

Federal Court



Cour fédérale

Date: 20250605

Docket: T-925-19

Citation: 2024 FC 845

Ottawa, Ontario, June 5, 2024

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

MANDY EASTER

Plaintiff

and

DOMINIC SHALE ALEXANDER AND HIS MAJESTY THE KING

Defendants

ORDER AND REASONS

I. Overview

[1] The Defendant, His Majesty the King, brings this motion in writing for an order granting leave to amend the Statement of Defence and Crossclaim to plead sections 269 and 270 of the *National Defence Act*, RSC 1985, c N-5 [*NDA*], in the manner and form at Schedule A to the Notice of Motion dated May 8, 2024 and such other relief as the Court may deem just.

[2] All further references to the Defendant (singular) will mean solely His Majesty the King because of Dominic Shale Alexander's lack of participation in this action to date.

[3] This is the Defendant's second motion in this action for the same relief. The first such motion was dismissed for the reasons given in *Easter v Alexander*, 2024 FC 568 [*Easter*]. Of note, the Defendant partially appealed the outcome in *Easter* (as it relates to section 269 of the *NDA*) to the Federal Court of Appeal on April 22, 2024. The appeal is pending under file number A-150-24.

[4] I have considered carefully the parties' records on this motion. For the reasons below, I determine that the Defendant's motion is an abuse of process and will be dismissed.

[5] See Annex "A" below for relevant legislative provisions mentioned in these reasons.

II. Analysis

[6] The Defendant's second motion involves evidence and arguments that in my view should have been raised in the first motion that was heard on April 4, 2024 and, thus, represents an impermissible effort to relitigate what already has been litigated.

[7] The Defendant's counsel argues that they only became aware of sections 269 and 270 of the *NDA* on March 1, 2024 of this year. Counsel says the Defendant did not intend, however, to waive the statute bar provision and, further, the Defendant should not be found to have treated the action as if it was not statute barred.

[8] That counsel had no instructions means just that, in my view – they had no instructions. There is no evidence before the Court on this motion about what the Defendant himself may or may not have thought about these sections at the time the Statement of Defence and Crossclaim was prepared. Counsel on this motion now speculates what that position would have been had the provisions been put to their client at that time. Counsel also attempts to shift responsibility to the Plaintiff to demonstrate that her strategy would have been different had the omission of the section 269 limitation period in particular not occurred.

[9] The Defendant, however, has not provided any reasons why the above arguments were not raised in the first motion which was filed initially on March 14, 2024 and subsequently amended on March 28, 2024. Further, and more to the point, the Court already has determined that the “alleged omission in this case is not the same as something that was unknowable” and that the proposed Amended Statement of Defence and Crossclaim “raises new defences, rather than clarifies pleaded facts”: *Easter*, above at paras 16-17. I find the Defendant’s attempt to draw a distinction between counsel’s inadvertent omission and their asserted client’s position is untenable.

[10] The Defendant argues further that the “significant new developments and marked changes in circumstances” since his first motion, namely, the adjournment of the trial for about seven months, means that there no longer is any prejudice to the Plaintiff that is not capable of being compensated by a costs award. The Plaintiff now has more time to conduct additional examination for discovery in respect of matters pertaining to sections 269 and 270 of the *NDA*.

[11] While I do not disagree necessarily, the Defendant fails to account for the fact that the change in circumstances is entirely because of the Defendant's own conduct that prejudiced the Plaintiff, as the Defendant admitted, by serving on the Plaintiff changed answers to key discovery questions the week before the trial was scheduled to commence. The reason for the adjournment of the trial lies squarely at the Defendant's feet, in my view, notwithstanding that the Plaintiff, understandably in the circumstances, requested the adjournment.

[12] Contrary to the Defendant's submissions, I am not persuaded that issue estoppel is inapplicable because of the changed circumstances. I reiterate that the circumstances were changed as a direct result of the Defendant's conduct in respect of which he now seeks to benefit.

[13] Regardless of whether the three preconditions to the operation of issue estoppel have been met here (as described in *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 25), I agree with the Plaintiff that the abuse of process doctrine applies to pleadings motions for the reasons articulated by Justice Paciocco in *National Industries Inc v Kirkwood*, 2023 ONCA 63 at para 26.

[14] I also agree with the Plaintiff that to grant the relief sought in the Defendant's second motion would "violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice," and would encourage litigation by installment or relitigation, against which the doctrine of abuse of process is meant to guard: *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 37.

[15] At its core, the Defendant's second motion seeks to reargue the first motion and makes arguments that were available at the time of the first; it thus should be dismissed as an abuse of the Court's process, or as frivolous and vexatious: *Global Petroleum Corp v Point Tupper Terminals Co*, 1998 NSCA 174 at para 10.

[16] The frivolity and vexatiousness of the Defendant's second motion is underscored, in my view, by the pending appeal of the outcome of the Defendant's first motion. To entertain the Defendant's second motion before the appeal is determined, particularly the public policy arguments regarding section 269 of the *NDA* in paragraphs 14 and 15 of the Defendant's reply submissions, could foster judicial inconsistency and result in an unnecessary waste of scarce judicial resources: *Janssen Inc v Apotex Inc*, 2023 FCA 253 at para 55; *Mehedi v Canada (Attorney General)*, 2024 FC 584 at para 12.

III. Conclusion

[17] For the above reasons, I thus conclude that the present motion, that is the Defendant's second motion to amend the Statement of Defence and Crossclaim, is dismissed, with costs to the Plaintiff in any event of the cause at the top of Column IV of Tariff B.

ORDER in T-925-19

THIS COURT'S ORDER is that:

1. The motion of the Defendant, His Majesty the King, for an order granting leave to amend the Statement of Defence and Crossclaim to plead sections 269 and 270 of the *National Defence Act*, RSC 1985, c N-5, in the manner and form at Schedule A to the Notice of Motion dated May 8, 2024, is dismissed.
2. The Plaintiff is entitled to costs of this motion in any event of the cause at the top of Column IV of Tariff B payable by the Defendant, His Majesty the King.

"Janet M. Fuhrer"

Judge

Annex “A”: Relevant Provisions

Federal Courts Rules (SOR/98-106)
Règles des Cours fédérales (DORS/98-106)

<p>Motions</p> <p>Motions in writing</p> <p>369 (1) A party may, in a notice of motion, request that the motion be decided on the basis of written representations.</p>	<p>Requêtes</p> <p>Procédure de requête écrite</p> <p>369 (1) Le requérant peut, dans l’avis de requête, demander que la décision à l’égard de la requête soit prise uniquement sur la base de ses prétentions écrites.</p>
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National Defence Act, RSC 1985, c N-5.
Loi sur la défense nationale, LRC 1985, ch N-5.

<p>Limitation or prescription period</p> <p>269 (1) Unless an action or other proceeding is commenced within two years after the day on which the act, neglect or default complained of occurred, no action or other proceeding lies against Her Majesty or any person for</p> <p style="padding-left: 20px;">(a) an act done in pursuance or execution or intended execution of this Act or any regulations or military or departmental duty or authority;</p> <p style="padding-left: 20px;">(b) any neglect or default in the execution of this Act or any regulations or military or departmental duty or authority; or</p> <p style="padding-left: 20px;">(c) an act or any neglect or default that is incidental to an act, neglect or default described in paragraph (a) or (b).</p> <p>Prosecutions</p> <p>(1.1) A prosecution in respect of an offence — other than an offence under this Act, the <i>Geneva Conventions Act</i> or the <i>Crimes Against Humanity and War Crimes Act</i> — relating to an act, neglect or default described in subsection (1) may not be commenced</p>	<p>Prescription</p> <p>269 (1) Se prescrivent par deux ans à compter de l’acte, de la négligence ou du manquement les actions :</p> <p style="padding-left: 20px;">a) pour tout acte accompli en exécution — ou en vue de l’application — de la présente loi, de ses règlements ou de toute fonction ou autorité militaire ou ministérielle;</p> <p style="padding-left: 20px;">b) pour toute négligence ou tout manquement dans l’exécution de la présente loi, de ses règlements ou de toute fonction ou autorité militaire ou ministérielle;</p> <p style="padding-left: 20px;">c) pour tout acte, négligence ou manquement accessoire à tout acte, négligence ou manquement visé aux alinéas a) ou b), selon le cas.</p> <p>Poursuites</p> <p>(1.1) Les poursuites visant une infraction prévue par une loi autre que les lois ci-après se prescrivent par six mois à compter de l’acte, de la négligence ou du manquement visé au paragraphe (1) qui y donne lieu :</p>
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<p>after six months from the day on which the act, neglect or default occurred.</p> <p>Saving provision</p> <p>(2) Nothing in subsection (1) is in bar of proceedings against any person under the Code of Service Discipline.</p>	<p>a) la présente loi; b) la <i>Loi sur les conventions de Genève</i>; c) la <i>Loi sur les crimes contre l'humanité et les crimes de guerre</i>.</p> <p>Disposition restrictive</p> <p>(2) Le paragraphe (1) n'a pas pour effet d'empêcher l'exercice des poursuites prévues par le code de discipline militaire.</p>
<p>Actions barred</p> <p>270 No action or other proceeding lies against any officer or non-commissioned member in respect of anything done or omitted by the officer or non-commissioned member in the execution of his duty under the Code of Service Discipline, unless the officer or non-commissioned member acted, or omitted to act, maliciously and without reasonable and probable cause.</p>	<p>Immunité judiciaire</p> <p>270 Les officiers ou militaires du rang bénéficient de l'immunité judiciaire pour tout acte ou omission commis dans l'accomplissement de leur devoir aux termes du code de discipline militaire, sauf s'il y a eu intention délictueuse ou malveillance sans aucune justification raisonnable.</p>

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-925-19

STYLE OF CAUSE: MANDY EASTER v DOMINIC SHALE ALEXANDER
AND HIS MAJESTY THE KING

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO
RULE 369 OF THE *FEDERAL COURTS RULES***

ORDER AND REASONS: FUHRER J.

DATED: JUNE 5, 2024

APPEARANCES:

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Karen Sanchez
Maija Pluto

FOR THE PLAINTIFF

Sean Gaudet
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(FOR HIS MAJESTY THE KING)

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