the legal validity of the impugned regulations.

It will be sufficient to address the appellant's alleged errors of law to adequately dispose of this appeal.

Standard of Review

[35] A determination of the correct procedure to follow in order to contest the *vires* of the impugned regulations (as well as to claim a partial refund of fees paid under such regulations) is a question of law for which no deference is accorded and thus will be determined on a correctness standard: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at paragraph 8.

[36] With respect to the certification decision itself, appellate courts should be reluctant to interfere given the discretionary nature of assessing the preferability of a class proceeding generally: Ward Branch, *Class Actions in Canada* (looseleaf) (Aurora: Canada Law Book, 2007) at ¶4.1850. As stated by the British Columbia Court of Appeal in *J.L.G. v. A.W.W.* 2003 BCCA 367 at paragraph 22:

> Absent an error of law or principle the decision of a certification judge is discretionary. Under the *Class Proceedings Act* the certification judge is the case management judge who is seized with all aspects of management of a class proceedings at least up to trial. The familiarity with the case thereby acquired is a reason to give greater deference to decisions of the case management judge on certification and procedural issues generally.

Analysis

In the Federal Court, can a class action proceed in advance of a decision first being rendered on the validity of an impugned immigration regulation?

Summary

[37] Section 18 of the *Federal Courts Act* grants exclusive jurisdiction to the Federal Courts to hear and determine challenges of decisions of federal boards by way of *certiorari*, *mandamus*, declarations, etc. using the judicial review procedure. The decision of this Court in *Grenier* underscored the importance of this exclusive jurisdiction and holds that it cannot be circumvented by launching a collateral attack by way of an action.

[38] However, *Grenier* does not hold that there must first be a successful application for judicial review invalidating an impugned immigration regulation before proceeding with a class action. There is also nothing stated in *Grenier* to suggest that where an application for judicial review is treated as an action, a claim for damages cannot be added to that action.

[39] This Court's decision in *Tihomirovs v. Canada* 2005 FCA 308 ("*Tihomirovs*") confirmed that an application for judicial review could be the basis for a class action prior to a complete disposition of the application for judicial review, provided that subsection 18.4(2) of the *Federal Courts Act* were employed to treat the application as an action and that the proposed class action satisfies the criteria set out in what was then Rule 299.18.

A Review of *Grenier*: What it Does and Does Not Stand For

[40] The case of *Grenier* concerned an action brought by an inmate seeking damages for administrative and disciplinary segregations he faced while serving time in a maximum security penitentiary. The inmate had not sought a judicial review of the Institutional Head's decision, even

though he knew or ought to have known of the effect of the decision upon him personally and knew or ought to have known that judicial review was available to him if he wished to challenge the decision. Following this Court's decision in *Tremblay v. Canada* (2004) 244 D.L.R. (4th) 422 (F.C.A.), leave to appeal to S.C.C. refused (file: 30424), Justice Létourneau concluded that 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 but must rather proceed by judicial review in order to have the decision invalidated. According to *Grenier*, to assert such a claim as an action as opposed to an application for judicial review would constitute a collateral attack on the original decision in light of section 18 of the *Federal Courts Act*.

[41] Justice Létourneau explained the rationales and importance of the exclusive jurisdiction outlined in section 18 of the *Federal Courts Act* at paragraphs 24-6:

> 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.
>
> 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".
>
> 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.

The respondents emphasize – and I agree – that one of the primary concerns of this Court in *Grenier* was also that an action should not be used as a way to circumvent the procedural requirements and limitation periods outlined in section 18 of the *Federal Courts Act*. Such concerns are of no relevance in this proceeding as the respondents – after the Federal Court's decision of *Momi* – correctly commenced this proceeding by way of an application for judicial review.

[42] *Grenier* simply stands for the proposition that certain civil actions against the Crown must be preceded by an application for judicial review where the basis for the claim is a challenge to the lawfulness, *vires* or legality of the federal board or tribunal's decision.

The Effect of Subsection 18.4(2) of the *Federal Courts Act*

[43] *Grenier* says nothing about the impact of subsection 18.4(2) of the *Federal Courts Act*, which provides that a Federal Court judge may, if it is appropriate, direct that an application for judicial review be treated and proceeded with as if it were an action. Indeed, there was no need to do

so as no judicial review had been commenced, and, as such, no request for "conversion" had been made, either.

[44] Subsection 18.4(2) is a legislative response to the concerns expressed in some of the cases arising prior to February 1, 1992 that an application for judicial review did not provide appropriate procedural safeguards where declaratory relief was sought: *Haig v. Canada* (1992) 97 D.L.R. (4th) 71 (F.C.A.), aff'd on other grounds [1993] 2 S.C.R. 995 ("*Haig*"). For instance, an application may be treated as if it were an action because facts necessary to render a decision on the application cannot be established through affidavit evidence alone: *Macinnis v. Canada (Attorney General)* [1994] 2 F.C. 464, [1994] F.C.J. No. 392 (QL) (C.A.) at para. 9. The provision places no limits on the considerations which may properly be taken into account in deciding whether or not to allow a judicial review application to be "converted" into an action (*Drapeau v. Canada (Min. of National Defence)* (1995), 179 N.R. 398 (F.C.A.)).

[45] It is trite to say that damages cannot be awarded on an application for judicial review: *Al-Mhamad v. Canada (Canadian Radio-Television and Telecommunications Commission)* 2003 FCA 45. However, there is very little jurisprudence that considers whether, once an application for judicial review is treated as an action, a claim for monetary remedies can be advanced in that action. In my opinion, it can.

[46] The authorities are not yet in agreement on this issue. In *Radil Bros. Fishing Co. v. Canada (Minister of Fisheries and Oceans) et al*, (1998), 158 F.T.R. 313 (T.D.) ("*Radil Bros.*"), Justice

Rouleau, at paragraph 22, suggested a more limited application to subsection 18.2(4) of the *Federal Courts Act*:

> ..the conversion of a judicial review application into an action does not entitle the plaintiff to subsequently file a Statement of Claim wherein different relief is sought than that set out in the Originating Notice of Motion. The purpose of Rule 18.2(4) is to permit a judicial review application to be proceeded with as if it were an action; that is, with discoveries, and the presentation of witnesses and their viva voce evidence. It does not create a new cause of action nor does it permit a party to seek new or additional relief than that originally sought.

[47] On the other hand, and more recently, Justice Hugessen took a more liberal approach to the provision in *Shubenacadie Indian Band v. Canada (Attorney General) et al* (2001), 202 F.T.R. 30 (T.D.), aff'd 2002 FCA 255 ("*Shubenacadie*"), stating, at paragraph 4:

> The Crown asserts that section 18.4 of the Federal Court Act does not allow an applicant who has become a plaintiff to add new claims or new parties to an action which has been converted from a judicial review application. I do not agree. There is nothing in the statutory text of section 18.4 [footnote omitted], nor in principle, that would prevent the plaintiffs from doing what they have done. The rules of the Court are extremely generous in respect of both amendments and joinder of parties and causes of action and as a matter of principle, it would seem to me that there is nothing that can be said against the joinder in a case such as this. Indeed, as I mentioned during an earlier hearing, if the plaintiffs were to institute a separate action claiming damages, it is entirely probable that the Court would, at some stage, order either the consolidation or the joinder of the two proceedings. If, at a later date the joinder turns out to be cumbersome or otherwise inappropriate, the Court retains a discretionary power under Rule 107 to order separate trials. That aspect of the Crown's motion is accordingly without foundation.

[48] In *Noade v. Blood Tribe*, 2006 F.T.R. 87 (Proth.), Prothonotary Hargrave explored the conflicting jurisprudence with respect to the ability to add new claims following the "conversion" of an application to an action, and stated, at para. 12, that he preferred the approach of Mr. Justice Hugessen. So do I.

[49] I am not convinced that subsection 18.4(2) should be read narrowly so as to only apply to the procedural aspects of an action, such as discoveries, the admission of *viva voce* evidence, and the like. It is well recognized that the right to treat an application as if it were an action is to compensate for certain procedural inadequacies with the process underlying applications. In my mind, however, I think it may sometimes also be appropriate to consider the remedial inadequacies of an application for judicial review, as well. One problem with applications for judicial review is that a remedy for damages cannot be sought. In most applications for judicial review, this is not a major concern as the desired remedy will usually lie in the form of *mandamus*, *certiori*, or a declaration. Where it is of concern, however, is when a totally separate action afterwards may be necessary in either Federal Court or a provincial court to advance a claim for damages: this is a potentially undesirable situation.

[50] Sometimes, such as the case at bar, it may prove too cumbersome to initiate a separate action for damages either concurrently with, or subsequent to, an application for judicial review. Instead of attempting a joinder, which is sometimes inevitable, employing subsection 18.4(2) of the *Federal Courts Act* to allow a claim for damages in a "converted" action should also be available. In cases such as this one, it may even economise on scarce judicial resources.

Subsection 18.4(2) and Class Proceedings – Justice Rothstein's Instructions in *Tihomirovs*

[51] The appellant argues that allowing section 18.4(2) of the *Federal Courts Act* to "convert" an application into an action prior to the judicial review running its course constitutes a procedural charade that renders section 18 of the *Federal Courts Act* meaningless. I do not agree.

[52] The existing jurisprudence as set by this Court in *Tihomirovs* acts as a sufficient gatekeeper to ensure that parties like the respondents are not simply "going through the motions." *Tihomirovs* establishes that the criteria to seek certification of a class action is a relevant consideration on a motion, pursuant to section 18.4(2) of the Federal Courts Act, to "convert" an application for judicial review into an action. Rothstein J.A. (as he then was) added at paragraph 14:

> The second certified question asks what the test is on a motion for conversion where the purpose is to certify an action as a class action. Mr. Tihomirovs says the mere expressed intention to initiate a class action satisfies the test. I am unable to agree. Because judicial review is to provide for the speedy and summary resolution of public law matters, it will always be necessary for the court to weigh the advantages of a class action proceeding against the efficiency of a judicial review proceeding. [Emphasis added.]

Conversion and certification applications should be heard together, unless the simultaneous consideration of conversion and certification can be demonstrated to be prejudicial: *ibid.* at para. 18.

[53] The Motions Judge explicitly followed the approach suggested by this court in *Tihomirovs*. As such, contrary to the argument of the appellant, I find no problem in principle with conversion prior to a final disposition of the application for judicial review.

[54] I conclude on this issue with one caveat. It would be an error to permit a claim for monetary relief to be decided prior to determining the underlying basis for liability – namely, the validity of the governmental decision, or in this case, the regulation. Indeed, this is the logical way in which other actions proceed. In patent infringement cases, the questions of the validity of the patent and infringement of the patent are considered before one explores the question of damages. Similarly, in tort law cases, liability is established before damages are addressed. In a case such as this one, although all the evidence on both issues may be heard together, *vires* ought to be decided first before the question of whether the class members are entitled to a partial refund is addressed.

In a Class Proceeding Arising Under IRPA, *Must the Application for Leave Encompass All Members of the Class?*

[55] The Motions Judge certified a class for all fees listed and collected pursuant to the impugned regulations even though the original leave was granted to Alan Hinton only as a representative of those paying the $75.00 sponsorship fee pursuant to one regulation. In my opinion, the Motions Judge erred in doing so.

[56] Subsection 72(1) of *IRPA* makes it clear that leave must be obtained for <u>any</u> matter:

(1) Judicial review by the Federal Court with respect to <u>any matter</u> – a decision, determination or order made, a measure taken or a question raised – under this Act <u>is commenced by making an application for leave to the Court.</u>	(1) Le contrôle judiciaire par la Cour fédérale de <u>toute mesure</u> — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi <u>est subordonné au dépôt d'une demande d'autorisation.</u>

[Emphasis added.]

[57] In my opinion, the Motions Judge erred in defining the class to include persons who paid fees pursuant to the impugned regulations which had not been properly challenged by way of application for leave pursuant to s. 72(1) of *IRPA*. The leave application was restricted to the respondents, but it was permissible to "convert" it into a class action to include people who were affected by the same regulation, since the application for leave requested an Order for declaratory relief that the regulation was *ultra vires* due to its contravention of the *Financial Administration Act*. However, given the mandatory language of subsection 72(1) of *IRPA*, the leave application cannot be construed to include attacks on the other impugned regulations made by the remainder of the class as certified by the Motions Judge.

[58] In the present case, without dictating to the Motions Judge (as Case Management Judge), or the respondents, how to rectify the situation, in my view it would suffice for the respondents to simultaneously apply for leave pursuant to section 72 of *IRPA* with respect to the remaining class members and move that those remaining members be allowed to join the class as modified by these reasons.

Was a class action the preferable procedure to fairly and efficiently determine the legal validity of the impugned regulations?

[59] In *Caputo v. Imperial Tobacco Ltd.*, [2005] O.J. No. 842 (QL) (Sup. Ct.) at paragraph 29, Winkler J., as he then was, described the consideration of whether a class proceeding is the preferable procedure for determining the common issues as "a matter of broad discretion." I am not convinced that the Motions Judge erred in law, principle, or made a palpable and overriding error in fact in deciding that a class action was a preferable proceeding to an application for judicial review.

[60] At best, the appellant's argument on this issue discloses that there were some factors that might militate against deciding that a class action is the preferable procedure. The Motions Judge, for his part, found a number of factors indicating that a class action was the preferable procedure, including (1) the greater simplicity of the restitutionary award in the event of a successful claim; (2) the appellant's refusal to set a test case; and (3) the notion that findings of fact would be more easily determined by way of discoveries and *viva voce* evidence available only in an action. The respondents also pointed out that it would be helpful if the entire class action were managed by a single Case Management Judge, and that a class proceeding places the class members and the appellant on a more equal footing.

[61] The appellant draws this Court's attention to the *obiter* comments of Justice Gonthier in *Guimond v. Québec (Attorney General)* [1996] 3 S.C.R. 347 at paragraph 20: "it is not necessary to pursue a class action to obtain a declaration of constitutional invalidity and therefore… it is generally undesirable to do so." However, courts have sometimes rejected this comment in deciding whether a class action is a preferable procedure in public law cases: see *Nanaimo Immigrant Settlement Society v. British Columbia* 2001 BCCA 75 at paragraphs 19-21, as an example.

[62] For these reasons I conclude that the Motions Judge did not err in exercising his discretion to decide that a class action was the preferable procedure. I am not satisfied that there exists a superior, alternative approach for the class members to obtain a partial refund. As implied by the

Motions Judge at paragraph 39 of his decision, individual applications for judicial review would not be practicable:

> The Minister has not agreed to a test case, or to a blanket extension of suit time. Unless protected now, as time goes by, members of the proposed class who do not currently face a six-year time bar will in the future. Furthermore, without a class action, the Court could theoretically be faced with millions of applications for extension of time and applications for leave. Not very many will bother.

Conclusion

[63] For the reasons above, I would allow the appeal in part to the extent that the class as presently certified must be modified so as to be confined to the individuals covered by the leave application. However, this holding is without prejudice to the right of Mr. Hinton or another person to apply for leave, pursuant to section 72 of *IRPA*, on behalf of persons affected by the other impugned regulations and to be added into this class already certified.

[64] No costs will be awarded.

"J. Edgar Sexton"
J.A.

"I agree
A.M. Linden J.A."

"I agree
M. Nadon J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-11-08
APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE HARRINGTON DATED JANUARY 4, 2008, NO. IMM-5015-06	
STYLE OF CAUSE:	*The Minister of Citizenship and Immigration v. Alan Hinton and Irina Hinton*
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 26, 2008
REASONS FOR JUDGMENT BY:	Sexton J.A.
CONCURRED IN BY:	Linden J.A. Nadon J.A.
DATED:	June 13, 2008

APPEARANCES:

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