

Federal Court



Cour fédérale

Date: 20240410

Docket: T-925-19

Citation: 2024 FC 568

Ottawa, Ontario, April 10, 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 for an order granting leave to amend the Statement of Defence and Crossclaim in accordance with the Amended Statement of Defence and Crossclaim of the Defendant, His Majesty the King attached as Schedule “A” to the notice of motion dated March 14, 2024 and to the amended notice of motion dated March 28, 2024.

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

[3] More specifically, the Defendant seeks to include, among the proposed amendments, references to sections 269 and 270 of the *National Defence Act*, RSC 1985, c N-5 [NDA].

[4] The asserted factual background and relevant procedural background are described in the reasons concerning the determination of the Plaintiff’s motion to amend the Statement of Claim, to tender the expert report of Jamie Jocsak dated February 22, 2024 and to call Jamie Jocsak as a witness at trial. The Plaintiff’s motion was heard at the same day as the Defendant’s motion. The order and reasons concerning the Plaintiff’s motion have been issued contemporaneously with the instant order and reasons concerning the Defendant’s motion. Consequently, for conciseness, the factual and procedural backgrounds will not be repeated here.

[5] I have considered carefully the parties’ records on this motion and their oral submissions. I find that, for the reasons provided below, the Defendant’s motion will be dismissed.

[6] See Annex “A” below for relevant legislative provisions mentioned in these reasons.

II. Analysis

[7] As explained below, I am not convinced that the Defendant has met the test for granting leave to amend the Statement of Defence and Crossclaim to include references to sections 269 and 270 of the *NDA*.

[8] Rule 75 of the *Federal Courts Rules*, SOR/98-106 [FCR] governs the amendment of documents, requiring the party seeking an amendment to bring a motion. The Court is empowered under this rule to make amendments on terms that will protect the rights of all parties.

[9] Jurisprudence overlays the above rule with the following test: “[a] pleadings amendment should be allowed for the purpose of determining the real questions in controversy, provided that allowing the amendment would not result in an injustice to the other party that is not capable of being compensated by an award of costs and the amendment would serve the interests of justice” [emphasis added]: *Apotex Inc v Bristol-Myers Squibb Company*, 2011 FCA 34 at para 4, citing *Canderel Ltd v Canada*, 1993 CanLII 2990 (FCA), [1994] 1 FC 3 [*Canderel*] at 10.

[10] In addition, a threshold question the Court must ask itself is “whether the grounds pleaded in the amendment have a ‘reasonable prospect of success’ ...only once this threshold is crossed will a court consider the issues of any prejudice to the opposing party and the interests of justice” [citations omitted]: 9107-7438 *Québec Inc v Trust Express Inc*, 2022 FC 1197 at para 18, citing *Teva Canada Limited v Gilead Sciences Inc*, 2016 FCA 176 at paras 28-31 and others. The Federal Court of Appeal suggests, alternatively, that the Court consider whether the requested amendment would be refused, assuming the pleaded facts are true, because it is plain and obvious the pleading discloses no reasonable cause of action: *McCain Foods Limited v JR Simplot Company*, 2021 FCA 4 at para 20.

[11] Starting with the latter consideration, I find that the Defendant's proposed amendment meets this threshold.

[12] That said, permitting the requested *NDA* amendments would result, in my view, in non-compensable injustice to the Plaintiff (i.e. in the sense of an award of costs) and, further, would not serve the interests of justice, for several reasons.

[13] First, regarding section 269 of the *NDA* which currently contains a two-year limitation period, there was no allegation in the Statement of Defence and Crossclaim as filed that the action was time-barred. The issue was not raised until the Defendant brought the instant motion, five years after the action was commenced, with the trial only weeks away. The lack of a defence rooted in an alleged limitation period is a point of distinction or difference between the situation here and that facing the Court in *Miller v Canada*, 2018 FC 599 at paras 41-42 [*Miller*], citing *Kochems v Canada*, 2008 FC 960 [*Kochems*] (see paras 12-14). In both *Miller* and *Kochems*, the facts supporting such a ground were contained in the original pleadings and this was a significant factor in the Court's determination to permit the amendment because of a lack of undue prejudice to the plaintiff in the circumstances.

[14] Second, section 270 of the *NDA* is a statutory bar that can be overcome only by establishing that an officer or non-commissioned member of the Canadian Armed Forces [CAF] "acted, or omitted to act, maliciously and without reasonable and probable cause" in the performance of their duty. As observed by the Ontario Superior Court, and I agree, "[r]equiring a

party to change its entire litigation strategy late in the litigation is non-compensable prejudice”:

Burton v Docker, 2023 ONSC 1974 at para 17.

[15] In my view, it is no meaningful answer, contrary to the Defendant’s submissions, to suggest that the prejudice to the Plaintiff is mitigated because the Plaintiff posed some questions involving malice during examinations for discovery. “Malice” is but one element of the statutory test and I accept that, had the Plaintiff been aware at the outset of the litigation that the Defendant intended to rely on section 270 of the *NDA*, as well as section 269 for that matter, her litigation strategy would have been different.

[16] The alleged omission in this case is not the same as something that was unknowable, in my view. It is clear because of cases like *Miller* that this particular Defendant (i.e. His Majesty the King on behalf of the CAF) is aware of sections 269 and 270 of *NDA*, as well as the necessity of pleading facts to support reliance on these provisions: *Value Village Market (1990) Ltd v Value Village Stores Co*, (1999) FCJ No 1663 (FCTD) at paras 17-18.

[17] I accept that the proposed amendments could facilitate the Court’s consideration of the merits of the action. I find, however, contrary to the Defendant’s submissions, that the motion is not timely and that it raises new defences, rather than clarifies pleaded facts. Further, the Defendant’s original position caused the Plaintiff to follow a course of action from which it is not easy to pivot at this stage. Ultimately, I believe permitting the requested amendments to include sections 269 and 270 of the *NDA* would delay the trial prejudicially to the Plaintiff in a

manner non-compensable with an award of costs: *Valentino Gennarini SRL v Andromeda Navigation Inc*, 2003 FCT 567 at paras 29-33.

[18] I am not persuaded by the Defendant's argument, for example, that so long as an amendment is sought before trial, it is timely. Timeliness is not restricted to a point in time, in my view, such as the commencement of trial, but must be viewed in context. Depending on the nature of the amendment sought, such as the addition of new defences as opposed to clarifications, the earlier the amendment is sought the greater the chance the likelihood of prejudice will be reduced. I find that the converse is equally true--the later in a proceeding's life cycle the amendment is sought, the greater the chance of prejudice to the other party, especially where the amendment is more substantive as opposed to a correction of an alleged minor omission. Here, I might have been inclined to view it as the latter had supporting facts been pleaded.

[19] I find that *Canderel* is instructive regarding the consideration of the interests of justice. The general rule is that "the courts and the parties have a legitimate expectation in the litigation coming to an end and delays and consequent strain and anxiety imposed on all concerned by a late amendment raising a new issue may well be seen as frustrating the course of justice" (at 11).

[20] Further, "[t]here is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time" [underlining in original]: *Canderel*, above at 11, citing *Ketteman v Hansel Properties Ltd*, [1988] 1 All ER 38 (HL) [*Ketteman*].

[21] In addition, while the Court must take into account whether delay occasioned by the proposed amendments can be compensated in costs, “justice cannot always be measured in terms of money and ... a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other” [emphasis added]: *Canderel*, above at 11-12, citing *Ketteman*, above. I find this quote apt in the case before me involving as it does an individual plaintiff, as opposed to a business or corporation.

[22] As also observed in *Canderel*, “[w]e can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of the proceedings”: *Canderel*, above at 12, citing *Ketteman*, above.

[23] I acknowledge that the Court in *Canderel* was faced with an amendment sought at the end of trial, as opposed to prior to trial. Here, however, the action has been ongoing for five years, with the trial scheduled to start in a matter of weeks. Even if negligence itself is not in issue, the Defendant has provided no satisfactory explanation, in my view, for his dilatoriness or somnolence in seeking the requested amendments.

III. Conclusion

[24] For the above reasons, the Defendant's motion will be dismissed, but without prejudice to submit an amended Statement of Defence and Crossclaim that seeks leave to replace references to "Her Majesty the Queen" and "HMQ" with "His Majesty the King" and "HMK" respectively.

[25] Although the Plaintiff is the successful party on this motion, I note that the Plaintiff is largely the unsuccessful party on her own motion. I further note that the Defendant has not sought costs on these motions and submits that the parties should bear their respective costs. I agree. Consequently, having awarded no costs to the Defendant on the Plaintiff's unsuccessful motion, I similarly exercise my discretion to award no costs to the Plaintiff on this motion.

ORDER in T-925-19

THIS COURT ORDERS that:

1. The motion of the Defendant, His Majesty the King, for an order granting leave to amend the Statement of Defence and Crossclaim in accordance with the Amended Statement of Defence and Crossclaim of the Defendant, His Majesty the King attached as Schedule “A” to the notice of motion dated March 14, 2024 and to the amended notice of motion dated March 28, 2024, is dismissed.
2. No costs are awarded.

"Janet M. Fuhrer"

Judge

Annex “A”: Relevant Provisions

Federal Courts Rules, SOR/98-106.
Règles des Cours fédérales, DORS/98-106.

<p>Amendments with leave</p> <p>75 (1) Subject to subsection (2) and rule 76, the Court may, on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties.</p> <p>Limitation</p> <p>(2) No amendment shall be allowed under subsection (1) during or after a hearing unless</p> <p style="padding-left: 20px;">(a) the purpose is to make the document accord with the issues at the hearing;</p> <p style="padding-left: 20px;">(b) a new hearing is ordered; or</p> <p style="padding-left: 20px;">(c) the other parties are given an opportunity for any preparation necessary to meet any new or amended allegations.</p>	<p>Modifications avec autorisation</p> <p>75 (1) Sous réserve du paragraphe (2) et de la règle 76, la Cour peut à tout moment, sur requête, autoriser une partie à modifier un document, aux conditions qui permettent de protéger les droits de toutes les parties.</p> <p>Conditions</p> <p>(2) L'autorisation visée au paragraphe (1) ne peut être accordée pendant ou après une audience que si, selon le cas :</p> <p style="padding-left: 20px;">a) l'objet de la modification est de faire concorder le document avec les questions en litige à l'audience;</p> <p style="padding-left: 20px;">b) une nouvelle audience est ordonnée;</p> <p style="padding-left: 20px;">c) les autres parties se voient accorder l'occasion de prendre les mesures préparatoires nécessaires pour donner suite aux prétentions nouvelles ou révisées.</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>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</p>
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<p>(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>fonction ou autorité militaire ou ministérielle; 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>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

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: APRIL 4, 2024

ORDER AND REASONS: FUHRER J.

DATED: APRIL 10, 2024

APPEARANCES:

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Maija Pluto

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