Federal Court  Cour fédérale

Date: 20200922

Docket: T-1281-18

Citation: 2020 FC 923

Toronto, Ontario, September 22, 2020

PRESENT: Mr. Justice Diner

BETWEEN:

STEVAN UTAH

Plaintiff

and

**THE ATTORNEY GENERAL OF CANADA,
DARRYL ZELISKO**

Defendants

ORDER AND REASONS

[1] The Defendants bring this motion for summary judgment on the basis that Mr. Utah's action is statute-barred, because he did not bring his action within two years of discovering the harm in question. They therefore assert that the Plaintiff's action raises no genuine issue for trial. I disagree. Many factual elements remain to be tested and determined, and this requires the benefit of witness testimony and full oral argument at a trial. Both parties have stated in pre-trial and case management proceedings that credibility remains a central issue. Before explaining my reasons for dismissing this motion for summary judgment, I will provide a brief background.

I. Background

[2] This Background section has been drawn from the documentation filed for this motion, which includes an Agreed Statement of Facts (Agreed Statement). It has been prepared for the purposes of this Order, and will be superseded by factual findings made over the course of the trial.

[3] The Plaintiff, Mr. Stevan Utah, is a citizen of Australia. In 2000, Mr. Utah witnessed a serious crime committed by members of the Bandidos gang in Australia. In the years that followed, Mr. Utah began working as a police informant in Australia, providing information about Outlaw Motorcycle Gangs (OMGs), including the Bandidos gang.

[4] After members of that gang learned or suspected that Mr. Utah was providing information to the police, the Bandidos made an attempt on his life. Mr. Utah sustained serious injuries but escaped. After a month recovering from some of his injuries, Mr. Utah fled to Canada, where he arrived in June 2006.

[5] In Canada, Mr. Utah continued to provide information about OMGs, including the Bandidos, to both Australian and Canadian law enforcement officials. In August 2007, he attended at Calgary Police Services (CPS) offices and surrendered his passport, having been told that this was necessary to comply with the *Immigration and Refugee Protection Act*, SC 2001, c 27) [*IRPA*]. About a year after his arrival in Canada, Mr. Utah applied for refugee status in September 2007.

A. *The claim for protection*

[6] The circumstances of Mr. Utah applying for refugee status were as follows. On September 19, and October 15, 2007, Mr. Utah attended at Canada Border Services Agency (CBSA) offices in Calgary for two intake interviews, making what he believed to be an application for protected person status under section 97 of *IRPA*. CBSA Officer Darryl Zelisko (Officer Zelisko) conducted both interviews. He wrote the title "refugee intake" at the top of his notes from the September 19, 2007 interview with Mr. Utah, and "Resumption of Intake Interview" on his follow-up notes from the October 15, 2007 interview.

[7] Officer Zelisko, however, never made an eligibility determination regarding Mr. Utah's claim, never entered the claim on into CBSA's computer system (the System), nor sent the claim to the Refugee Protection Division (RPD). Officer Zelisko deposes in his affidavit for this litigation, that he sought to protect Mr. Utah's identity, and thought that putting Mr. Utah's name into the System could endanger Mr. Utah's life.

B. *The refugee determination process in 2007*

[8] At the time of Mr. Utah's claim, the government's policy manual entitled "Processing Claims for Protection in Canada" (PP1) set out the procedures for processing a refugee claim. PP1 was available to Officer Zelisko to provide him with guidance and direction regarding the manner in which he was to process Mr. Utah's refugee claim. This policy guidance was based on the relevant law – namely *IRPA*, and the associated regulations and rules. PP1 at the time stated:

> When creating the RR Screen, the officer will enter the date on which the claim will be referred to the RPD in the appropriate field. Ideally, the decision will be made before the 3 working day period is up and the date that the decision is made will be entered,

> thus avoiding a deemed referral. However, if a claim for refugee protection is not referred to the RPD within 3 working days, it is deemed to be referred unless there is a suspension, or it is determined to be ineligible.
>
> [Emphasis added.]

[9] In other words, PP1 required Officer Zelisko, like any CBSA officer conducting a refuge intake interview, to enter essential information about the claim into the System, and refer Mr. Utah's claim to the RPD within three days if he found the claim eligible.

[10] However, because Officer Zelisko never made any eligibility determination regarding Mr. Utah within the mandated three-day period, nor did he produce a report on admissibility under section 44 of *IRPA* (a section 44 Report) – moreover, because Officer Zelisko never entered his claim into the System at all – Mr. Utah's claim was not referred to the RPD. Section 44 Reports refer individuals for determination of admissibility into Canada, and suspend the processing of a refugee application pending a decision. The failure to take any action on Mr. Utah's file prevented him from obtaining benefits that refugee claimants usually obtain in Canada, such as health care and a work permit.

C. *IFHP and work permits*

[11] Refugee claimants in Canada are – and were at the time that Mr. Utah applied – eligible for a health care program known as the Interim Federal Health Program (IFHP, a background of which is described at paras 32-49 of *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651). They are also eligible for work permits. Mr. Utah, according to the Agreed Statement, only learned about the IFHP program in February 2016.

[12] Because of Officer Zelisko's actions (or inactions), Mr. Utah never received health care, including emergency dental care, or a work permit before early February 2016. It was only then that CBSA Officer Darryl Kane (Officer Kane) – who took over Mr. Utah's file in June 2015 – informed Mr. Utah on how to obtain IFHP coverage and a work permit.

[13] From September 2007 to February 2016 (the Delay Period), Mr. Utah continued to advise and assist Canadian law enforcement officials, sharing information about OMGs, including the Bandidos. During this time, Mr. Utah also often met or spoke by phone with Officer Zelisko and members of CPS. A number of emails from Mr. Utah to Officer Zelisko show the former expressed his discomfort with living in Canada without a work permit and health care coverage.

D. *CBSA requests a section 44 Report*

[14] According to the Agreed Statement, CBSA headquarters directed Officer Zelisko in November 2011 to write a section 44 Report. Officer Zelisko had in fact prepared notes for such a section 44 Report. However, while Officer Zelisko considered and prepared notes for a possible section 44 Report, he never produced one, nor otherwise make any determination regarding Mr. Utah's eligibility as a refugee claimant. Yet, the evidence appears to indicate that Officer Zelisko continued to work on Mr. Utah's file. For example, he claimed five hours of overtime on Mr. Utah's file in January 2014. On numerous occasions during the time in question, Officer Zelisko met with Mr. Utah and members of CPS regarding Mr. Utah's case.

[15] The record also shows that Mr. Utah submitted a humanitarian and compassionate (H&C) application to Officer Zelisko in November 2010, and then again in February 2011. Though

Officer Zelisko noted these submissions in his records, they never made their way to CBSA national headquarters, nor to either of the two Ministers addressed therein.

E. *Officer Kane takes over*

[16] In June 2015, Officer Kane took over Mr. Utah's file. Officer Kane invited Mr. Utah to CBSA offices in Calgary in early 2016 to complete a refugee intake application. Mr. Utah contends that when he asked Officer Kane why this was necessary given his application in 2007, Officer Kane explained that "errors had been made" in the past and that completing a form would help Mr. Utah because it would enable him to obtain a work permit.

[17] February 4, 2016 marked an important day for Mr. Utah's case. That was the day he completed a Basis of (Refugee) Claim form with Officer Kane, and that Officer Kane submitted a section 44 Report in respect of Mr. Utah to the Immigration Division (ID). Finally, CBSA served a departure order on Mr. Utah that same day. On February 22, 2016, the Minister's referral was forwarded to the ID. Following a two-day admissibility hearing in June 2017, the ID found Mr. Utah not to be inadmissible under paragraph 37(1)(a) of *IRPA*. Mr. Utah's refugee matters proceeded shortly thereafter. The RPD held a hearing on September 11, 2017. It granted Mr. Utah "protected person" status on September 29, 2017.

F. *The ATIP request and the Statement of Claim*

[18] In early 2018, Mr. Utah filed an Access to Information and Privacy (ATIP) request to obtain records from CBSA. He maintains that it was only upon receiving the response to the ATIP request in June 2018 that he learned that the refugee paperwork he filled out in September 2007 with Officer Zelisko had never been submitted to the RPD, or otherwise processed.

[19] Mr. Utah filed his Statement of Claim on June 29, 2018, pleading that Officer Zelisko committed the torts of misfeasance in public office and negligent investigation, and in the process, breached his rights under sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. Specifically, Mr. Utah claims that during the Delay Period, the Defendants prevented him from working, receiving health or dental benefits, establishing a bank account and credit file, obtaining a driver's license and other identity documentation, and obtaining any form of social assistance, amongst other harms.

II. Issue raised

[20] This motion raises one question, namely whether there is there a genuine issue for trial. The moving parties – the Defendants to this action – argue that the Plaintiff's action is statute-barred by the limitations period set out in Alberta's *Limitations Act*, RSA 2000, c L-12 [*Limitations Act*], since Mr. Utah filed the action in June 2018, but knew or ought to have known more than two years prior that (i) he suffered the injuries claimed in his pleadings, (ii) those injuries were attributable to the conduct of the Defendants, and (iii) they warranted bringing the action. The Defendants contend that because the injury – rather than the cause of action – was discoverable at various points during the Delay Period, his June 2018 action raises no genuine issue for trial, and the action must be dismissed through the summary judgment mechanism contained in Rule 215 of the *Federal Courts Rules*, SOR/98-106 (the *Rules*).

A. *Genuine issue for trial*

(1) Key considerations under the law on summary judgment

[21] Summary judgment rules promote the efficient disposition of actions by enabling courts to decide matters summarily. The *Rules* stipulate:

215 (1) If 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.	**215 (1)** Si, 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.
…	[…]
(3) If the Court is satisfied that there is a genuine issue of fact or law for trial with respect to a claim or a defence, the Court may	**(3)** Si la Cour est convaincue qu'il existe une véritable question de fait ou de droit litigieuse à l'égard d'une déclaration ou d'une défense, elle peut :
(a) nevertheless determine that issue by way of summary trial and make any order necessary for the conduct of the summary trial; or	**a)** néanmoins trancher cette question par voie de procès sommaire et rendre toute ordonnance nécessaire pour le déroulement de ce procès;
(b) dismiss the motion in whole or in part and order that the action, or the issues in the action not disposed of by summary judgment, proceed to trial or that the action be conducted as a specially managed proceeding.	**b)** rejeter la requête en tout ou en partie et ordonner que l'action ou toute question litigieuse non tranchée par jugement sommaire soit instruite ou que l'action se poursuive à titre d'instance à gestion spéciale.

[22] The Defendants rely heavily on *Hryniak v Mauldin*, 2014 SCC 7 [*Hryniak*], arguing that the Supreme Court encouraged the use of summary judgment as a procedure when the interests of justice do not require a trial. They also cite post-*Hryniak* decisions by the Federal Courts to support their argument that the requirements of Rule 215 are met.

[23] The key post-*Hryniak* summary judgment decisions and the principles they enunciate under Rule 215 were recently reviewed respectively by Justice Anne Mactavish in *Milano Pizza Ltd v 6034799 Canada Inc*, 2018 FC 1112 [*Milano Pizza*], and then enumerated by Justice Janet Fuhrer in *Rallysport Direct LLC v 2424508 Ontario Ltd*, 2019 FC 1524 [*Rallysport*] at para 42:

> [42] In *Milano Pizza*, Mactavish J (as she then was) thoroughly canvassed the law of summary judgment as applied to the Federal Courts following the Supreme Court's decision in *Hryniak*, above: *Milano Pizza*, above at paras 24-41. These principles are as follows:
>
> > A. The purpose of summary judgment is to allow the Court to (i) dispense summarily with an action if there is no genuine issue to be tried, (ii) conserve scarce judicial resources, and (iii) improve access to justice: *Milano Pizza*, above at para 25.
> >
> > B. Summary judgment rules must be interpreted broadly, favouring proportionality and fair access to affordable, timely and just adjudication; to be "fair and just" the process "must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found": *Milano Pizza*, above at para 29, citing *Hryniak*, above at paras 5 and 28.
> >
> > C. The test of whether no genuine issue for trial exists is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial; or, alternatively, whether there is "no legal basis" to the claim based on the law or the evidence brought forward. It is not restricted to the "clearest of cases": *Milano Pizza*, above at paras 31 and 33, citing *Canada (Citizenship and Immigration) v Campbell*, 2014 FC 40 at para 14, *Itv Technologies Inc. v Wic Television*, 2001 FCA 11 at paras 4-6, *Premakumaran v Canada*, 2006 FCA 213 at paras 9-11; *Canada (Minister of*

Citizenship and Immigration) v Schneeberger, 2003 FC 970 at para 17; *Manitoba v Canada*, 2015 FCA 57 at para 15-16; and *Burns Bog Conservation Society v Canada*, 2014 FCA 170 at paras 35-36.

D. Where the necessary facts cannot be found to resolve the dispute fairly and justly, or where it would be unjust to make a finding on those facts alone, summary judgment should not be granted: *Milano Pizza*, above at paras 29 and 36, citing *Hryniak*, above at para 28.

E. It would be unjust to make a finding on the facts alone where issues were not raised by one party, as doing so would preclude them from knowing the case to meet: *Milano Pizza*, above at paras 107-108 and 112, citing *Albian Sands Energy Inc. v Positive Attitude Safety System Inc.*, 2005 FCA 332 [*Albian Sands*] at para 45.

F. Issues of credibility should not be decided on a motion for summary judgment. Observing live testimony and cross-examination often places a judge in a better position to draw appropriate inferences, and to weigh evidence, than can be done on affidavit evidence alone: *Milano Pizza*, above at paras 37-38, citing *TPG Technology Consulting Ltd. v Canada*, 2013 FCA 183 at para 3; *Newman v Canada*, 2016 FCA 213 at para 57; *Suntec Environmental Inc. v Trojan Technologies, Inc.*, 2004 FCA 140 [*Suntec*] at paras 20, 28-29; *MacNeil Estate v Canada (Department of Indian and Northern Affairs)*, 2004 FCA 50 at para 38.

G. Not all conflicting evidence will raise credibility issues and preclude summary judgment. Courts should "take a hard look at the merits of the case" to determine if credibility issues need be resolved: *Milano Pizza*, above at para 39, citing *Granville Shipping Co. v Pegasus Lines Ltd. SA*, 1996 CanLII 4027 (FC) at para 7.

H. The effect of granting summary judgment will be to preclude a party from presenting any evidence at trial; in other words, the unsuccessful party will lose its day in court: *Milano Pizza*, above at para 40, citing *Apotex Inc. v Merck & Co. Inc.*, 2004 FC 314 at para 12, *aff'd* 2004 FCA 298.

[24] Finally, in terms of the onus, the moving party has the heavy burden of establishing all the facts necessary to obtain summary judgment, while the responding party bears the evidential burden of showing there is a genuine issue for trial. Both parties are expected to put their best foot forward (*Gemak v Jempak*, 2020 FC 644 at para 133).

[25] Starting with the last point, both parties have provided extensive materials for this motion, putting their best feet forward: their motion records number approximately 900 and 2,650 pages, respectively. They include several key affidavits and discovery transcripts that serve as the basis for the Agreed Statement – and their submissions point out areas of trenchant factual dispute that subsist between the parties, including areas where credibility is questioned on both sides. The motion materials also include extensive argument and jurisprudential support for the propositions raised.

[26] I will now consider the evidence presented by the parties under the summary judgment rules and principles. This key question, given the limitations challenge, involves the date of discoverability. If I find that Mr. Utah is indeed statute-barred under Alberta's *Limitations Act*, the finding would eliminate his ability to bring this action and justify this Court summarily disposing of the matter.

(2) Statutory limitations period

[27] In Mr. Utah's case, we must first look to the Alberta limitations statute. The applicable provision of the *Limitations Act* provides:

> **3(1)** Subject to subsections (1.1) and (1.2) and sections 3.1 and 11, if a claimant does not seek a remedial order within

> **(a)** 2 years after the date on which the claimant first knew, or in the circumstances ought to have known
>
> **(i)** that the injury for which the claimant seeks a remedial order had occurred
>
> **(ii)** that the injury was attributable to conduct of the defendant, and
>
> **(iii)** that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
>
> …
>
> … the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

[28] The Supreme Court has recently held that discoverability requires that a claimant exercise reasonable diligence (*Pioneer Corp v Godfrey*, 2019 SCC 42 at para 31[*Pioneer*]). The test is objective. Constructive or imputed knowledge, in addition to actual knowledge, will trigger the limitation period (*Yugraneft Corp v Rexx Management Corp*, 2010 SCC 19 at para 60). If the plaintiff did not have actual knowledge of an injury, then the court must determine what a reasonable person would have known or could have discovered with the exercise of reasonable diligence.

[29] The knowledge and interests of the particular claimant are relevant in determining if the claimant "ought to have known" of the criteria in paragraph 3(1)(a) of the *Limitations Act* (*Another Look Ventures Inc v 642157 Alberta Ltd*, 2012 ABCA 253 at para 11). For the purpose of the calculation of the limitations period, the inquiry "focuses on knowledge about the injury, not the cause of action" (*Lay v Lay*, 2019 ABCA 21 at para 29 [*Lay*]). Mere suspicion is insufficient to trigger the running of a limitation period; the claim can only be "known" to the

plaintiff when he has some support for the suspicion (*Lay* at para 30; *Stack v Hildebrand*, 2010 ABCA 108 at para 14).

[30] In cases where the tortfeasor concealed their wrongdoing, the doctrine of fraudulent concealment can allow the tolling of a limitation period until such time as the plaintiff ought to have discovered the fraud, as explained in *Guerin v The Queen*, [1984] 2 SCR 335 at 390, [1984] SCJ No 45 (QL):

> It is well established that where there has been a fraudulent concealment of the existence of a cause of action, the limitation period will not start to run until the plaintiff discovers the fraud, or until the time when, with reasonable diligence, he ought to have discovered it. The fraudulent concealment necessary to toll or suspend the operation of the statute need not amount to deceit or common law fraud.

[31] Finally, this Court has found it inappropriate to grant summary judgment on an issue that cannot be separated from others in the action (*Samson Indian Nation and Band v Canada*, 2015 FC 836 at para 98).

[32] As there is fundamental disagreement about the facts of this case, including discoverability of the injury, I will first summarize the parties' respective arguments and then explain why I feel that there are genuine issues for trial, taking into account the limitations period.

B. *The Defendants' (moving parties') position*

[33] The Defendants emphasize that that the two-year limitation period in Alberta starts to run as soon as a plaintiff knew or, in the circumstances, ought to have known that the three criteria set out in subsection 3(1) of the *Limitations Act* are met, namely that (i) the injury occurred, (ii) it

was attributable to the defendants' conduct, and (iii) it warranted the action, by – at the very latest – January 2016. The Defendants contend that because Mr. Utah failed to act upon discovery of the injury within the two-year period, he is now statutorily barred and cannot bring this action.

[34] The Defendants concede that Officer Zelisko neither entered Mr. Utah's date into the System, nor referred Mr. Utah's claim, nor issued a section 44 Report for evaluation of inadmissibility. The Defendants claim that Officer Zelisko took take these actions (or non-actions) out of a concern for Mr. Utah's security and a desire to protect him. As grounds for the assertion, the Defendants point out that Mr. Utah had himself claimed that the Bandidos were looking for him in both Canada and Australia, and that officials in Australia were corrupt. Officer Zelisko explained that the fact that CPS officers often accompanied the Plaintiff to their meetings lent a degree of credibility to those claims and, presumably, this affected the decision not to submit the claim in the usual manner.

[35] The Defendants further dispute Mr. Utah's allegations of unawareness, maintaining that Mr. Utah could have pursued his action at many points during the decade in question, throughout which he was fully aware of his health care and work permit woes. The Defendants point out that he consulted and/or retained a number of counsel over the years, any one of whom could have provided him with the necessary clarifications.

[36] The Defendants posit that, at the very latest, Mr. Utah discovered his cause of action when he learned from Officer Kane about the need to submit a new refugee claim in June 2015 or early 2016. In his affidavit, Officer Kane deposes that, after he took over the file in May 2015, he met with Mr. Utah on June 23, 2015, and advised him that the claim had not been submitted

to the IRB, and that "a new process had to be started because there was no way of continuing the process that was originally started as we were no longer using that computer system." Officer Kane also deposes that he "also told [Mr. Utah] that in order to have the claim referred, we needed to start the process over on the new system."

[37] In the same affidavit, in response to the Plaintiff asking in January 2015 why he was being requested to come into CBSA offices to fill out paperwork for a refugee claim for the second time, Officer Kane recounts an e-mail exchange where he informed the Plaintiff that "errors were made by [a] previous officer and the process was not put forward." Officer Kane also deposes that he advised Mr. Utah that, by filling out a new claim, he would be entitled to apply for the standard coverage (including IFHP and a work permit).

[38] On February 4, 2016, Officer Kane gave Mr. Utah the refugee claim forms to complete, and sent to Mr. Utah proof of suspension of his Refugee Claim under subsection 103(1) of *IRPA*. The Defendants argue that because these proceedings were filed over 26 months later (in late June 2018), they are statute-barred and there is therefore no genuine issue for trial.

C. *The Plaintiff's position*

[39] Mr. Utah takes a divergent position, arguing that the very opposite of what the Defendants assert is true: Officer Zelisko's failure to enter the data and refer the claim, and to communicate the same to him and others, were deliberate acts of concealment, meant to cause difficulty to Mr. Utah in Canada. Mr. Utah, in asserting this perspective, alleges that the evidence gathered in the preparatory stages of this litigation includes Officers Zelisko's and Kane's admissions on cross-examination that the System was secure. From Mr. Utah's perspective, the

conduct was intended to harm, rather than to protect. By depriving him from obtaining basic necessities including an income and health care, he argues that the authorities hoped he would become discouraged, relinquish his claim, and return to Australia, which he maintains constitutes public misfeasance.

[40] Furthermore, Mr. Utah presents evidence that he had genuine reason to think that his refugee claim had been filed in September 2007. E-mail correspondence between September 2007 and May 2015 shows that he had discussed his refugee claim with Officer Zelisko and CPS members on multiple occasions. Mr. Utah also maintains that Officer Zelisko never advised him (i) that his refugee claim had not been filed, or (ii) that he did not refer his claim out of concern for Mr. Utah's safety. Finally, Mr. Utah notes that others who were assisting him (namely three CPS detectives) were also in the dark and were "actively misled" by Officer Zelisko, pointing to evidence such as Detective Robson's affidavit.

[41] As for Officer Kane's evidence in his affidavit, Mr. Utah contends that he did not understand the nature of the "error" Officer Kane referred to in his communications with him. Furthermore, Mr. Utah has consistently stated under oath that he never knew his claim had not been referred to the IRB until he received his ATIP release package in June 2018, and that if he had understood this fact, he would have done something about it promptly. However, since this understanding never crystallized, and he only discovered the reason for his problems at that late date, his action could not have been brought in a more timely manner.

[42] Finally, Mr. Utah argues that since Officer Zelisko admits (in his affidavit) to the facts upon which the tortious malfeasance is based, his limitation only began to toll in June 2018, upon receipt of the ATIP documents, on the basis of fraudulent concealment.

III. Analysis

[43] I note that this case is unusual because during his period in limbo, Mr. Utah met and communicated with Officer Zelisko, other CBSA officers, and CPS detectives on multiple occasions. During this time, Mr. Utah made no secret of his main concern – to have his refugee claim determined – but also made it clear that he wished to obtain health care and dental care (available under the IFHP), and a work permit. At the same time, information on work permits and the IFHP was clearly posted on the government's publicly accessible web site, which Mr. Utah does not deny.

[44] There are also factors that favour the Defendants. Officer Zelisko states that he was concerned about Mr. Utah's criminal record in Australia, and allegations of Mr. Utah's criminal activity in Canada, as were others within CBSA. The Defendants presented evidence that Officer Zelisko spent time waiting for Mr. Utah to supply him with documentation to help assess Mr. Utah's eligibility as a refugee claimant and admissibility to Canada, as a way of explaining why Officer Zelisko did not proceed with Mr. Utah's refugee claim between 2007 and 2015.

[45] Thus, this unique case presents two very different version of the same events. The Plaintiff and Defendants – despite having jointly drafted the helpful Agreed Statement outlining key milestones that took place between 2007-2017 – provide completely different narratives of what underlies those milestones and what occurred over that decade. Their portraits show a stark contrast in their painting of this litigation. It is this very contrast that convinces me that this is not a case appropriate for summary judgment under the *Milano Pizza* and *Rallysport* principles outlined above, for two clear reasons.

[46] First, this case presents facts and issues that merit consideration at trial: there is a strong basis on both the evidence and law to proceed. One must recall that the *Limitations Act*'s two-year period is predicated not only on the date when the claimant first knew, or in the circumstances ought to have known, that the injury occurred (subparagraph 3(1)(a)(i)), but also when that injury was attributable to conduct of the defendant (subparagraph 3(1)(a)(ii)), and (assuming liability on the part of the defendant) the injury warrants bringing a proceeding (subparagraph 3(1)(a)(iii)).

[47] Therefore, the two-year limitation is premised not only upon the injury, but also upon the author of the injury, and when the identity of that author was revealed to the plaintiff. Mr. Utah's evidence, as summarized above, is that he and others only knew that the evidence was attributable to Officer Zelisko, and warranted bringing a proceeding, upon reviewing the results of his ATIP request in June 2018.

[48] If the factual assertions that Mr. Utah makes withstand cross-examination, his primary ground of malfeasance appears to have a strong basis in law. I also agree that if Mr. Utah's arguments are supported by factual findings, they could give rise to the doctrine of fraudulent concealment discussed above, given the unconscionability of the alleged action (*Pioneer* at para 54).

[49] Second, several key factual determinations necessary to resolve the dispute fairly and justly, and about which material conflicts remain, cannot be made on the materials presented with this motion (*Stankovic v 1536679 Alberta Ltd*, 2019 ABCA 187 at paras 3-4). Despite voluminous motion materials filed, including various affidavits from key witnesses and transcripts of discovery on cross-examination on those affidavits, significant issues of credibility

remain unanswered. Justice would be undermined by making a summary decision without the full light of trial (see *Milano Pizza* at paras 29, 36; *Hryniak* at para 28).

[50] In short, at this point in the proceedings – namely, less than six weeks before trial – one thing clearly emerges from the motion materials before the Court: there are central issues of credibility and factual differences that call for clarification and determination at trial.

[51] From the Plaintiff's perspective, it must remembered that Mr. Utah was in a unique position – namely, he was vulnerable, and awaiting the outcome of a refugee claim for over a decade (until its positive result on September 29, 2017). To achieve his objective of establishing his status as a protected person in Canada, and to try to remedy his injuries, he maintained regular communication during this period with CBSA Officers Zelisko and Kane, amongst other officials. He made his priorities abundantly clear, stating that his first objective was to obtain status in Canada since he could not obtain protection in Australia, while also being straightforward about his need for work and healthcare. As the Supreme Court held in *Novak v Bond*, [1999] 1 SCR 808 at para 90, [1999] SCJ No 26 (QL), "[t]he task in every case is to determine the point at which the plaintiff reasonably could bring an action, taking into account his or her own interests and circumstances."

[52] The Defendants argue that *Hryniak* should convince this Court to make a summary determination in favour of the Defendants based on the motion record. They also argue the record contains sufficient evidence on both a subjective and objective basis to find, on a balance of probabilities, that Mr. Utah could, and should, have discovered his injuries by January 2016 at the latest.

[53] I do not agree with the Defendants that that they have shown on a balance of probabilities that the Plaintiff has missed his limitations period. Rather, I find that there are significant points where credibility needs to be determined, and the facts and law established, such that the Defendants have failed to show that no genuine issue for trial exists.

[54] Finally, turning to the Federal Courts' jurisprudence on the issue, the *Hryniak* principles are contemplated in the principles of summary judgment synthesized in *Milano Pizza* and later enumerated in *Rallysport*. Further, in *Manitoba v Canada*, 2015 FCA 57 at paras 15-16, the Federal Court of Appeal clarified that the *Hryniak* powers principally come to bear only in summary trials under Rule 216, resorting to which remains one potential outcome of a summary judgment motion. However, with a trial of this matter scheduled a few weeks hence, a summary trial is not a viable option in the current proceedings.

IV. Conclusion

[55] Ultimately, if one thing comes through loud and clear in this motion, it is that central factual points are disputed. The materials filed to date suggest that Mr. Utah did not know that Officer Zelisko had never processed his September 2007 refugee claim until he received the response from his ATIP request, which was nine days before he filed his Statement of Claim on June 29, 2018. The Defendants have therefore failed to meet their burden to establish that there is no genuine issue for trial. Mr. Utah, on the other hand, has clearly established at least one such issue. This motion for summary judgment will accordingly be dismissed. The matter will proceed to trial, beginning on November 3, 2020. Costs for the motion will be awarded to the Plaintiff, payable forthwith.

ORDER in T-1281-18

THIS COURT ORDERS that:

1. The motion is dismissed.

2. Costs are payable forthwith to Mr. Utah by the Defendants.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1281-18
STYLE OF CAUSE:	STEVAN UTAH v THE ATTORNEY GENERAL OF CANADA, DARRYL ZELISKO
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DATE OF HEARING:	SEPTEMBER 15, 2020
ORDER AND REASONS:	DINER J.
DATED:	SEPTEMBER 22, 2020

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