Federal Court of Appeal

Cour d'appel fédérale

Date: 20240311

Docket: A-178-22

Citation: 2024 FCA 43

CORAM: **RENNIE J.A.**
MACTAVISH J.A.
MONAGHAN J.A.

BETWEEN:

MICHAEL PHILIPPUS BRINK and
FUH-CHII YANG

Appellants

and

HIS MAJESTY THE KING

Respondent

Heard at Vancouver, British Columbia, on December 13, 2023.

Judgment delivered at Ottawa, Ontario, on March 11, 2024.

REASONS FOR JUDGMENT BY: MACTAVISH J.A.

CONCURRED IN BY: RENNIE J.A.
MONAGHAN J.A.

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REASONS FOR JUDGMENT

MACTAVISH J.A.

[1] The Federal Court struck out the statement of claim in the appellants' proposed class action challenging the constitutionality of certain fees charged to individuals who apply for either permanent resident status in Canada or Canadian citizenship. The appellants asserted in their statement of claim that the levying of such fees violates subsection 15(1) of the *Canadian*

Charter of Rights and Freedoms, as they only apply to "non-Canadian born" individuals, and as they discriminate against such individuals on the basis of their national or ethnic origin.

[2] In a decision reported as 2022 FC 1231, the Federal Court accepted that the appellants' statement of claim identified two groups of individuals who were required to pay the fees in question, who were thus treated differently than others. It found, however, that the basis for that differential treatment was neither an enumerated nor an analogous ground of discrimination as contemplated by section 15 of the Charter. Consequently, the Federal Court found that it was plain and obvious that a claim asserting discrimination against these groups based on the Charter was bound to fail. Accordingly, the Court struck out the appellants' statement of claim, without leave to amend.

[3] The Federal Court also dismissed the appellants' motion to certify the action as a class proceeding, again on the basis that the statement of claim failed to disclose a reasonable cause of action.

[4] The appellants submit that in striking their statement of claim and refusing to certify the action as a class proceeding, the Federal Court erred in law in failing to find that it was at least arguable that being "non-Canadian born" could qualify as a protected ground for the purpose of subsection 15(1) of the Charter. The Court further erred, the appellants say, in denying them leave to amend their statement of claim.

[5] The appellants also argue that the Federal Court erred in failing to render a decision with respect to the four other criteria that have to be satisfied for a proceeding to be certified as a class action, even though the Court had already found the reasonable cause of action requirement had not been met. According to the appellants, the Court's failure to address these other criteria was contrary to the principle that the Court should seek to secure the most expeditious and least expensive outcome for every case.

[6] For the reasons that follow, I have concluded that the appellants' statement of claim does not disclose a reasonable cause of action, and that the Federal Court did not err in denying leave to the appellants to amend their statement of claim. I have further found that the Court did not err in failing to consider the other four criteria for the certification of class actions. Consequently, I would dismiss the appeal.

I. Background

[7] There are two categories of fees at issue in this proceeding. The first is a $500.00 fee prescribed by subsection 303(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (*IRPA Regulations*). This fee is charged to foreign nationals who seek to acquire permanent resident status. The parties refer to this as the "Right of Permanent Residence Fee" [RPRF].

[8] The second category of fees being challenged is that prescribed by section 32 of the *Citizenship Regulations*, SOR/93-246. This is a fee of $100.00 which is to be paid "for the right

to be a citizen", and is payable by the applicant at the time of making the application for citizenship, but is refunded if citizenship is not granted. The parties describe this as the "Right to be a Citizen Fee" [RCF].

[9] I shall refer to the RPRF and the RCF collectively in these reasons as "the Fees".

[10] The appellant, Michael Brink, is an immigrant who resides in Canada. On May 10, 2017, while still resident in South Africa, Mr. Brink applied to become a permanent resident of Canada. He paid the RPRF as well as an application fee for the processing of his application, and his application for permanent residence was granted on March 17, 2018. Mr. Brink came to this country in 2019.

[11] The appellant, Fuh-Chii Yang, was born in Taiwan and came to Canada in 2015. Ms. Yang was a permanent resident of Canada when she applied for Canadian citizenship on July 13, 2019, paying the RCF and an application fee at that time. Ms. Yang became a Canadian citizen in 2021.

II. The Appellants' Statement of Claim

[12] Paragraph 15 of the statement of claim states that the appellants bring the proposed class action on their own behalf, and on behalf of a putative class described as being comprised of:

> All individuals who were not born in Canada and between September 8, 2014 until the date of the Court's trial judgment, have paid, or would otherwise be subject to the following fees:
>
> a. a Right of Permanent Residence Fee; and/or
>
> b. a Right to be a Citizen Fee,
>
> excluding those who:
>
> c. have received a refund of the Right of Permanent Residence Fee under subsection 303(4) of the *Immigration and Refugee Protection Regulations*; or
>
> d. have received a refund of the Right to be a Citizen Fee under section 33 of the *Citizenship Regulations*.

[13] Paragraph 19 of the statement of claim further states that the class is comprised of "individuals born outside of Canada that are otherwise fully qualified to permanently reside in Canada, or to have the right or privilege of being a Canadian citizen, and are charged taxes that are not charged to individuals born in Canada".

[14] While the putative class is identified as being comprised as "individuals who were not born in Canada", paragraphs 40 and 42 of the statement of claim state that the distinction created by the Fees is based upon class members' "national or ethnic origin, or country of origin".

[15] Paragraph 45 of the statement of claim further asserts that "singling out the Class Members under the guise of charging the Taxes [has] further injured their dignity, feelings, and self-respect".

[16] The appellants submit that they were subject to fees to which individuals born in Canada are not subject. They contend that these fees are discriminatory and contrary to the constitutional guarantee of substantive equality contained in section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Consequently, the appellants submit that they (and other members of the class) are entitled to restitution of what they say are unconstitutional fees.

[17] The appellants refer to both classes of fees as "taxes" throughout the statement of claim, stating at paragraph 4 that the Fees are "akin to 'head taxes'". However, counsel for the appellants confirmed at the hearing that nothing turns on the appellants' use of the term "taxes" in the claim, and that the term is used interchangeably with the term "fees" in the pleading. In particular, counsel confirmed that the appellants are not pursuing an argument that the Fees are in fact unlawful taxes, such as that advanced in *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, [1998] S.C.J. No. 72.

[18] That said, the appellants assert that whether the Fees are characterized as a tax or a regulatory charge does not change the fact that they are discriminatory and unconstitutional.

[19] It should be noted that the appellants do not take issue with the fact that they have to apply for permanent residency or Canadian citizenship, nor do they allege that the application fees that class members are required to pay as part of their applications for permanent residence or citizenship are discriminatory.

[20] Canada acknowledges that it requires foreign nationals to pay the RPRF in order to acquire permanent resident status and that landed immigrants have to pay the RCF to acquire Canadian citizenship. It asserts, however, that the Fees are required in order to impose a greater share of costs on those who receive a specific benefit, thereby sharing the financial burden more equitably among those who benefit from it.

[21] Following the resolution of certain preliminary issues, the appellants brought a motion to certify this proceeding as a class action and Canada brought its motion to strike the statement of claim. The Federal Court dealt with both motions in a single decision.

III. The Federal Court's Decision

[22] As noted earlier, Canada's motion was successful, and the Federal Court struck out the appellants' statement of claim without leave to amend on the basis that it did not disclose a reasonable cause of action. The Court dismissed the appellants' certification motion for the same reason.

[23] The Federal Court found that although the appellants' statement of claim stated that the groups required to pay the Fees in order to obtain permanent resident status and Canadian citizenship are treated differently than others, that distinction is not based on a prohibited ground of discrimination. As a result, the Court held that the appellants had failed to establish that their statement of claim disclosed a reasonable cause of action.

[24] Citing this Court's decision in *Wenham v. Canada (Attorney General)*, 2018 FCA 199 at para. 29, the Federal Court recognized that its task was not to assess the odds of a cause of action ultimately succeeding. The test was, rather, "whether a cause of action has been pleaded that is not plain and obvious to fail": *Wenham*, above at para. 31. The appellants do not take issue with the test identified by the Federal Court, but rather with its application in this case.

[25] The Federal Court noted that the appellants claimed that there is a distinction in the treatment accorded to those born in Canada and those born outside Canada. The question for determination was whether this equated to discrimination based on an enumerated or analogous ground for the purposes of section 15 of the Charter.

[26] While the appellants' statement of claim alleged discrimination based on "national or ethnic origin, or country of origin", the Federal Court observed that the alleged bases for the discrimination had expanded over time. In addition to the aforementioned grounds, the appellants' memorandum of fact and law filed in support of their certification motion also asserted that the Fees create a distinction based on the analogous ground of citizenship.

[27] The Federal Court noted that the alleged grounds of discrimination had further evolved in the appellants' oral submissions to the Court, with counsel asserting that the bases for the alleged discrimination between the two groups were the enumerated grounds of national origin or ethnic origin, and analogous grounds that included citizenship, birth, or place of birth.

[28] The Federal Court observed that a Charter claim could only succeed if the distinction in issue was based on a proscribed ground of discrimination, whether it be an enumerated or an analogous ground. If it was not based on at least one such ground, then it was plain and obvious that the action could not succeed. The Court thus considered each of the alleged bases of distinction alleged by the appellants, and whether the distinction with respect to the Fees was based on that ground.

[29] Dealing first with the question of "national origin", the Federal Court held that "national origin" refers to the nation where a person was born, or more broadly, where that person's ancestors came from. The Court held that the distinction between the two groups—those who must pay the Fees and those who are not required to pay the Fees—was not based on individuals' national origin, as "there are persons in each group with a variety of national origins, and some with the same national origin".

[30] The Court further observed that while most people born in Canada are automatically Canadian citizens, there are exceptions to this such as, for example, children born in Canada to diplomatic or consular officers of a foreign government. Such individuals would have a Canadian "national origin" as they were born here, but they would nevertheless be required to pay the Fees. Similarly, children born outside Canada to parents, at least one of whom is a Canadian citizen, are automatically Canadian citizens. The "national origin" of such individuals would be that of a country other than Canada, but they would not be required to pay the Fees.

[31] From this, the Federal Court concluded that the distinction in issue in this case was not based on the class members' national origin.

[32] The Federal Court next considered whether it was plain and obvious that the discrimination claim based on "ethnic origin" was bound to fail. The Court noted that "ethnic origin" refers to the ethnic or cultural origins of a person and/or the person's ancestors, and that the ethnic origin of those born in Canada encompasses most or all of the world's cultural or ethnic origins. As such, the Court found that there was no arguable case that the distinction at issue in this case was based on the class members' ethnic origins. Indeed, the ethnic origin of those born in Canada who were not required to pay the Fees parallels the ethnic origins of those not born in Canada who may be required to pay the Fees.

[33] Although not specifically referred to as an alleged ground of discrimination in the statement of claim, the Federal Court also considered whether "citizenship" was the basis of the distinction at issue in this case. The Court observed that while it was true that Canadian citizens are not required to pay either type of fee, it was also true that not all non-Canadian citizens seeking either permanent residence or citizenship were required to pay the Fees.

[34] Indeed, the Court observed that the *IRPA Regulations* exempt various categories of individuals from the RPRF, many of whom are persons born outside Canada. Such individuals include, for example, dependent children of principal applicants for permanent resident status. The *Citizenship Act,* R.S.C. 1985, c. C-29, similarly exempts certain classes of non-citizen individuals from the RCF, including, for example, minor adoptees.

[35] From this, the Federal Court concluded that the basis of the distinction between those required to pay the Fees and those who are not is not their citizenship.

[36] Insofar as class members' "place of birth" was concerned, the Federal Court found that it was plain and obvious that the claim based on place of birth could not succeed for the same reason that the claim based on national origin was bound to fail. That is, individuals subject to the Fees could have been born anywhere. Consequently, the distinction in question is not based on individuals' places of birth.

[37] The Federal Court thus accepted that the appellants had identified two groups of individuals who were required to pay the Fees who were distinguished from another group of persons not required to pay the Fees. However, the basis for that distinction was neither an enumerated nor an analogous ground of discrimination for the purposes of section 15 of the Charter. Consequently, the Court found that it was plain and obvious that the appellants' discrimination claim was bound to fail, and it granted the Crown's motion to strike without leave to amend. The Court dismissed the appellants' motion to certify the action as a class proceeding for the same reason.

IV. Issues

[38] The primary issue raised by the appellants is whether the Federal Court erred in law in failing to find that it was at least arguable that being "non-Canadian born" could qualify as an

analogous protected ground for the purposes of section 15 of the Charter. The appellants further argue that the Federal Court erred in denying them leave to amend their statement of claim.

[39] The other issue raised by the appellants is whether, having found that their statement of claim did not disclose a reasonable cause of action, the Federal Court erred in failing to render a decision with respect to the four remaining certification criteria.

V. Standard of Review

[40] Whether a pleading discloses a cause of action is primarily a question of law. The standard of appellate review of the Federal Court's decision on both the motion to strike and the first certification condition is thus that of correctness: *Canada (Attorney General) v. Nasogaluak*, 2023 FCA 61 at para. 21; *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at para. 57; *Canada (Attorney General) v. Jost*, 2020 FCA 212 at para. 21. On this standard, this Court owes no deference to the Federal Court: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.

[41] The decision whether or not to grant leave to a party to amend their statement of claim is a discretionary one. So too is the decision whether or not to address other issues raised by a case, once a determinative issue has been decided. The standard of review applicable to discretionary decisions of the Federal Court is the *Housen v. Nikolaisen* standard. That is, correctness for questions of law and palpable and overriding error for questions of fact and questions of mixed fact and law (except where there is an extricable question of law): *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at para. 79; *Canada v.*

Preston, 2023 FCA 178 at para. 12; *Michaels of Canada, ULC v. Canada (Attorney General)*, 2023 FCA 243 at para. 2; *Newbould v. Canada (Attorney General)*, 2017 FCA 106 at para. 19.

VI. Principles Governing Motions to Strike

[42] As noted earlier, the parties agree that the Federal Court properly identified the principles governing motions brought pursuant to Rule 221(1)(a) of the *Federal Court Rules*, SOR/98-106 to strike statements of claim on the basis that they do not disclose a reasonable cause of action.

[43] That is, a statement of claim should not be struck unless it is plain and obvious that the action cannot succeed, assuming the facts pleaded in the statement of claim to be true: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 at 980; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 63. In other words, the claim must have no reasonable prospect of success: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17.

[44] The onus is on the party who seeks to establish that a pleading fails to disclose a reasonable cause of action: *La Rose v. Canada*, 2023 FCA 241 at para. 19; *Edell v. Canada*, 2010 FCA 26 at para. 5. The threshold that a plaintiff must meet to establish that a claim discloses a reasonable cause of action is a low one: *Brake v. Canada (Attorney General)*, 2019 FCA 274 at para. 70.

[45] Pleadings must, moreover, be read generously, in a manner that accommodates any inadequacies in the allegations that are merely the result of deficiencies in the drafting of the

document: see *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, [1985] S.C.J. No. 22 at 451.

[46] Motions judges should not delve into the merits of a plaintiff's argument, but should, rather, consider whether the plaintiff should be precluded from advancing the argument at all: *Salna v. Voltage Pictures, LLC*, 2021 FCA 176 at para. 77. Recognizing that the law is not static, motions judges must also err on the side of permitting novel, but arguable claims to proceed to trial: *R. v. Imperial Tobacco*, above at paras. 19-25; *Mohr v. National Hockey League*, 2022 FCA 145 at para. 48, leave to appeal to SCC refused, 40426 (20 April 2023).

[47] That said, it must also be recognized that there is a cost to access to justice in allowing cases that have no substance to proceed. The diversion of scarce judicial resources to such cases diverts time away from potentially meritorious cases that require attention: *Mohr*, above at para. 50; *Coote v. Lawyers' Professional Indemnity Company*, 2013 FCA 143 at para. 13.

[48] Insofar as the appellants' certification motion is concerned, Rule 334.16(1) of the *Federal Courts Rules* identifies five conditions that must be satisfied for a proceeding in the Federal Court to be certified as a class proceeding. The first of these requires that the pleadings disclose a reasonable cause of action. This condition is assessed on the same standard that applies on a motion to strike out a pleading: *Pro-Sys*, above at para. 63; *Salna*, above at para. 72; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 14; *Nasogaluak*, above at para. 18.

[49] To fail at this stage of the test the claim must be "bereft of any possibility of success": *Wenham*, above at para. 33, citing *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at para. 47.

[50] As is the case with motions to strike, there is a heavy burden on a defendant trying to defeat a certification motion on the ground that the statement of claim fails to disclose a reasonable cause of action. Indeed, the burden resting on a defendant in such cases has been described by this Court as "onerous": *Nasogaluak*, above at para. 19; *Canada v. Greenwood*, 2021 FCA 186 at para. 144, leave to appeal to SCC refused, 39885 (17 March 2022).

VII. Principles of Pleading

[51] Before considering whether the appellants' statement of claim discloses a reasonable cause of action, it is important to first have regard to the requirements of pleading.

[52] Rule 174 of the *Federal Courts Rules* provides that "[e]very pleading shall contain a concise statement of the material facts on which the party relies...". Rule 181(1) further requires that pleadings "contain particulars of every allegation contained therein …".

[53] As this Court observed in *Mancuso v. Canada (National Health and Welfare)*, 2015 FCA 227, "[i]t is fundamental to the trial process that plaintiffs plead material facts in sufficient detail to support the claim and relief sought". This is because pleadings play an important role in providing notice, and in defining the issues to be tried: at para. 16.

[54] Not only is the proper pleading of a statement of claim necessary for a defendant to prepare a statement of defence, the material facts will also establish the parameters of relevancy of evidence at discovery and trial: *Mancuso*, above at para. 17. In addition, the nature of the facts pleaded allows counsel to advise their clients, prepare their case and map a trial strategy. The Court and the opposing parties should thus not be left to speculate as to how the facts might be arranged to support various causes of action.

[55] A statement of claim must plead each constituent element of every cause of action with sufficient particularity, and each allegation must be supported by material facts. The bald assertion of conclusions does not constitute the pleading of material facts: *Mancuso*, above at para. 27; *Canadian Olympic Association v. USA Hockey, Inc.* (1997), 74 C.P.R. (3d) 348, 72 A.C.W.S. (3d) 346 (F.C.T.D.). Indeed, if the Court were to "[allow] parties to plead bald allegations of fact or mere conclusory statements of law, the pleadings would fail to perform their role in identifying the issues": *Mancuso*, above at para. 17.

[56] What will constitute a material fact in a statement of claim in a given case is to be determined in light of the causes of action asserted and the damages sought. Plaintiffs must plead—in summary form but with sufficient detail—the constituent elements of each cause of action or legal ground raised. The pleading must tell the defendant the "who, when, where, how and what" of the actions that allegedly give rise to its liability: *Mancuso*, above at para. 19.

[57] An assessment of the sufficiency of the material facts pleaded in a statement of claim is contextual and fact-driven. There is no bright line between material facts and bald allegations,

nor is there a bright line between the pleading of material facts and the prohibition on the pleading of evidence. They are, rather, points on a continuum. It is the responsibility of a motions judge, "looking at the pleadings as a whole, to ensure that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair": *Mancuso*, above at para. 18.

[58] Plaintiffs can neither file inadequate pleadings and rely on defendants to request particulars, nor supplement insufficient pleadings to make them sufficient through particulars: *Mancuso*, above at para. 20; *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112.

[59] This Court has confirmed that there are no separate rules of pleadings for Charter cases, and that the requirement of material facts applies to pleadings of Charter infringement in the same way that it does with respect to causes of action rooted in the common law. The substantive content of each Charter right—including claims under section 15 of the Charter—has been clearly defined by decisions of the Supreme Court, and plaintiffs must plead sufficient material facts to satisfy the criteria applicable to the provision in question. This is not a technicality, but is rather essential to the proper presentation of Charter issues: *Mancuso*, above at paras. 21, 25; *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, [1989] S.C.J. No. 88 at 361-367.

[60] The normal rules of pleading similarly apply with equal force to proposed class proceedings. Indeed, the launching of a proposed class action is a serious matter, as it potentially affects the rights of many class members as well as the interests of defendants. Compliance with the requirements of the *Rules* is consequently not a trifling or optional matter; it is both

mandatory and essential: *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184 at para. 40.

[61] With this understanding of the requirements for pleading a claim such as this, I turn next to consider the appellants' arguments as to the errors allegedly committed by the Federal Court in determining that their statement of claim should be struck for failing to disclose a reasonable cause of action.

VIII. The Appellants' Section 15 Arguments

[62] Subsection 15(1) of the Charter states that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

[63] The protections afforded by section 15 of the Charter are not limited to the grounds expressly referred to in the provision itself (the "enumerated grounds"). They also extend to certain grounds not specifically mentioned in the section, known as the "analogous grounds". Analogous grounds are often the bases for stereotypical decisions made not on the basis of merit, but on the basis of personal characteristics that are immutable or constructively immutable, being changeable only at unacceptable cost to personal identity: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, 173 D.L.R. (4th) 1 at para.13.

[64] To establish a violation of subsection 15(1) of the Charter, a plaintiff must demonstrate that the impugned law or state action:

1. creates a distinction based on enumerated or analogous grounds, on its face or in its impact, and
2. imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage: *R. v. Sharma*, 2022 SCC 39 at para. 28; *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at para. 27.

[65] A claimant must first establish that the differential treatment to which he or she claims to have been subjected is based on either an enumerated or an analogous ground within the scope of section 15.

[66] In addition to being victims of discrimination based on their national or ethnic origins, the appellants contend that class members are subject to discrimination based on their "places of birth" and the fact that they were born outside of Canada. They further submit that class members form the type of discrete and insular minority that warrants protection under section 15 of the Charter.

[67] The first question for consideration is thus whether the appellants' section 15 claim as pleaded in their statement of claim is based on an enumerated or analogous ground.

A. *Is the Appellants' Section 15 Claim Based on an Enumerated or Analogous Ground?*

[68] I agree with Canada that the alleged grounds of discrimination in this case have been something of a moving target. The appellants assert that the differential treatment allegedly at issue in this case was based on the fact that members of the putative class were "non-Canadian born". This, the appellants say, resulted in discrimination based on class members' national origin, ethnic origin, and/or their country of origin.

[69] As noted earlier, "citizenship" was not alleged as a basis for the differential treatment in the statement of claim, but was raised as a ground of discrimination in the memorandum of fact and law filed by the appellants in support of their certification motion. The proscribed grounds of discrimination alleged by the appellants further evolved in their oral argument before the Federal Court, when they alleged that the distinction in issue was based on class members' "place of birth" or simply their "birth".

[70] That said, the appellants have acknowledged that their "primary complaint of discrimination" relates to the place of birth of class members being outside of Canada.

[71] I will consider citizenship as a possible arguable ground for the appellants' section 15 claim later in these reasons. In the meantime, I will confine my analysis to the grounds of alleged discrimination that were specifically identified in the appellants' statement of claim, namely discrimination based on class members' national origin, ethnic origin, and/or their country of origin, including their country of birth.

[72] In assessing whether a statement of claim should be struck, the Court must look at the claim as it has been drafted, not how it might be drafted: *Merchant Law Group*, above at para. 40.

[73] The appellants argue that the Federal Court erred in striking their statement of claim by failing to find that it was at least arguable that their claim disclosed a reasonable cause of action based on their places of birth. In support of this contention, they cite the decisions of the Federal Court and this Court in *Veffer v. Canada (Minister of Foreign Affairs)*, 2006 FC 540 (*Veffer FC*), aff'd 2007 FCA 247 (*Veffer FCA*), leave to appeal to SCC refused, 32260 (14 February 2008). These decisions held that an individual's place of birth is immutable, and that it thus qualifies as an analogous ground for the purpose of section 15 of the Charter.

[74] The appellants further observe that once recognized, an analogous ground always stands as a constant marker of potential legislative discrimination: *Corbiere*, above at para. 10; *Fraser*, above at para. 183. Consequently, the appellants say that the Federal Court erred in failing to find that they had an arguable case based upon class members' places of birth.

[75] The appellants note that the threshold that they had to meet to establish that their statement of claim disclosed a reasonable cause of action was a low one, submitting that it was not "plain and obvious" that an individual being non-Canadian born could not be protected from discrimination under section 15 of the Charter. According to the appellants, the *Veffer* decisions are "a complete answer" to the first step of the two-part section 15 analysis, and their statement

of claim thus raises an arguable case that the imposition of the Fees draws a distinction between class members and others based on the analogous ground of "place of birth".

[76] The appellants further assert that they brought the *Veffer* decisions to the attention of the Federal Court in their written submissions, but that the Court failed to address them in its decision.

[77] The facts of *Veffer* are instructive. Mr. Veffer is a Canadian citizen who was born in Jerusalem. He applied for a Canadian passport, indicating in his application form that his place of birth was "Jerusalem, Israel", asking that it be recorded as such in his passport. The Government of Canada denied his request based on a policy that required that the place of birth designation for individuals born in Jerusalem be indicated simply as "Jerusalem" in their Canadian passports, and not "Jerusalem, Israel".

[78] Mr. Veffer sought judicial review of this decision, alleging that the Government's policy regarding place of birth descriptions in passports violated his right to freedom of religion under subsection 2(a) of the Charter and his section 15 equality rights, based on his religion and his place of birth.

[79] The Federal Court held that the Government's passport policy drew a formal distinction between Mr. Veffer and others, based on his place of birth. The Court further found that Canadian passport applicants born in Jerusalem were treated differently from other passport

applicants born outside Canada: *Veffer FC*, above at para. 34. The Federal Court went on, however, to determine that such a distinction was not discriminatory.

[80] In *Veffer FCA*, the parties agreed that “place of birth” was a ground analogous to those enumerated in subsection 15(1) of the Charter, as it met the criteria laid out in *Corbiere*, namely that it was an innate, immutable characteristic that was not alterable by conscious action: *Veffer FCA*, above at para. 56. This Court nevertheless dismissed Mr. Veffer’s appeal. In so doing, this Court observed that not every distinction created by legislation will be discriminatory, and that a reasonable person would not conclude that the passport policy invaded Mr. Veffer’s human dignity: at paras. 58, 72.

[81] The appellants here argue that to establish that their statement of claim discloses a reasonable cause of action all they need is an opening to advance a novel claim. They say that this Court’s decision in *Veffer* provides that opening, and that accordingly this case should be allowed to go to trial.

[82] It is important to recognize, however, that the alleged discrimination at issue in *Veffer* was based upon the claimant having a *particular place of birth*—that is, his having been born in the city of Jerusalem. Both Courts accepted that Mr. Veffer (and others born in Jerusalem) were treated differently than other passport applicants, because of the particular place where they were born.

[83] That is not the situation here. Members of the putative class are not a discrete and insular minority, as was the case in *Veffer*. Indeed, they are a diffuse and disparate group. Class members are not subject to the Fees because they were born in a specific country, as the Fees apply regardless of class members' country of origin and the legislation imposing the Fees draws no distinction with respect to applicants' places of birth. Class members are subject to the Fees because they seek permanent residency in Canada or Canadian citizenship, regardless of where they were born.

[84] The appellants contend that they do not need to show that every class member is potentially subject to the Fees, as the Supreme Court has held that "partial discrimination" is no less discriminatory than discrimination occurring in situations in which all members of a protected group are affected: *Fraser*, above at para. 72. That said, it bears noting that, as the Federal Court observed in this case, some individuals may be subject to the Fees, even though they were born in Canada.

[85] The distinction between having a particular place of birth and being born outside Canada writ large illustrates the flaw in the appellants' "head tax" analogy.

[86] As noted earlier, the appellants characterize the Fees as being "akin to 'head taxes'" in their statement of claim. In so doing, they attempt to draw an analogy between the Fees at issue in this case and the shameful practice in Canada's past where migrants from China (and no other country) were required to pay a monetary amount in order to come to Canada. This was known as a "head tax".

[87] What was particularly offensive about the head tax was the singling out of would-be immigrants from one country. Not only was the policy racist in origin, it perpetuated negative stereotyping of Chinese individuals and clearly communicated to them (and others) that they were less worthy of being admitted to Canada and less welcome in this country than would-be immigrants from other countries.

[88] A more apt analogy to a head tax could arise if RPRF and RCF fees were only charged to people born in Germany or Somalia or Vietnam who were seeking permanent residence in Canada or Canadian citizenship: *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651 at para. 765.

[89] That is not, however, what we are dealing with here. The Fees are payable by anyone—whatever their national origin, ethnic origin or place of birth—who seeks permanent residence in Canada or Canadian citizenship. *Veffer* is thus distinguishable from the present case, and this Court's comments in *Veffer FCA* with respect to "place of birth" being an analogous ground have to be read in this context.

[90] This distinction was recognized by this Court in *Pawar v. Canada* (1999), 247 N.R. 271, [1999] F.C.J. No. 1421 (F.C.A.). *Pawar* involved a section 15 Charter challenge to the residency requirement of the *Old Age Security Act*, R.S.C. 1985, c. O-9 brought by individuals who were born abroad. In upholding the Federal Court's decision dismissing the action by way of summary judgment, this Court held that "being born abroad" was not embraced by the concept of "national

and ethnic origin", and that it was neither an enumerated nor an analogous ground under section 15 of the Charter: at para. 2.

[91] This Court observed that the distinction at issue in *Pawar* was based on class members' prior residency in countries without reciprocal pension agreements with Canada, and that it had nothing to do with the plaintiffs' "national or ethnic origin". In other words, the distinction at issue in *Pawar* was not based on *the particular country* where class members had previously resided, but rather on whether those countries had entered into reciprocal pension agreements with Canada: para. 2.

[92] More importantly for our purposes, this Court further held in *Pawar* that "people born abroad" "do not form a discrete and insular group who have suffered historical disadvantage because of immutable personal characteristics or vulnerability to political and social prejudice": at para. 3.

[93] The appellants point to the brevity of this Court's reasons in *Pawar*, suggesting that the decision may not have been fully considered, and that this should limit the decision's persuasive effect. While it is true that the decision is only five paragraphs in length, this Court started its reasons by acknowledging the "great significance of the case": at para. 1. The Court went on to state that it had arrived at its decision only "[a]fter having long considered and studied the written representations of counsel and listened carefully to their oral arguments": at para. 2. The panel thus clearly understood the importance of the case, and considered it carefully.

[94] Perhaps more importantly, the decision of the Federal Court under consideration was substantial, detailed and carefully considered: *Pawar v. Canada*, [1998] F.C.J. 1418, [1999] 1 F.C. 158. This Court agreed with that decision, finding it unnecessary to repeat the Federal Court's analysis: at para. 4. That does not mean that this Court did not carefully consider the case. It also bears noting that the Supreme Court of Canada subsequently denied leave to the class members in *Pawar* to appeal this Court's decision: [1999] S.C.C.A. No. 526, 27578 (8 June 2000).

[95] A differently constituted panel of this Court subsequently came to the same conclusion as the Court did in *Pawar*: *Shergill v. Canada*, 2003 FCA 468, leave to appeal to SCC refused, 30177 (13 May 2004).

[96] In accordance with doctrine of vertical *stare decisis*, this Court's decision in *Pawar* was binding on the Federal Court. Even though the Federal Court did not mention *Pawar* in its analysis, the Court was nevertheless bound to find that that "being born abroad" was not an analogous ground for the purpose of section 15 of the Charter, nor was it subsumed within the enumerated grounds of national or ethnic origin. As a result, it was plain and obvious that the appellants' claim could not succeed.

[97] *Stare decisis* also has a horizontal aspect, which provides that decisions from the same court should be followed unless there is a compelling reason not to do so: *R. v. Sullivan*, 2022 SCC 19 at paras. 74-79; *Janssen Inc. v. Canada (Minister of Health)*, 2021 FCA 137 at para. 72.

[98] Indeed, as this Court observed in *Miller v. Canada (Attorney General)*, 2002 FCA 370, while it is open to this Court to overrule its prior decisions, "the values of certainty and consistency lie close to the heart of the orderly administration of justice in a system of law and government based on the rule of law": at para. 8. As a result, one panel of this Court ought not to come to a different conclusion from a different panel, even if it were the view that the first decision was wrongly decided: *Miller*, above at para. 8.

[99] The appellants have not provided a compelling reason that would justify departing from this Court's decision in *Pawar*. This Court is thus required to conclude that individuals' place of birth outside of Canada is not embraced by the concept of "national and ethnic origin", and that "being born abroad" is not an analogous ground under section 15 of the Charter.

[100] As noted above, class members are subject to the Fees because they are seeking permanent residency in Canada or Canadian citizenship. Their need to do so is a function of their immigration status rather than their place of birth or their national or ethnic origin. This does not assist the appellants, however, as this Court has rejected "immigration status" as an analogous ground on the basis that it is not a personal characteristic that is immutable or changeable only at great personal cost: *Almadhoun v. Canada*, 2018 FCA 112 at para. 28. See also *Forrest v. Canada (Attorney General)*, 2006 FCA 400 at para. 16; *Toussaint v. Canada (Attorney General)*, 2011 FCA 213 at para. 99.

[101] As noted earlier, the first part of the two-part test for assessing section 15 claims requires claimants to demonstrate that the impugned law or state action creates a distinction *based on*

enumerated or analogous grounds, on its face or in its impact. As explained above, none of the grounds currently identified in the appellants' statement of claim constitute enumerated or analogous grounds in the circumstances of their claim.

[102] It is thus plain and obvious that, to the extent that the appellants' claim is based on their places of birth being outside of Canada, their national or ethnic origin or their country of origin, it could not succeed, as it did not engage any of the enumerated or analogous grounds protected by subsection 15(1) of the Charter. The Federal Court thus did not err in striking the appellants' statement of claim on that basis.

[103] This argument was the primary focus of the appellants' appeal. To the extent that the appellants raised other issues regarding the viability of their section 15 claim, these arguments will be addressed in the next section of these reasons.

B. *Other Arguments Advanced by the Appellants*

[104] Citing the Supreme Court's decision in *Fraser*, above at paragraphs 117 and 120, the appellants contend that an evidentiary record may be required in order for a court to recognize a new analogous ground. Consequently, the appellants say that the Federal Court erred in striking their claim at this stage of the proceeding, thereby denying them the opportunity to lead the necessary evidence to establish that the discrimination at issue in this case was based on an analogous ground.

[105] It is important to note that the basis for the alleged discrimination at issue in *Fraser* was family/parental status, and the Court was being asked to recognize such status as a new analogous ground for the purposes of section 15 of the Charter: at para. 116. While "family status" is a protected ground in the federal and most provincial human rights statutes, the Supreme Court had not previously considered whether family/parental status constituted an analogous ground in the Charter context. As a result, the Court was understandably concerned about recognizing a new analogous ground, in the absence of evidence as to the possible impact that such recognition could have: *Fraser*, above at para. 120. That is not what we are faced with here.

[106] As the appellants acknowledge at paragraph 29 of their memorandum of fact and law, whether an alleged ground of discrimination is an enumerated or analogous ground is a legal question. Unlike the situation that the Supreme Court faced in *Fraser*, the asserted grounds of discrimination at issue in this case have all been judicially considered in the Charter context, including the allegedly analogous grounds of "place of birth" or "being born outside of Canada".

[107] The appellants also cite the Supreme Court's decision in *Sharma*, above, where the Court stated that indirect discrimination may require evidence to be adduced at trial, evidence that could not be made available to the Federal Court on a motion to strike: at paras. 42-44, 49. Assuming for the sake of argument that the alleged discrimination at issue in this case is indeed indirect discrimination (something about which I express no opinion), evidence would undoubtedly be required to demonstrate that the impugned actions actually have a differential impact on a protected group.

[108] However, whether the affected individuals are in fact members of a protected group such that section 15 of the Charter is engaged on the facts, as pleaded, is a legal question.

[109] As a consequence, I do not accept the appellants' contention that they should be given the opportunity to lead evidence at trial to demonstrate that their statement of claim discloses a reasonable cause of action based on section 15 of the Charter.

[110] I would also observe that Rule 221(2) of the *Federal Courts Rules* specifically precludes the use of evidence on a motion to strike a pleading under Rule 221(1)(a) for failing to disclose a reasonable cause of action. This is because the defect in the pleading must be apparent on its face. In this case, it is clear from the jurisprudence discussed above that, as currently pleaded, it is plain and obvious that the appellants' claim is bereft of any chance of success.

[111] There are other defects in the appellants' statement of claim.

[112] The appellants did not plead sufficient material facts to satisfy the second part of the section 15 Charter test. That is, the requirement that the Fees impose a burden on class members in a manner that has the effect of reinforcing, perpetuating, or exacerbating a disadvantage. The appellants also failed to plead sufficient material facts capable of demonstrating that the Fees limited their access to permanent residence or citizenship in a discriminatory manner. Their statement of claim contains a set of conclusions, but does not provide any material facts supporting those conclusions.

[113] The appellants have also not alleged that the Fees target individuals born abroad in an exclusionary way, or in a way that deprives them of their self-worth or livelihood, or that any proposed class members were impacted in this way. They baldly assert that class members are singled out by the Fees and that their "dignity, feelings and self-respect are injured", but they provide no material facts in this regard, nor have they alleged that the Fees perpetuate a view that those who have to pay them have less value as members of society.

[114] It is, therefore, plain and obvious that, as pleaded, the appellants' claim would also be bound to fail at the second stage of the section 15 analysis.

[115] Finally, after the hearing of this appeal, the parties drew the Court's attention to the recent decision of the Ontario Superior Court in *Bjorkquist et al. v. Attorney General of Canada*, 2023 ONSC 7152.

[116] The appellants say that *Bjorkquist* is relevant to this appeal in that it recognizes that being born outside of Canada (regardless of the country) is covered by the enumerated ground of "national origin" under section 15 of the Charter. The Court further found that the enumerated ground of "national origin" includes "country of birth", and that the plain reading of section 15 would cover not only birth in a particular country but also "whether one was born in Canada or in a different country": at para. 77.

[117] The Crown observes that *Bjorkquist* does not address either the sufficiency of pleadings issue or the requirement to plead material facts, in particular. The Crown further submits that the

case may or may not be relevant to this appeal, and that, in any event, the decision is both distinguishable and incorrect. I agree.

[118] *Bjorkquist* involved a challenge to paragraph 3(3)(a) of the *Citizenship Act*, which provides that Canadian citizens born abroad are precluded from passing their Canadian citizenship on to their children automatically, if those children were also born abroad. This was known as the "second-generation cut-off". Canadians born outside Canada who obtain their citizenship by descent from their Canadian-born parents are treated differently in this regard than Canadians born in Canada and naturalized Canadians, who are entitled to pass their citizenship on to their children, regardless of where those children may be born.

[119] Amongst other things, the applicants argued that the second-generation cut-off violated section 15 of the Charter, based on their national origin.

[120] In *Bjorkquist*, the Court relied on my decision in *Canadian Doctors for Refugee Care*, above, where I held that the term "national origin" is broad enough to include people who are born in a particular country, as well as people who come from a particular country: at para. 767. The Court went on in *Bjorkquist* to find that if discrimination based on country of birth is protected under section 15 of the Charter, it must also protect against discrimination based on whether one was born in Canada or in a different country: at para. 77.

[121] The Court thus found that the distinction at issue in *Bjorkquist* was based on the national origin of the claimants, in that it treats those individuals who became Canadians at birth because

they were born in Canada differently from those Canadians who obtained their citizenship by descent upon their birth outside of Canada. This latter group holds a lesser class of citizenship because, unlike Canadian-born citizens, they are unable to pass on Canadian citizenship by descent to their children born abroad: *Bjorkquist*, above at para. 85.

[122] It is, however, important to understand the context in which my comments in *Canadian Doctors* were made. At issue in that case was governmental action that reduced the level of healthcare insurance coverage available to refugees and others claiming the protection of Canada, if those individuals came from certain specified countries known as "designated countries of origin". Such individuals received fewer healthcare benefits than refugees and others from non-designated countries of origin.

[123] In concluding that the government's actions violated section 15 of the Charter, I found that limiting the healthcare insurance coverage available to such individuals denied them the equal benefit of the law, and conveyed the message that these individuals' lives were less worthy and that they were less welcome in Canada.

[124] This is consistent with my earlier comments in this case with respect to the discriminatory nature of the "head tax" that singled out individuals from one country for adverse differential treatment. It is also consistent with this Court's decision in *Veffer FCA*, where individuals born in one place—the city of Jerusalem—were treated differently than other applicants for Canadian passports whose passports would signify their country of their birth.

[125] However, unlike the situation in *Bjorkquist*, where the differential treatment applied only to individuals born outside Canada, the Fees at issue in this case are payable by anyone—wherever they were born (including in Canada)—who applies for permanent residency or Canadian citizenship. The legislation does not differentiate between applicants born in Canada and those born outside of Canada, and the appellants have not argued that the law has a differential impact on applicants born outside Canada relative to those who were born in this country.

[126] The facts in *Bjorkquist* are thus distinguishable from those of the present case. Moreover, to the extent that the Superior Court's ruling in *Bjorkquist* is inconsistent with this Court's holding in *Pawar* that "being born abroad" is not an analogous ground for the purposes of section 15 of the Charter, *Pawar* governs this case.

[127] The final issue for determination with respect to this ground of appeal is whether the Federal Court erred in refusing to grant leave to the appellants to amend their statement of claim. This question will be considered next.

IX. <u>Did the Federal Court Err in Refusing to Grant Leave to Amend the Statement of Claim?</u>

[128] As noted earlier, having rejected all of the alleged grounds of discrimination raised by the appellants in their statement of claim and in their written or oral arguments, the Federal Court struck out their statement of claim, without leave to amend. In so doing, the Federal Court did not distinguish between the grounds of discrimination that were specifically pleaded in the

appellants' statement of claim and those that were merely the subject of argument, in particular, that of "citizenship".

[129] Insofar as the alleged discrimination based on citizenship was concerned, the Federal Court observed that while Canadian citizens are not required to pay either type of fee, there are applicants for permanent residence who are not Canadian citizens who also do not have to pay the RPRF. These include individuals born outside Canada such as dependent children and a range of family members of persons sponsoring permanent resident applications. There are also several categories of individuals who are exempt from paying the RCF, including minors applying as adults, minors being granted citizenship and minor adoptees.

[130] From this, the Federal Court concluded that the basis of the distinction between those required to pay the Fees and those who are not required to do so is not citizenship.

[131] The appellants submit that they have an arguable case that the Fees discriminate against class members based upon their citizenship. Consequently, the appellants say that if this Court were to decide that the claim, as currently drafted, does not disclose a reasonable cause of action, the Court should nevertheless grant them leave to amend their claim to plead discrimination based on citizenship, and to remedy any deficiencies that the Court may otherwise identify in their statement of claim.

[132] The decision as to whether or not a party should be granted leave to amend their pleading is a discretionary one. As noted earlier, the standard of review applicable to discretionary orders of the Federal Court is the *Housen v. Nikolaisen* standard.

[133] Leave to amend a statement of claim in a proposed class proceeding should only be denied in the clearest cases. That is, where it is plain and obvious that no tenable cause of action is possible on the facts as alleged, and there is no reason to suppose that the party could improve his or her case by an amendment: *Jost*, above at para. 49.

[134] It is true that citizenship has been recognized as an analogous ground for the purpose of section 15 of the Charter on the basis that it is, at least temporarily, a personal characteristic that is not alterable by conscious action, and in some cases is not alterable except on the basis of unacceptable cost: *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143, [1989] S.C.J. No. 6 at 151, 158; *Lavoie v. Canada*, 2002 SCC 23 at paras. 2, 39. However, as was noted earlier, class members are subject to the Fees because they are individuals who are actively seeking to change their legal status. This relates to their *immigration status* rather than their place of birth or their national or ethnic origin, or, indeed, their citizenship.

[135] The Supreme Court of Canada has further observed that it is "the most fundamental principle of immigration law" that non-citizens do not have an unqualified right to enter or remain in Canada: *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, 90 D.L.R. (4th) 289 at 733. The Court further observed in *Chiarelli* that Parliament has the right to adopt an immigration policy, and to enact legislation prescribing the conditions

under which non-citizens will be permitted to enter and remain in Canada: at para. 24. Requiring that applicants who wish to immigrate to Canada or become Canadian citizens pay certain fees is within this domain of policy making, as long as such individuals are not targeted in a discriminatory fashion. As explained above, the appellants are subject to the Fees because of their immigration status and not their citizenship, which is neither an enumerated nor an analogous ground.

[136] Consequently, it is plain and obvious that no reasonable cause of action based on section 15 is possible based on citizenship, and the Federal Court did not err in denying the appellants leave to amend their statement of claim.

X. The Federal Court's Failure to Address the Other Four Certification Criteria

[137] A motion to certify an action as a class proceeding in the Federal Courts is governed by Rule 334.16(1) of the *Federal Courts Rules*. This Rule states that a judge shall certify a proceeding as a class proceeding if the following five requirements are met:

1. the pleadings disclose a reasonable cause of action;
2. there is an identifiable class of two or more persons;
3. 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);

4. a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and

5. there is a representative plaintiff or applicant who would fairly and adequately represent the interests of the class.

[138] This list is conjunctive: that is, the Court must be satisfied that all five requirements are satisfied in a given case before the Court can certify an action as a class proceeding: *Buffalo v. Samson First Nation*, 2008 FC 1308 at para. 35, aff'd 2010 FCA 165 at para. 3.

[139] As discussed earlier, the Federal Court found that the appellants' statement of claim in this case did not disclose a reasonable cause of action. Consequently, the first of the five certification criteria was not satisfied, and it followed that the appellants' certification motion must necessarily fail.

[140] Having found that the first of the certification criteria had not been satisfied in this case, it was entirely open to the Federal Court to determine that it was unnecessary to consider the remaining four certification criteria. Given that all of the certification requirements had to be satisfied before the action could be certified as a class proceeding, there was nothing that the Federal Court could decide with respect to the four remaining criteria that could have affected the outcome of the certification motion.

[141] That is, the existence of, for example, important common questions of law or a strong litigation plan could not make up for the lack of a reasonable cause of action in the certification process: *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9 at para. 52.

[142] Whether or not to address the remaining outstanding issues in such circumstances was a matter wholly within the discretion of the motions judge. As noted earlier, this Court should not interfere with discretionary decisions of the Federal Court absent an error of law or a palpable and overriding error on a question of fact or of mixed fact and law, and the appellants have not identified a reviewable error in the Federal Court's exercise of discretion in this regard.

XI. Proposed Disposition

[143] For these reasons, I would dismiss the appeal. In accordance with Rule 334.39 I would not order costs with respect to the appellants' certification motion, and in the exercise of my discretion, I would make no order as to costs in relation to Canada's motion to strike.

"Anne L. Mactavish"
J.A.

"I agree.
Donald J. Rennie J.A.

"I agree.
K.A. Siobhan Monaghan J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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