Date: 20080104

Docket: IMM-5015-06

Citation: 2008 FC 7

BETWEEN:

ALAN HINTON
IRINA HINTON

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

HARRINGTON J.

[1] This is the sequel to *Momi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 738, [2007] 2 F.C.R. 291. *Momi* is a proposed class action taken by 11 plaintiffs on their own behalf as well as on behalf of literally millions of others who applied for and paid processing fees with respect to various immigration visas. They seek a partial refund on the basis that Her Majesty made a profit on the service, contrary to the restraints of the *Financial Administration Act*. They calculate the excess payments to be more than $700 million dollars.

[2] Were it not for the decision of the Federal Court of Appeal in *Grenier v. Canada*, 2005 FCA 348, [2006] 2 F.C.R. 287, I would have certified *Momi* as a class action. *Grenier* held that challenges to decisions of Federal boards and tribunals must be by way of judicial review, rather than by action. The fees in question are found in regulations enacted by Her Excellency the Governor General in Council. As it has been held that such statutory instruments are decisions of a Federal board or tribunal, I held the *Momi* action was premature, and stayed it.

[3] Alan and Irina Hinton were prepared to act as the representative plaintiffs in *Momi,* which is one of the requirements of a class action. Taking *Momi* to heart, they applied for leave and for judicial review of the decision of Citizenship and Immigration Canada dated on or about May 30, 2003 whereby the Minister charged and Alan Hinton paid $75.00 to the Receiver General of Canada for the determination of an application for sponsorship of his wife, Irina, the whole pursuant to section 304 (1) of the *Immigration and Refugee Protection Regulations*.

[4] Although the application was out of time (it should have been taken within either 15 or 30 days), the Court extended the delays and granted leave. The Hintons have now moved that their application for judicial review be treated as and proceeded with as an action, as permitted by section 18.4(2) of the *Federal Courts Act* and that it be certified as a class action pursuant to Federal Courts Rule 299.11. This is the very approach recommended by the Federal Court of Appeal in *Tihomirovs v. Canada (Minister of Citizenship and Immigration),* 2005 FCA 308, [2006] 2 F.C.R. 531.

[5] The Minister opposes both aspects of the motion. She submits that the judicial review should not be treated as an action, and, failing that, should not be certified as a class action. In her view, none of the conditions which justify a class action as laid down in Rule 299.18 has been met.

[6] The history, and benefits, of class actions were reviewed in *Momi* and need not be repeated. We can proceed directly to the conditions of certification required under Rule 219.18, i.e. a reasonable cause of action, an identifiable class, common questions, preferred procedure and a representative plaintiff. Although the Minister argues that the Hintons do not meet any of the required conditions, she has two overarching submissions which percolate into all five of the conditions. I think it better to deal with them at the outset. The first is that in light of *Grenier,* the motion is still premature. The second is that the proposed certification unduly expands what is in issue. The application for judicial review only puts the validity of one fee, the spousal sponsorship fee, in issue, while the motion before me puts more than forty fees in issue.

***Grenier* Revisited**

[7] Grenier was an inmate whose behaviour was perceived as a threat to a corrections officer. He was found guilty of a disciplinary offence and sentenced to 14 days segregation. On the eve of the third anniversary of the decision he took an action in damages in this Court. The validity of the *Corrections and Conditional Release Act,* and the regulations thereunder, were not challenged. The question considered by Mr. Justice Létourneau, speaking for the Court of Appeal, was whether it was necessary for Mr. Grenier - - "to attack the administrative segregation decision of the institutional head by way of judicial review before bringing an action in damages" (para. 12).

[8] He pointed out that the under section 17 of the *Federal Courts Act,* the Federal Court and the Provincial Courts have concurrent jurisdiction to try actions in damages under the *Crown Liability and Proceedings Act.* However, judicial review is reserved to the exclusive jurisdiction of the Federal Court and the Federal Court of Appeal under sections 18 and 28.

[9] The following passages of *Grenier* are most important:

> [24] […]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. […]
>
> [33] It is especially important not to allow a section 17 proceeding as a mechanism for reviewing the lawfulness of the Federal Agency's decision when this indirect challenge to the decision is used to obviate the mandatory provisions of sub-section 18(3) of the *Federal Courts Act.*

[10] He noted that the Quebec Court of Appeal had already acknowledged the Federal Court's exclusive jurisdiction to rule on the legality of decisions of a Federal tribunal by way of judicial review (*Canada v. Capobianco*, 2005 QCCA 209, [2005] J.Q. No. 1155).

[11] Combining *Grenier* with the decisions of Mr. Justice Rothstein, as he then was, in *Saskatchewan Wheat Pool v. Canada (Attorney General)*, 67 F.T.R. 98, 107 D.L.R. (4th) 190, and the Saskatchewan Court of Appeal in *Saskatchewan Wheat Pool v. Canada (Attorney General*), [1993] S.J. No. 436, 107 D.L.R. (4th) 63, I held that by enacting the *Regulations* by Order in

Council, the Governor General in Council was acting as a Federal board, commission or tribunal, subject to the superintending power of this Court. Thus *Momi* could not commence as an action.

[12] The effect of *Grenier* was carefully considered by Mr. Justice Kelen in *Agustawestland International Ltd. v. Canada (Minister of Public Works and Government Services),* 2006 FC 767, [2006] F.C.J. No. 961, and again at 2006 FC 1371, [2006] F.C.J. No. 1718. In the former, he "converted" an application for judicial review into an action. As he said in the latter decision at paragraphs 26 & 27:

> [26] In my Reasons for Order dated June 15, 2006, [2006] F.C.J. No. 961, 2006 FC 767, I stated the following at paragraph 47:
>
> > In *Grenier v. Canada*, the Federal Court of Appeal held that a person cannot indirectly challenge the lawfulness of a decision, by way of an action for damages, that is subject to judicial review within 30 days after the decision is made pursuant to subsection 18.1(2) of the Federal Courts Act. I would add that subsection 18(3) of the Federal Courts Act provides that the remedies of judicial review may be obtained only on an application for judicial review under section 18.1. The *Grenier* case applies to administrative decisions which are generally subject to judicial review, not to acts by the Crown which are normally subject to legal actions for breach of contract or tort. For this reason, the plaintiff's action in this case for breach of contract and for tort would not be barred if the plaintiff had not, as the plaintiff has, also commenced applications for judicial review over the same subject matter.
> >
> > [Footnotes omitted]
>
> [27] I shall elaborate. *Grenier* provides that an action in damages arising out of a ministerial decision cannot precede the judicial review of the decision at issue. However, I disagree with the

> defendants' submission that *Grenier* has the far-reaching effect of prohibiting an action in damages from proceeding *concurrently* with a judicial review. A review of the Court of Appeal's policy reasons in *Grenier* for prohibiting collateral attacks leads me to conclude that the *ratio* of that judgment does not extend to the facts of this case.

[13] On reconsideration, I question whether *Grenier* was simply intended to be limited to administrative decisions or whether, as I thought, it also extended to regulations enacted by Order in Council.

[14] *Grenier* was not followed by the Newfoundland Court of Appeal in *Genge v. Canada (Attorney General*), 2007 NLCA 60, [2007] N.J. No. 335. The Attorney General had moved to strike a Statement of Claim which alleged that a seal fishery area had been closed when in fact no such Order had been issued under the *Marine Mammal Regulations* and the *Fishery (General) Regulations.* The action was for loss of revenue.

[15] At paragraph 34, L.D. Barry J.A. stated:

> 34 […] On the facts of *Grenier*, Létourneau J.A. concluded that the claim should properly be characterized as in essence a challenge to the authority of a warden to issue a segregation order in the circumstances. If the reasoning employed should be interpreted as going further in deciding that, as a matter of law, in every tort action regarding federal administrative action, judicial review is a prerequisite for the superior court of a province to have jurisdiction, however, the essence of the claim should be properly characterized, I must disagree.

[16] In any event, nowhere is it stated in *Grenier* that a judicial review must run its ordinary course, before an action can be commenced. The Rules allow that a judicial review may be treated

as an action and certified as a class action. Rule 299.11 is quite specific as is the decision of the Federal Court of Appeal in *Tihomirovs,* supra, a decision in which Mr. Justice Létourneau also sat. I conclude that *Grenier* does not serve as a bar.

ONE FEE OR MANY FEES?

[17] The Hintons' application for judicial review, as it currently stands, is limited to the $75.00 fee paid pursuant to sub-section 304(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002 - 227. Prior to hearing this motion, the Court directed that a draft Statement of Claim in support of the proposed class action be filed. It puts into question some 43 types of visas, authorizations and extensions. Twenty-eight relate to *Regulations* under the former *Immigration Act* and fifteen under the current *Regulations*. The Minister submits that a motion to treat a judicial review as a certified class action cannot serve as the basis to question fees which are not the subject of the original application for judicial review. Indeed, since revenue and expenses are determined on an annual basis, it is possible that a profit was made on one fee, one year, but not in another. Given a six-year time bar, this could lead to 258 separate applications for leave and for judicial review, each then subject to motions for leave, extensions of time and to be treated as a class action.

[18] 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".

[19] This case is a bit unusual in that the record comprises far more than the bare pleadings. The various motions are replete with affidavits, and contrary to the usual practice in immigration matters, permission was granted to cross-examine before leave to commence the judicial review was granted. The motion to convert was supported by affidavit, and an affidavit was filed in reply.

[20] At its commencement, the Hintons' application for judicial review had to be limited to the single decision which directly affected them (rule 302). 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.

The Five Part Test for Certification

[21] The requirements of rule 299.18 were set out at paragraphs 26 and following of *Momi:*

> [26] In *Western Canada Shopping Centres*, Chief Justice McLachlin recommended that it would be better if the skeletal rules of practice, then current in Alberta, were fleshed out. At that time, the *Federal Courts Rules* also lacked detail, leaving it to individual judges to deal with individual cases on an *ad hoc* basis. Specific class action rules, rule 299.1 and following, were added in 2002 [SOR/2002-417, s. 17]. The key is that a proposed class action must be certified before it can proceed on behalf of anyone other than the plaintiffs specifically named therein. The rest is detail.

a) Reasonable cause of Action

[22] In this context, a reasonable cause of action for the purposes of certification is one that is not plainly and obviously deficient (*Western Canadian Shopping Centers Inc. v. Dutton,* 2001 SCC 46, [2001] 2 S.C.R. 534 and *Le Corre v. Canada (Attorney General)*, 2005 FCA 127, 347 N.R. 126).

Notwithstanding the Minister's comment that the remark was *obiter*, in *Tihomirovs*, above, Mr. Justice Rothstein pointed out that in the immigration context, leave must first be obtained before applying for judicial review. Leave is not given unless the Court considers there is a fairly arguable case. Furthermore, since the application was out of time, the Court also had to be satisfied the delay was justified and that the pleadings established a reasonable cause of action on the merits. There is a reasonable cause of action.

b) Identifiable Class

[23] It is clear that there is a class of two or more persons. The Minister's position is that there are 43 classes, or perhaps 258. However, as stated in *Momi*, all potential plaintiffs allege a systemic violation of section 19(2) of the *Financial Administration Act*. As the case may develop, it may become necessary to create sub-classes. Furthermore, I would exclude from the overall class those who may face a six-year time bar defence.

c) Common Questions of Law or Fact

[24] This test has been met. As mentioned above, the systemic violation of section 19(2) of the *Financial Administration Act* permeates throughout. Again, I acknowledge that some sub-classes may have to be created if it is established that different fees were determined by way of different methodologies.

d) Is a Class Action the Preferable Procedure?

[25] While not downplaying the Minister's other submissions, I think it accurate to say that the main objection rested on this point. The actual text of rule 299.18(1) (d) provides "Subject to subsection (3), a judge shall certify an action as a class action if… (d) a class action is the preferable procedure for the fair and efficient resolution of the common questions of law or fact; …".

[26] Rule 299.18(2) requires certain matters to be considered in concluding whether a class action is the preferable procedure. There are five such matters.

[27] The first is whether questions of law or fact common to the member of the class predominate over questions affecting individual members. Common questions predominate, as I will exclude from the class those individuals who may be facing a time bar defence.

[28] The second is whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions. The answer is clearly no. For instance, based on their calculations, the Hintons would only be entitled to a recovery of $36.69. The costs will easily run into the hundreds of thousands of dollars.

[29] The third matter to be considered is whether the class action would involve claims that are or have been the subject of any other action. The Hintons have excluded those who have amicably resolved another dispute with the Minister. The only other individuals who were involved in other actions are the ten individuals otherwise within the class who filed separate actions in 2001, actions

which were either discontinued or dismissed for want of prosecution. I shall exclude them from the class.

[30] The crux of the matter is to be found in rule 299.18(2)(d) and (e): "(*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."

[31] I am guided by the words of Mr. Justice Rothstein in *Tihomirovs*, above, at paragraphs 12 and 19:

> [12] I agree with the Minister that the intention of judicial review proceedings is to have public law matters decided in a summary manner. However, as I will explain, this is not a bar to conversion. It is just another consideration to be taken into account on the application for conversion.
>
> [19] To answer the Minister's concern that conversion for the purpose of certifying a class action defeats the purpose of judicial review, the question of the preferable procedure is a matter to be taken into account in the conversion/certification proceeding. The court will look at the questions of practicality and efficiency and which procedure will provide the least difficulty for resolving the matter. For example, a multiplicity of judicial review proceedings, which a class action might avoid, might also be avoided if the parties agree to treat one judicial review as a test case for other judicial reviews dealing with the same issue. These and other considerations should allow the court to determine whether to grant conversion and certification.

[32] *Tihomirovs* was sent back to the Federal Court for reconsideration. The issue in that case was whether the applications for permanent residence of the proposed class be assessed in

accordance with the old criteria set out in the *Immigration Act* or the new criteria under the *Immigration and Refugee Protection Act*. As Madam Justice Mactavish stated in *Tihomirovs v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 197, [2006] 4 F.C.R. 341, at paragraphs 119 and 120:

> [119] As the respondent pointed out, the Minister is obliged to follow the law. As a consequence, should the Court ultimately declare that the regulation in question is ultra vires, and that members of the proposed class are entitled to have their applications for permanent residence assessed in accordance with the criteria set out in the Immigration Act, the Minister will be obliged to act accordingly. This will be the case, whether or not individual members of the proposed class assert their right to have their applications treated in this fashion.
>
> [120] As a result, there is no need to ensure that all of the members of the proposed class be party to a class action in order to derive a benefit from a favourable decision in Mr. Tihomirovs' case. Moreover, requiring that notice be given of the litigation and of the court's resolution of the common question will only add unnecessary cost and delay to the process.

[33] Consequently, she did not convert *Tihomirovs* into an action, and certify it as a class action. Her decision was followed by Mr. Justice von Finckenstein in *Sander Holdings Ltd. v. Canada (Minister of Agriculture)*, 2006 FC 327, 289 F.T.R. 221, recently upheld by the Court of Appeal, 2007 FCA 322, [2007] F.C.J. No. 1363. That case related to the Net Income Stabilization Program under the *Farm Income Protection Act*. The Program was voluntary and set out what were called Point of Sale Guidelines (POS). The guidelines were changed over the life of the program. The plaintiffs argued that the change amounted to an invalid amendment or were *ultra vires* the agreement, and that in any event the defendant was obliged to reimburse amounts allegedly improperly excluded from the relevant calculations.

[34] As I read *Sander*, the focus was on the legitimacy of the changes, although at paragraph 57 Mr. Justice von Finckenstein did note that there were factual differences in affidavits as to financial calculations. He was of the view that there was no need for a trial and *viva voce* evidence to get the facts properly established. He said: "Should the Plaintiff be successful in having the POS declared *ultra vires*, that decision will have to be addressed by the Defendant and appropriate action will undoubtedly ensue." In this case, the main focus is on financial calculations. If income did not exceed outgo, the Regulations are perfectly valid.

[35] The Minister submits that the Hinton claim should continue on the narrow platform of a judicial review. In simple terms, the Tribunal (the Governor in Council) files the record before it when the decision was made, the applicants file their motion record with supporting affidavits, the respondent files her motion record which may or may not be supported by affidavit, cross-examinations ensue, and then a hearing is scheduled. Although the respondent is not obliged to put in affidavit evidence, she represents she would do so. Furthermore, the Court under rule 313 may order other material to be filed, and even in special circumstances authorize a witness to testify (rule 316). The validity of the regulations are better considered in an ordinary judicial review and if declared invalid, as noted by Madam Justice Mactavish in *Tihomorovs*, other members of the proposed class would benefit from that declaration, without all the unnecessary paraphernalia and expense of a class action.

[36] I do not agree. As aforesaid, the fundamental point is that the validity of the regulations cannot be determined purely as a point of law. The regulations are only invalid, or not fully

enforceable, if Her Majesty made a profit. This is essentially a question of fact on which the Court will need the benefit of expert testimony. The Minister takes the position that the cost of the service exceeded the revenue. If so, that is a perfectly valid defence. The best way to get to the bottom of things is by an action.

[37] The tribunal record already produced in accordance with the *Federal Courts Immigration and Refugee Protection Rules* is limited to the statutory instrument registered and published in the Canada Gazette enacting the *Immigration and Refugee Protection Regulations*. The bilingual record comprises a mere 25 pages. There is no information whatsoever as to past expenses, past income, and future projections.

[38] *Tihomorovs* was a very different situation. The declaration was prospective. If Mr. Tihomorovs succeeded, then those whose applications for permanent residence had not yet been processed would be processed under the same regulations. In this case, all the fees were paid in advance. Depending on the timeframe fixed by the Court, the Minister estimates that over 12 million visas may be in issue.

[39] 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. As I stated in *Momi*, above, at paragraph 16:

> [16] In *Western Canadian Shopping Centres Inc. v. Dutton,* [2001] 2 S.C.R. 534 on appeal from the Court of Appeal for Alberta, Chief Justice McLachlin stated three important advantages of a class action over a multiplicity of individual actions. First, there is judicial economy in that unnecessary duplication is avoided. Second, litigation costs are spread over a large number of plaintiffs. This makes access to justice easier in that the advancement of claims is more economical than if pursued on an individual basis. Finally, these actions ensure that actual and potential wrong doers modify their future behaviour. Without such actions, those who cause widespread but individually minor harm may not otherwise have their conduct called into account.

[40] As mentioned above, in an application for judicial review, the respondent may decide not to put in affidavits, and in any event may be selective in terms of the documentation produced and as to the matters deposed on affidavit. This has been a recurring problem in *Agustawestland*, above.

[41] In an action, on the other hand, a party is required to issue an affidavit of documents identifying all the documents in its possession, custody or control that touch upon an issue, not simply those which were before the decision maker. The representative of a party examined on discovery must testify to knowledge, information and belief, not limiting himself or herself to personal knowledge. The examination for discovery is far more intrusive, and well designed to elicit admissions which could either shorten or bring the proceedings to an end. The questions are based on the pleadings and are less constrained than a cross-examination, which should automatically find its way into the court record.

[42] 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.

[43] 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.

[44] The Minister submits that if it turns out that the narrow platform of an ordinary judicial review, even with the Court ordering that more documentation be produced and allowing for the testimony of witnesses in open court, is found insufficient, then the judicial review could be converted into an action. To my way of thinking, this proposal is far less practical and far less

efficient than converting now and through case management cutting back if, as and when appropriate. By the same token, I do not think that the administration of a class action would cause greater difficulties than if relief were sought by other means.

[45] The Minister has expressed some concern over the sheer volume of applications which would be covered by the class action. There may well be in excess of 12 million. This will not add up to 12 million plaintiffs, as some would have paid more than one and perhaps several processing fees. Nevertheless, although records may no longer be complete with respect to some of the earlier visas, the Minister does have extensive records. Furthermore, the fees for the different visas remained constant over the years. This is to be contrasted with the recent decision of the Court of Appeal of Ontario in *Cassano v. Toronto-Dominion Bank*, [2007] O.J. No. 4406, [2007] On.C.A. 781, where Chief Justice Winkler, speaking for the Court, certified a class action involving foreign currency transactions conducted with Visa credit cards issued by the Bank. The Motions Judge noted that in 2003 alone there were in excess of 4 million Toronto-Dominion Bank Visa cards ([2005] O.T.C. 161, [2005] O.J. No. 845). One of the complaints was that the Bank charged a "conversion fee" which was undisclosed and unauthorized. Rates of exchange, unlike the fees in this case, change almost daily. The Bank estimated that it would take 1,500 people about one year to identify and record the foreign exchange transactions on the cardholder statements that are available only on microfiche and at a cost of $48,500.000. However as Chief Justice Winkler stated:

> [49] The economic argument advanced by TD ignores the fact that the damages calculation would only be necessary if TD is found to have breached the contract with its cardholders. Therefore, the essence of TD's argument is that the recovery phase of the litigation, subsequent to a finding of liability, will cause it to incur significant expense. It would hardly be sound policy to permit a defendant to

> retain a gain made from a breach of contract because the defendant estimates its costs of calculating the amount of the gain to be substantial. A principal purpose of the *CPA* is to facilitate recovery by plaintiffs in circumstances where otherwise meritorious claims are not economically viable to pursue. To give any effect to the economic argument advanced by TD here would be to pervert the policy underpinning the statute.

This concern is addressed in the Hinton litigation plan, as the initial focus would be on a single year, a bifurcation allowed under rule 106 and following.

e) Representative Plaintiff

[46] I am satisfied that the Hintons would fairly and adequately represent the interests of the class. Their litigation plan sets out a workable method of advancing the action and notifying class members of how the proceeding is progressing (although the plan can and will be improved). They do not have a conflict on the common questions of law or fact, and have provided a summary of the agreement regarding fees and disbursements.

[47] The plan calls for notices to be given to class members through the plaintiffs' solicitors' website, the Citizenship and Immigration website, by notices at counsellor offices and notices in Canadian newspapers which cater to recent immigrants. These notices do not go far enough. For instance, those who paid for student and other temporary visas are presumably no longer here, and have no particular reason to visit the nominated websites. Many may not have computers. Until these matters are refined, and given the real possibility of an appeal, I dispense with notice as authorized by rule 299.34.

[48] The litigation plan is probably too ambitious in estimating that the matter would be ready for trial in a year. However that is a detail which can be modified from time to time through scheduling orders. I will order that a Statement of Claim which is already in draft form be filed and served by January 31, 2008. As a Statement of Defence was already filed in the *Momi* action, the Minister's Statement of Defence shall be due within the normal delays, that is to say 30 days after service of the Statement of Claim.

Contents of Order

[49] As I am satisfied that this application for judicial review should be treated and proceeded with as an action, and certified as a class action, rule 299.19 requires the order to:

> (*a*) describe the class;
>
> (*b*) state the name of the representative plaintiff;
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> (*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
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> (*f*) specify the time and manner for members to opt out of the class action.

The *Momi* Statement of Claim was filed 11 March 2005, while the Hinton application for leave and for judicial review was only filed 12 September 2006. This means that some individuals who would have fallen within the *Momi* class are, by my reasoning, excluded from the Hinton class because they may have to deal with a six-year time bar, which is an individualized problem. On the other hand, in *Momi* I would have excluded those who filed applications on or after 1 April 2003, as the

data for that fiscal year was not available when the Statement of Claim was filed. However, it was available when the Hinton application was filed, and, as with the other years, the plaintiffs have a reasonable cause of action. The *Momi* action is still alive, and depending how the law develops, may possibly serve as a class action for those who do not fall within the Hinton class.

[50] Thus the plaintiff 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 the defendant for a determination of any of the applications made pursuant to any one or more of the regulations listed in Schedule A of the Order, and who were informed of determination decisions in respect of such applications on or after 12 September 2000, and includes all such persons regardless of the outcome of their application, as well as all such applications that are currently in progress.

[51] Excluded from the class are the 10 individuals referred to in paragraph [29] hereof, as well as those covered by an amicable settlement, being certain persons who before 1 January 2002 submitted applications seeking an immigrant visa in the skilled worker, self employed, entrepreneur and investor categories, excluding provincial nominees and those destined to Quebec, as more precisely defined in the accompanying Order.

[52] The representative plaintiffs are Alan Hinton and Irina Hinton.

[53] The nature of the claims, and the relief claimed by and on behalf of the class are:

> a) a declaration that the fee regulations, and each of them are unlawful, unconstitutional and *ultra vires*;
>
> b) restitution of the portion of the fees paid by the plaintiff class to Her Majesty which exceeds the cost of providing the service to the plaintiff class during the period in question;
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> c) a declaration that all such excess fees are held in trust for the plaintiff and the plaintiff class;
>
> d) an order that such excess fees be repaid to the plaintiff and the plaintiff class; and
>
> f) interest.

[54] The common question of fact is whether the fees and charges for the service exceed the cost to Her Majesty in Right of Canada of providing the service to the plaintiff class. If so, the common question of law is whether the plaintiff class is entitled to recovery.

[55] As stated earlier, the time and manner for members to opt out of the class is left in abeyance for the time being.

<u>Certified Questions</u>

[56] The Regulations were issued on the recommendation of the Minister of Citizenship and Immigration and the Treasury Board pursuant to the subsection 5(1) of the *Immigration and Refugee Protection Act* (IRPA) and subsections 19(1)(a), 19.1(a) and 20(2)(ii) of the *Financial Administration Act*. An application for judicial review under IRPA requires leave (s. 72). A negative judicial review by the Federal Court under the *Immigration and Refugee Protection Act* is normally

final. An appeal to the Federal Court of Appeal only lies under s. 74(d) if the judge certifies that a serious question of general importance is involved and states the question.

[57] The very fact that this is the first contested case certified as a class action under rule 299 and following raises serious questions of general importance, some of which I pose myself. I am quite uncertain whether the *Immigration and Refugee Protection Act* should be read in such a way that one who is directly affected by a regulation under the *Act* must obtain leave in order to challenge the *vires* of the regulation, and has no right of appeal if leave is not given. The serious questions of general importance which I have certified are as follows:

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?

[58] In addition, and despite some overlapping, I certify the two questions posed by the Minister as follows:

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*?

[59] Although the Hintons submitted there was no need to certify questions, in the event the Court did determine a question ought to be certified they proposed the following, which I also certify, notwithstanding some repetition with the others:

> 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)?

[60] In summation, I am satisfied that the standard for a class action has been met. There is judicial economy, access to justice is easier and more economical, and were it not for this form of action there would be little incentive to apply to the courts for redress, because, if the applicants are right, individual loss is minor but the overall loss is substantial (*Western Canadian Shopping Centers*, above, and *Bisaillon v. Concordia University,* 2006 SCC 19, [2006] 1 S.C.R. 666).

[61] There is no reason to depart from the no-cost principle set out in rule 299.41.

"Sean Harrington"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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