**Date: 20021220**

**Docket: A-508-02**

**Ottawa, Ontario, December 20, 2002**

**CORAM:** **DÉCARY J.A.**
**LÉTOURNEAU J.A.**
**NADON J.A.**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Appellant**

**and**

**WALTER OBODZINSKY**
**(Alias Wlodzimierz or Volodya Obodzinsky)**

**Respondent**

**JUDGMENT**

The appeal is allowed with costs, the decision of the motions judge on September 6, 2002, is reversed and the motion for a summary judgment is dismissed with costs. The cross-appeal is dismissed without costs. The respondent's motion for a stay of the appeal proceedings is dismissed without costs.

"Robert Décary"
Judge

Certified true translation

Suzanne M. Gauthier, C. Tr., LL.L.

**Date: 20021220**

**Docket: A-508-02**

**Neutral citation: 2002 FCA 518**

**CORAM:** **DÉCARY J.A.**
**LÉTOURNEAU J.A.**
**NADON J.A.**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Appellant**

**and**

**WALTER OBODZINSKY**
**(Alias Wlodzimierz or Volodya Obodzinsky)**

**Respondent**

Hearing held at Ottawa, Ontario, on December 11, 2002

Judgment rendered at Ottawa, Ontario, on December 20, 2002

REASONS FOR JUDGMENT: LÉTOURNEAU J.A.

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

**Date: 20021220**

**Docket: A-508-02**

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**CORAM:** **DÉCARY J.A.**
**LÉTOURNEAU J.A.**
**NADON J.A.**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Appellant**

**and**

**WALTER OBODZINSKY**
**(Alias Wlodzimierz or Volodya Obodzinsky)**

**Respondent**

## REASONS FOR JUDGMENT

**LÉTOURNEAU J.A.**

[1] The Court has before it an appeal and a cross-appeal from a decision on a motion for summary judgment made pursuant to Rule 216 of the *Federal Court Rules (1998)*. The special aspect of these appeals is that they call in question the Court's jurisdiction to review the merits of that decision, in view of s. 18(3) of the *Citizenship Act*, R.S.C. 1985, c. C-29 ("the Act"), which prohibits

appeals from decisions made in connection with a reference made pursuant to s. 18(1). I set out below ss. 10 and 18 of the Act and Rules 213 and 216, which are the essence of the dispute:

| | |
|---|---|
| **10.** (1) Subject to section 18 but notwithstanding any other section of this Act, where the Governor in Council, on a report from the Minister, is satisfied that any person has obtained, retained, renounced or resumed citizenship under this Act by false representation or fraud or by knowingly concealing material circumstances, | **10.** (1) Sous réserve du seul article 18, le gouverneur en conseil peut, lorsqu'il est convaincu, sur rapport du ministre, que l'acquisition, la conservation ou la répudiation de la citoyenneté, ou la réintégration dans celle-ci, est intervenue sous le régime de la présente loi par fraude ou au moyen d'une fausse déclaration ou de la dissimulation intentionnelle de faits essentiels, prendre un décret aux termes duquel l'intéressé, à compter de la date qui y est fixée : |
| (*a*) the person ceases to be a citizen, or | *a*) soit perd sa citoyenneté; |
| (*b*) the renunciation of citizenship by the person shall be deemed to have had no effect, | *b*) soit est réputé ne pas avoir répudié sa citoyenneté. |
| as of such date as may be fixed by order of the Governor in Council with respect thereto. | |
| (2) A person shall be deemed to have obtained citizenship by false representation or fraud or by knowingly concealing material circumstances if the person was lawfully admitted to Canada for permanent residence by false representation or fraud or by knowingly concealing material circumstances and, because of that admission, the person subsequently obtained citizenship. | (2) Est réputée avoir acquis la citoyenneté par fraude, fausse déclaration ou dissimulation intentionnelle de faits essentiels la personne qui l'a acquise à raison d'une admission légale au Canada à titre de résident permanent obtenue par l'un de ces trois moyens. |
| **18.** (1) The Minister shall not make a report under section 10 unless the Minister has given notice of his intention to do so to the person in respect of whom the report is to be made and | **18.** (1) Le ministre ne peut procéder à l'établissement du rapport mentionné à l'article 10 sans avoir auparavant avisé l'intéressé de son intention en ce sens et sans que l'une ou l'autre des conditions suivantes ne se soit réalisée : |
| (*a*) that person does not, within thirty days after the day on which the notice is sent, request that the Minister refer the case to the Court; or | *a*) l'intéressé n'a pas, dans les trente jours suivant la date d'expédition de l'avis, demandé le renvoi de l'affaire devant la Cour; |
| | *b*) la Cour, saisie de l'affaire, a décidé qu'il y avait eu fraude, fausse déclaration ou dissimulation intentionnelle de faits essentiels. |

(*b*) that person does so request and the Court decides that the person has obtained, retained, renounced or resumed citizenship by false representation or fraud or by knowingly concealing material circumstances.

(2) The notice referred to in subsection (1) shall state that the person in respect of whom the report is to be made may, within thirty days after the day on which the notice is sent to him, request that the Minister refer the case to the Court, and such notice is sufficient if it is sent by registered mail to the person at his latest known address.

(3) A decision of the Court made under subsection (1) is final and, notwithstanding any other Act of Parliament, no appeal lies therefrom.

**213.** (1) Where available to plaintiff — A plaintiff may, after the defendant has filed a defence, or earlier with leave of the Court, and at any time before the time and place for trial are fixed, bring a motion for summary judgment on all or part of the claim set out in the statement of claim.

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

**216.** (1) Where no genuine issue for trial — Where on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

(2) Genuine issue of amount or question of law — Where on a motion for summary judgment the Court is satisfied that the only genuine issue is

(2) L'avis prévu au paragraphe (1) doit spécifier la faculté qu'a l'intéressé, dans les trente jours suivant sa date d'expédition, de demander au ministre le renvoi de l'affaire devant la Cour. La communication de l'avis peut se faire par courrier recommandé envoyé à la dernière adresse connue de l'intéressé.

(3) La décision de la Cour visée au paragraphe (1) est définitive et, par dérogation à toute autre loi fédérale, non susceptible d'appel.

**213.** (1) Requête du demandeur — Le demandeur peut, après le dépôt de la défense du défendeur — ou avant si la Cour l'autorise — et avant que l'heure, la date et le lieu de l'instruction soient fixés, présenter une requête pour obtenir un jugement sommaire sur tout ou partie de la réclamation contenue dans la déclaration.

(2) Requête du défendeur — Le défendeur peut, après avoir signifié et déposé sa défense et avant que l'heure, la date et le lieu de l'instruction soient fixés, présenter une requête pour obtenir un jugement sommaire rejetant tout ou partie de la réclamation contenue dans la déclaration.

**216.** (1) Absence de véritable question litigieuse — Lorsque, par suite d'une requête en jugement sommaire, la Cour est convaincue qu'il n'existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence.

(2) Somme d'argent ou point de droit — Lorsque, par suite d'une requête en jugement sommaire, la Cour est convaincue que la seule véritable question litigieuse est :

| | |
|---|---|
| (*a*) the amount to which the moving party is entitled, the Court may order a trial of that issue or grant summary judgment with a reference under rule 153 to determine the amount; or | *a*) le montant auquel le requérant a droit, elle peut ordonner l'instruction de la question ou rendre un jugement sommaire assorti d'un renvoi pour détermination du montant conformément à la règle 153; |
| (*b*) a question of law, the Court may determine the question and grant summary judgment accordingly. | *b*) un point de droit, elle peut statuer sur celui-ci et rendre un jugement sommaire en conséquence. |
| (3) Summary judgment — Where on a motion for summary judgment the Court decides that there is a genuine issue with respect to a claim or defence, the Court may nevertheless grant summary judgment in favour of any party, either on an issue or generally, if the Court is able on the whole of the evidence to find the facts necessary to decide the questions of fact and law. | (3) Jugement de la Cour — Lorsque, par suite d'une requête en jugement sommaire, la Cour conclut qu'il existe une véritable question litigieuse à l'égard d'une déclaration ou d'une défense, elle peut néanmoins rendre un jugement sommaire en faveur d'une partie, soit sur une question particulière, soit de façon générale, si elle parvient à partir de l'ensemble de la preuve dégager les faits nécessaires pour trancher les questions de fait et de droit. |
| (4) Where motion dismissed — Where a motion for summary judgment is dismissed in whole or in part, the Court may order the action, or the issues in the action not disposed of by summary judgment, to proceed to trial in the usual way or order that the action be conducted as a specially managed proceeding. | (4) Rejet de la requête — Lorsque la requête en jugement sommaire est rejetée en tout ou en partie, la Cour peut ordonner que l'action ou les questions litigieuses qui ne sont pas tranchées par le jugement sommaire soient instruites de la manière habituelle ou elle peut ordonner la tenue d'une instance à gestion spéciale. |
| (My emphasis.) | (Mon soulignement) |

[2] More specifically, the appeal ultimately requires the Court to decide whether it has jurisdiction to review the motions judge's decision that in 1946 no legal power existed to prohibit the entry and permanent admission to Canada of Mr. Obodzinsky.

[3] The cross-appeal made by the respondent challenged the part of the motions judge's decision which concluded that the reference made by the Minister of Citizenship and Immigration ("the Minister") to the Trial Division under s. 18(1) of the Act is not subject to

prescription. In light of s. 18(3) of the Act, it also raised the preliminary matter of this Court's jurisdiction to review that conclusion.

[4] However, two preliminary questions must be decided even before I can consider the merits of the appeal and cross-appeal. The first is whether recourse to the summary judgment proceeding, made to a judge other than the one deciding the reference, is permitted in a reference made under s. 18(1) of the Act. The second is in two parts. Assuming for purposes of discussion that such a procedure is permitted, it should first be determined whether recourse to the summary judgment procedure was appropriate in the circumstances. In other words, were the conditions required for making such a motion met in the case at bar? Secondly, the Court must determine whether the motions judge properly exercised the discretion conferred on her by Rule 216(2)(*b*) and (3). Counsel for the respondent argued that, in view of the appeal prohibition in s. 18(3), this Court has no jurisdiction to decide the two parts of this second preliminary question.

[5] Before proceeding to consider the two preliminary questions, I feel I should set out the principal facts which led to the case at bar and the procedural context in which it was heard.

**Facts and procedure**

[6] The respondent Mr. Obodzinsky was born in Poland in 1919. He was temporarily admitted to Canada from Italy in November 1946 pursuant to Order in Council P.C. 3112. In April 1950, he obtained permanent resident status under the same Order. He was granted Canadian citizenship in 1955.

[7] In January 1993, the Canadian government was informed that the respondent's name had come up in certain testimony heard in the United Kingdom. This testimony connected the respondent to an auxiliary police force assisting the German police forces in 1941 and accused him of being involved in criminal acts. The information came from a historian employed by a British group investigating war crimes, the British War Crimes Unit.

[8] Employees of the Canadian counterpart to the British group, the Canadian War Crimes Unit, made an investigation of the respondent and concluded that he had obtained his admission to Canada by fraud. When informed of this, the Minister accepted the recommendation made to him to make a report to the Governor in Council and have the respondent's citizenship revoked. In accordance with s. 18(1) of the Act the Minister on July 30, 1999, informed the respondent of his intention to make a report to the Governor in Council. On August 24, 1999, the respondent, as he was entitled to do, asked the Minister to refer the matter to the Federal Court Trial Division for the latter to determine whether there was any fraud, false representation or deliberate concealment of material circumstances.

[9] At the respondent's request the Minister on February 1, 2000, by a statement of claim, initiated proceedings for this purpose in the Federal Court Trial Division. Those proceedings alleged that the respondent had concealed his activities during the Second World War from Canadian authorities, especially his collaboration with the Nazi forces. In short, they accused him

of deliberately concealing material circumstances which would have rendered him inadmissible to Canada.

[10] On August 5, 2002, the respondent made a motion for a summary judgment. His motion, based on Rule 216, essentially sought three things: first, that the proceedings be terminated because they were prescribed; second, that the motions judge rule that there was no legal basis for the power exercised by the Minister, and that consequently the part of the statement of claim concerning the exercise of that power should be dismissed; and finally, that another part of the statement of claim should also be dismissed, that relating to the illegal admission of the respondent to Canada. In this last case the respondent requested dismissal on the ground that the allegations of false representations related to the respondent's temporary admission to Canada, not his permanent admission. I set out below the actual wording of the motion and the grounds, to be found at pp. 28 and 29 of the appeal record:

> [TRANSLATION]
>
> THE MOTION SEEKS:
>
> a summary judgment concluding that the plaintiff's action should be dismissed with costs;
>
> THE GROUNDS FOR THE MOTION ARE:
>
> the plaintiff's statement of claim should be dismissed in part on the challenge dealing with his legal admission to Canada as a permanent resident, because the plaintiff did not have the legal power to prohibit his permanent entry or permanent admission under Order in Council 3112 or the Royal Prerogative;
>
> the plaintiff's statement of claim should be dismissed in part on the challenge dealing with his legal admission to Canada as a permanent resident because the alleged false representations related to the defendant's temporary admission, not his permanent admission;
>
> the plaintiff's statement of claim should be dismissed *in toto* because it is prescribed;

> the plaintiff's action is without basis in law and presents no valid cause of action and there are no serious questions to be tried . . .

[11] In a decision on September 6, 2002, the motions judge allowed the respondent's motion for a summary judgment in part and ruled that in 1946 there was no legal authority for denying the respondent [admission] on security grounds. Her decision took the form of the following order:

> [TRANSLATION]
>
> ORDER
>
> THE COURT ORDERS THAT
>
> I find that the plaintiff, at the time of the plaintiff 's [*sic*] admission to Canada, did not have legal authority to prohibit his entry and admission to Canada as a permanent resident on security grounds. The motion for a summary judgment is allowed on this point. With costs.

The motions judge further concluded, in paragraph 26 of her decision, though without however making any order on the point, that the proceedings before the reference judge were not subject to prescription: she thus dismissed this part of the motion for a summary judgment. It is that decision which is now on appeal, and to which the respondent replied by a motion to stay proceedings under s. 52(*a*) of the *Federal Court Act*.

Is recourse to a motion for summary judgment made to a judge other than the reference judge permitted in connection with a reference under s. 18(1) of the Act?

[12] As Rule 213 mentions, a motion for a summary judgment is designed to terminate all or part "of the claim set out in the statement of claim". It results in a final disposition of all or part

of the conclusions of a statement of claim. It should be noted that it concerns not the allegations of the statement of claim, but its conclusions. I will return to this point when I consider the motion filed by the respondent. Accordingly, on the conclusions of the statement of claim on which it rules, the summary judgment is thus a final, not an interlocutory judgment.

[13] Rule 216 provides that a motion for summary judgment may be allowed when there is no genuine issue for trial or when the only genuine issue concerns the amount to which the moving party is entitled or a question of law. In view of the nature of a summary judgment and that of a reference made pursuant to s. 18(1) of the Act, I do not think application can be made to any judge other than the reference judge to obtain a summary judgment.

[14] As a matter of fact, Rule 169 states that Part 4 of the Court's rules on pleadings in an action applies to references under s. 18 of the Act:

| | |
|---|---|
| **169.** Application — This Part applies to all proceedings that are not applications or appeals, including | **169.** Application — La présente partie s'applique aux instances, autres que les demandes et les appels, et notamment : |
| (*a*) references under section 18 of the *Citizenship Act*; | *a*) aux renvois visés à l'article 18 de la *Loi sur la citoyenneté*; |
| (*b*) applications under subsection 576(1) of the *Canada Shipping Act*; and | *b*) aux demandes faites en vertu du paragraphe 576(1) de la *Loi sur la marine marchande du Canada*; |
| (*c*) any other proceedings required or permitted by or under an Act of Parliament to be brought as an action. | *c*) aux instances introduites par voie d'action sous le régime d'une loi fédérale ou de ses textes d'application. |

[15] Of course, a reference by the Minister under s. 18 of the Act is not an action in the ordinary or traditional sense. A proceeding initiated under s. 18 is essentially an investigative proceeding used to collect evidence of facts surrounding the acquisition of citizenship, so as to determine whether it was obtained by fraudulent means. It results simply in a non-executory finding which is the basis of a report by the Minister to the Governor in Council for a decision to be taken by the latter, unlike an action, which when valid produces executory conclusions. The very nature of a reference under s. 18 of the Act is that the provisions contained in Part 4 of the Court's Rules must be applied, making the necessary alterations not only as to terminology but also as to the advisability of applying certain provisions contained in that Part.

[16] A reference under s. 18 of the Act involves a mandate to a judge of the Trial Division to make an informed report on a factual situation. The purpose of this proceeding, which is both serious and significant for the two parties involved, is hard to reconcile with a breaking up of the questions at issue, the result of which is that the person responsible for making to the Minister a report fraught with serious consequences has no opportunity to consider points which are important to his report in the more broad-ranging and better informed setting of his investigation. As we will see below, the motions judge's decision in the case at bar exemplifies the inconsistency and inadvisability of applying to another judge for a summary judgment, and even of using that procedure. For the moment, I will simply say two things: first, that a report resulting from a s. 18 reference is not a judgment in the sense in which that word is used in the summary judgment procedure under Rule 216, and second, that the disputed points on which the reference

judge must report at the conclusion of his investigation are factual ones, not questions on a point of law terminating the investigation he is conducting.

[17] Admitting for purposes of discussion that recourse to the summary judgment procedure made to a judge other than the reference judge is not prohibited, the Court must then decide whether that procedure was appropriate in the circumstances and whether the motions judge exercised her discretion properly. I am not forgetting that counsel for the respondent objected to this Court's jurisdiction to make such a determination. However, in order to avoid tiresome repetition and for a better understanding of the discussion on the objection itself, I feel it is preferable to describe and analyse what actually happened in the case at bar. I will therefore dispose of the two parts of the second preliminary question immediately.

Was it appropriate for the motions judge to make a summary judgment in the case at bar?

[18] I have to say at the outset that I am not sure of the actual effect of the judgment by the motions judge in the case at bar. It contains no disposition from which it could be concluded that a summary judgment on the reference was made in whole or in part: the question of fact which was the subject of the reference still remains. Further, the judgment rendered is actually similar to a declaratory judgment, a ruling on a point of law and a striking out of pleadings. Even counsel for the respondent acknowledged that she did not know exactly how the summary judgement affected the scope of the inquiry conducted by the judge hearing the reference.

[19] In fact, the conclusion and order of the motions judge are very significant and clearly illustrate the problem. At p. 20 of her decision, she wrote:

> [TRANSLATION]
>
> I find that the plaintiff, at the time of the plaintiff's [*sic*] admission to Canada, did not have legal authority to prohibit his entry and admission to Canada as a permanent resident on security grounds. The motion for summary judgment is allowed on this point. With costs.

As can be seen, this conclusion is more like what is obtained by a declaratory judgment against a federal board, commission or other tribunal, mentioned in s. 18 of the *Federal Court Act*, or similar to the conclusion sought by Rule 220, which authorizes the filing of a motion before trial requesting a determination by the Court on a question of law. Both recourse to the declaratory judgment procedure and seeking a determination on a question of law are subject to implementation criteria of their own which differ from those applicable to a motion for a summary judgment.

[20] Second, as appears from Rule 213, the motion for a summary judgment must be filed before the time and place for trial are set. This requirement is understandable, since the purpose of the motion is to save time and energy involved in holding a trial or hearing. In the case at bar, the date of trial was set for January 5, 2001, and it was not until August 5, 2002, that the respondent's motion for a summary judgment was filed. The fact that by several motions the respondent was able to delay the start of the hearing and oblige the judicial administrator, on August 20, 2002, to set a new date at which the parties were to again appear, does not in any way alter the meaning of Rule 213 and the objective being sought of speed and efficiency. The motion

was filed when the hearing before Lemieux J., the judge assigned to the reference, was about to begin, thereby squarely conflicting with the objective sought by the rule. Moreover, the uncertainty surrounding the validity and scope of the motions judge's decision places the reference judge in a difficult position as he actually goes on with the hearing.

[21] Third, for Rule 216(2)(*b*) on which the motion for a summary judgment is based to apply the point of law on which there is to be a ruling must be "the only genuine issue", which is not the case here. If we look simply at the facts, they are greatly in dispute and are unquestionably by far the "genuine" question at issue in the reference proceeding. As already mentioned, the inquiry following the reference is intended specifically to determine the facts, to analyse them in order to separate the wheat from the chaff and to determine their evidentiary value, for the purpose of reporting on them. Additionally, the further question of the respondent's good morals remains to be decided and is a hotly debated issue, as at the time it was an essential requirement for obtaining residence.

[22] Fourth, by his motion for a summary judgment the respondent was for all practical purposes asking the Court to dismiss not the conclusions in the plaintiff's statement of claim, but the allegations contained in paras. 47 and 48 of that statement of claim, which deal with the false representations on his temporary admission to Canada and the legal authority to deny him entry. I set out again the following passages from that motion, to be found at p. 28 of the appeal record:

> the plaintiff's statement of claim should be dismissed in part on the challenge dealing with his legal admission to Canada as a permanent resident, because the plaintiff did not have the legal power to

> prohibit his permanent entry or permanent admission under Order in Council 3112 or the Royal Prerogative;
>
> the plaintiff's statement of claim should be dismissed in part on the challenge dealing with his legal admission to Canada as a permanent resident because the alleged false representations related to the defendant's temporary admission, not his permanent admission;

[23] The respondent's motions are not of the kind contemplated by the summary judgment procedure. They approximate in fact to the procedure to strike a pleading contained in Rules 2 and 221, by which it is possible to have the Court strike the allegations in a statement of claim in whole or in part. As we know, this motion is one the nature, conditions for exercise and consequences of which are quite different from the motion for a summary judgment. However, this is also a motion which does not permit the Court to decide mixed questions of fact and law: see *Nidek Co. v. Visx Inc.* (1998), 82 C.P.R. (3d) 289 (F.C.A.). At best, the two allegations in the statement of claim challenged by the respondent raise mixed questions of fact and law. At worst, one of them, namely the question of whether the respondent lied, might simply be a question of fact.

[24] In view of the nature of the reference under s. 18(1), that of the motion for a summary judgment, the conclusions sought by the respondent and the fact that the conditions for use of that motion were not met, I consider that it was both incorrect and improper to allow the motion to be filed and heard. This leads me to consider the exercise made of the discretion conferred by Rule 216(2)(*b*) and (3).

Did the motions judge properly exercise the discretion conferred on her by Rule 216(2)(*b*) and (3)?

[25] In considering the exercise by the motions judge of her discretion, my function is not to revise the decision that resulted but to see whether, in the process leading up to that decision, the person exercising the discretion took irrelevant factors into account or failed to consider relevant points, in which case the decision can be reversed if the impact of those factors or points was such that the decision probably would not have been the same. Further, the decision of a Court, as against an administrative tribunal, exercising a discretionary power may be reviewed if the judge did not give sufficient weight to all relevant points: see *Reza v. Canada*, [1994] 2 S.C.R. 394, at 404-405. In the case at bar, I feel that this was the case and that consequently the decision should be set aside.

[26] The motions judge concluded that in 1946 there was no legal basis for Canadian authorities to deny the respondent admission for security reasons. In coming to this conclusion she relied primarily on the decision of our brother judge Noël J., as he then was, in *Canada (M.C.I.) v. Dueck*, [1999] 3 F.C. 203. In that case, Noël J. came to the conclusion that no legal authority existed prior to 1950 to reject applicants for admission to Canada on security grounds. With respect, I feel that the factual and legal situation before the motions judge was clearly different from that on which Noël J. made his ruling.

[27] The motions judge failed to consider as a relevant and important point the fact that Order in Council P.C. 3112 expressly mentions a representative of the Royal Canadian Mounted Police (RCMP) as a member of the committee to assess Polish candidates for agricultural employment, which was not contained in Order In Council P.C. 1947-2180, which Noël J. had to interpret in *Dueck* and on which the Minister relied. At p. 272, para. 294, Noël J. wrote:

> Order in Council P.C. 1947-2180 does not authorize the rejection of immigrants on security grounds. On the face of it, this Order in Council concerns itself with the selection of persons who sought to come thereunder by reference to labour requirements. This is a matter which came directly under the jurisdiction of the Interdepartmental Immigration Labour Committee constituted in March 1947. The order explicitly contemplates the involvement of these two departments in the selection of DPs; it does not contemplate the involvement of the Department of Justice or the RCMP.
>
> (My emphasis.)

[28] I set out the following extract from Order in Council P.C. 1946-3112, which the motions judge had to interpret:

> AND WHEREAS the Minister of Mines and Resources proposes to permit entry into Canada under the authority of the Immigration Act of 4,000 single ex-members of the Polish Armed Forces who served with the Allied Forces engaged in hostilities against the Axis powers and who are presently located in the United Kingdom and Italy and are qualified for and willing to undertake agricultural employment in Canada;
>
> NOW, THEREFORE, His Excellency the Governor General in Council, on the joint recommendation of the Minister of Labour and the Minister of Mines and Resources is pleased to order and doth hereby order as follows: -
>
> 1. The Minister of Labour is hereby authorized
>
> (a) by arrangement with the Departments concerned to send representatives of the Departments of Mines and Resources and Labour and the Royal Canadian Mounted Police to the United Kingdom and Italy to interview and examine persons of the above-mentioned description for the purpose of selecting 4,000 of such persons for agricultural employment in Canada and to pay the necessary transportation and living expenses of such representatives while so engaged . . .
>
> (My emphasis.)

[29] The absence of any reference to the police force in Order in Council P.C. 1974-2180 led Noël J. to conclude that the Order in question indicated concern by the authorities about immigration, as such, not security. It is certainly possible to come to a different conclusion when a representative of the RCMP is specifically assigned to the selection of agricultural candidates, especially when we consider for a moment the origin of the potential candidates.

[30] In fact, the candidates were Polish nationals and the Canadian authorities had reasonable grounds to believe that there were in this group a number of persons suspected of having collaborated with the Nazis before joining the Allied troops and the Resistance.

[31] As appears from para. 29 of her decision, the motions judge also refused to accept the Minister's arguments that the testimony of experts and of persons familiar with these matters was necessary for a proper understanding of Order in Council P.C. 1946-3112, and of the function of the individuals appointed by the government to select the candidates Canada was prepared to accept.

[32] I have to say that the motions judge had several documents before her concerning adoption of Order in Council P.C. 1946-3112, tending to indicate the security concerns of the Canadian government about such nationals, and leading to an Order dealing with them specifically. The testimony which had not yet been heard at the time the motions judge was considering the motion for a summary judgment, and without which she ruled on the question of security, could have provided valuable clarification about the content and scope of the Order in

question. I set out below a passage from the affidavit by John Baker filed in support of the Minister's arguments. At para. 6 of that affidavit Mr. Baker reviews the origin of Order in Council P.C. 1946-3112, and files documents in support of his testimony. He writes:

> Four months later, an External Affairs committee foresaw the need for security screening of visa applicants, probably by the RCMP (Exhibit "B", Memorandum, 14 Feb. 1946). The Asst Commissioner of the RCMP believed that implementation of Section 3, Sub-sections d, e, f, n, o, q and r of the *Immigration Act* required security screening (Exhibit "C", Letter, 16 May 1946). The Security Panel, created by the Cabinet to advise on security matters, at its 5th meeting, foresaw the need for security screening by the RCMP (Exhibit "D", Minutes, 19 Aug. 1946). Cabinet approved the criteria for the Polish Agricultural Workers, which included a "meticulous" selection on security grounds, to ensure there are "no Nazis or agents" (Exhibit "E", Memorandum to Cabinet, 27 May 1946). Later, the enabling Order-in-Council for the Polish Agricultural Workers, included provision for the RCMP to be part of the Mission (Exhibit) "F", PC 3112, 23 Jul. 1946). The RCMP Commissioner obtained approval of the Minister of Justice for an RCMP-led security screening program program (Exhibit "G", Letter 9 Oct. 1946).

[33] It seems to me that interpretation of the Order in the case at bar, as in *Dueck*, *supra*, where Noël J. heard several witnesses (see pp. 217 to 273), required additional evidence which was excluded and consequently ignored in the case at bar.

Does this Court have jurisdiction to hear an appeal from the decision authorizing the respondent to use the summary judgment procedure laid down in Rule 216 and review the exercise of the discretion conferred by that rule?

[34] Counsel for the respondent objected to this Court's jurisdiction on the basis of the appeal prohibition contained in s. 18(3) of the Act. With respect, I do not consider that there is any merit in that objection.

[35] Section 18(3) excludes any appeal from a Trial Division decision made pursuant to s. 18(1) when that decision settles the question of whether citizenship was obtained by fraudulent means. A decision on a summary judgment is not the kind of "decision" made by the Court on a reference within the meaning of s. 18 of the Act. It is also not a decision made by the judge hearing the reference. When one looks at the purpose and objective of s. 18(1) and (3), it seems to me that the decision from which there can be no appeal is the one made by the judge hearing the entire matter, who determines in light of all the facts whether there was a fraudulent act. In the case at bar, the decision by the motions judge is not a decision made on the issue before the reference judge, namely a decision on whether there was a fraudulent act.

[36] The decision of the motions judge in the case at bar, whether that decision is described as a summary judgment, a declaratory judgment or a judgment striking out allegations, is and remains a decision interpreting the scope and requirements of the Court's rules of procedure. I feel quite certain that s. 18(3) of the Act does not cover a decision interpreting the scope of Rule 216 on obtaining a summary judgment. A decision on the procedural requirements imposed by Rule 216 is a decision of a procedural nature, which bears no resemblance to the nature and content of the determination that must be made under s. 18(1) of the Act, a determination that is essentially factual in nature: on the nature of the determination, see *Canada (Secretary of State) v. Luitjens* (1992), 142 N.R. 173 (F.C.A.), leave to appeal to the Supreme Court of Canada denied (1992), 143 N.R. 316. In other words, I feel certain that by adopting s. 18(3) of the Act, Parliament did not intend that a summary judgment that might be made as a consequence of erroneous interpretation or application of the Court's rules of procedure not be subject to appeal.

[37] I further consider that a decision on the scope and requirements of the summary judgment proceeding is similar to a decision ordering a stay of proceedings, and this is not covered by the appeal prohibition contained in s. 18(3): see *Canada v. Tobiass*, [1997] 3 S.C.R. 391, at para. 57. Both decisions are procedural in nature. One, the stay of proceedings, is designed to terminate proceedings, and the other, the summary judgment procedure, either to terminate or to shorten proceedings by terminating a part of them. At no time, however, does a decision on the validity of recourse to either of these procedural vehicles affect or impinge on the matter being heard by the Trial Division under s. 18(1), namely a determination of whether the respondent has obtained entry to Canada by fraud or false representation.

[38] As an additional reason, I would add that a motion for a summary judgment submitted to a judge other than the one who heard the reference is a *sui generis* proceeding, as was the application for a stay in *Tobiass*, which does not fall within the appeal prohibition contained in s. 18(3) of the Act and which is actually intended to deprive the judge hearing the reference of his ultimate power to determine whether there was a fraudulent act.

[39] Finally, the confusion that resulted from the proceeding initiated by counsel for the respondent has obscured the nature and consequences of the judgment. It has also been a source of confusion surrounding the right of appeal. I have difficulty concluding that there is no right of appeal from a judgment the nature and consequences of which are uncertain, especially for the judge hearing the reference, who must continue his inquiry. It appears all the more difficult to

reach such a conclusion as in the case at bar the benefit sought by having no right of appeal enures to the party who created the confusion and uncertainty.

[40] Similarly, for the reasons mentioned above, it seems clear that an incorrect exercise of the discretion conferred by Rule 216 is not covered by the appeal prohibition. For all practical purposes, it is an example of the rule that the accessory follows the principal. If a decision interpreting the conditions and criteria for applying the summary judgment procedure is subject to the right of appeal, it goes without saying that there must also be an appeal from a decision involving an improper exercise of discretion in the actual application of those conditions and criteria.

[41] In short, I am persuaded that this Court has jurisdiction to review on appeal the decision by the motions judge that the summary judgment procedure was applicable in the case at bar and to review the question of whether in ruling on the points submitted to her by that procedure the motions judge exercised her discretion properly.

Cross-appeal and merits of motions judge's decision

[42] In view of the conclusion I have come to on the interpretation of Rule 216 and the exercise of the discretion by the motions judge, it is not necessary to decide the preliminary question of jurisdiction raised by the motions judge's decision on the merits. However, I would add the following on one of the arguments on the merits raised by counsel for the respondent.

[43] The motions judge did not rule on one of the respondent's arguments, namely that the false representations which led to acquiring citizenship should relate to the application for permanent residence, and accordingly that the fact the respondent lied in his application for temporary admission is of no consequence. Counsel for the respondent based her argument in part on the words "if the person was lawfully admitted to Canada for permanent residence by false representation or fraud or by knowingly concealing material circumstances" contained in s. 10(2) of the Act. I feel that subsection should be set out again here:

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| (2) A person shall be deemed to have obtained citizenship by false representation or fraud or by knowingly concealing material circumstances if the person was lawfully admitted to Canada for permanent residence by false representation or fraud or by knowingly concealing material circumstances and, because of that admission, the person subsequently obtained citizenship. | (2) Est réputé avoir acquis la citoyenneté par fraude, fausse déclaration ou dissimulation intentionnelle de faits essentiels la personne qui l'a acquise à raison d'une admission légale au Canada à tire de résident permanent obtenue par l'un de ces trois moyens. |

[44] Without deciding the merits of that argument, I feel I should point out that s. 10(2) only creates a presumption and that the subsection does not have the effect of limiting or restricting the scope of s. 10(1) and the grounds for revoking acquisition of citizenship. Quite apart from the presumption in s. 10(2), the Governor in Council may withdraw citizenship from someone when he or she is persuaded that the person has acquired it by false representation or fraud or by deliberate concealment of material circumstances. In other words, the presumption in s. 10(2) is useful, but it does not limit the question of fraud or the use of fraudulent means solely to the time the person was admitted to Canada as a permanent resident.

[45] I note that the purpose of the cross-appeal is to reverse the motions judge's decision in which she concluded that the appellant's action was not subject to prescription. Without discussing the validity of that decision on the merits, I feel that it was not possible to submit the question of prescription to the motions judge for a summary judgment, especially in view of the facts in the record. In fact, for the following reasons, I do not feel that an objection based on prescription could even be made to the judge hearing the reference.

[46] The objection based on prescription made by the respondent resulted both from a misconception and a misunderstanding of the reference procedure in which he was engaged.

[47] A careful reading of s. 18 of the Act reveals the following procedure. When the Minister is informed of grounds that may justify a report to the Governor in Council, he must notify the person in respect of whom he intends to write a report to the Governor in Council. However, he can only send that report if the person in question has not asked that the matter be referred to the Trial Division within the specified deadline, or if the Court has concluded after its hearing that there was fraud, misrepresentation or deliberate concealment of material circumstances.

[48] Section 18(2) gives the person in question an opportunity to hear the Minister's allegations and refute them by asking that the allegations be referred to the Court for an impartial determination of the facts made at the conclusion of a hearing. At this time, the person concerned in the report is given an opportunity to challenge and refute the allegations made against him.

How then can he ask for the termination on the grounds of prescription of a reference he has himself requested for his own benefit? I think simply putting the question in this way suggests the answer, without any need to discuss principles of actual or presumed waiver of the benefit of prescription.

[49] Additionally, assuming the respondent could rely on prescription, I do not see how this could run in his favour so long as he has not made an application for reference to the Court, since the very existence of the reference, which he wishes to cut short by prescription, depends on a purely potestative condition, namely that he has himself requested a reference.

[50] In any case, first for the reasons already stated, it was not possible to proceed by summary judgment in the case at bar. Second, it was equally improper to venture into the area of prescription when the facts were not all known. For example, it can be seen from the limited evidence before the motions judge that the Canadian authorities were informed in 1993 of the allegations regarding the respondent and that he was not located in Canada until 1995. It is thus unlikely that even if prescription could be relied on it began to run prior to that date, still less in 1950, as counsel for the respondent maintained.

[51] Further, the notice of revocation, which gives the respondent the right to the reference and to the hearing that followed, was not sent to him until August 1999. In fact, it was his own application for a reference which, if it was not to lapse, had to be made within 30 days from the date the notice was sent. Section 18(1)(*a*) clearly indicates that it is a benefit conferred on the

respondent, a benefit which he may lose by his failure to act. Once again, how could he seek prescription of a benefit conferred on him which may expire? There is as much valid logic in this argument by the respondent about prescription as in his argument that the motions judge's judgment was a final judgment, but one which remains interlocutory because it did not dispose of the action.

[52] I would conclude by saying that, for the reasons already stated, this Court has jurisdiction to hear the cross-appeal and dismiss it.

[53] For these reasons, I would allow the appeal with costs, I would reverse the motions judge's decision on September 6, 2002, and I would dismiss the motion for a summary judgment with costs. I would dismiss the cross-appeal without costs. I would dismiss the respondent's motion for a stay of the appeal proceedings without costs.

"Gilles Létourneau"
Judge

"I concur
Robert Décary J.A."

"I concur
M. Nadon J.A."

Certified true translation

Suzanne M. Gauthier, C. Tr., LL.L.

**FEDERAL COURT OF CANADA**
**APPEAL DIVISION**

**SOLICITORS OF RECORD**

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| **FILE:** | A-508-02 |
| **STYLE OF CAUSE:** | THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. WALTER OBODZINSKY |
| **PLACE OF HEARING:** | Ottawa, Ontario |
| **DATE OF HEARING:** | December 11, 2002 |
| **REASONS FOR JUDGMENT:** | LÉTOURNEAU J.A. |
| **CONCURRED IN BY:** | DÉCARY J.A.<br>NADON J.A. |
| **DATE OF REASONS:** | December 20, 2002 |

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