Federal Court of Appeal | Cour d'appel fédérale

Date: 20190401

Docket: A-217-18

Citation: 2019 FCA 61

CORAM: **DE MONTIGNY J.A.**
WOODS J.A.
LASKIN J.A.

BETWEEN:

PHILIP JAMES MILLER

Appellant

and

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA

Respondent

Heard at Ottawa, Ontario, on March 4, 2019.

Judgment delivered at Ottawa, Ontario, on April 1, 2019.

REASONS FOR JUDGMENT BY: LASKIN J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

LASKIN J.A.

[1] Philip James Miller appeals from a judgment of the Federal Court (2018 FC 599, Mosley J.), granting a motion by the Crown in an action brought by Mr. Miller. The motion sought leave to amend the Crown's statement of defence to plead the six-month limitation period set out in subsection 269(1) of the *National Defence Act*, R.S.C. 1985, c. N-5 (NDA), and summary judgment dismissing the action as statute-barred.

[2] The action was commenced in the Federal Court in June 2015. Mr. Miller sought, among other things, damages in relation to a tragic incident that took place in July 1974 at Canadian Forces Base Valcartier, Québec. Mr. Miller was then 15 years of age. He was a Royal Canadian Army Cadet attending a six-week military training session. The session included a lecture in an indoor facility on the safe handling of munitions. A live grenade was mistakenly included in a box of "dummy" munitions that was circulated among the cadets. It exploded. Six cadets were killed and many others injured.

[3] Mr. Miller was not listed as injured and received no medical treatment in the aftermath of the explosion. Shortly after the explosion, a military Board of Inquiry into the incident was convened. Mr. Miller was interrogated several times. He was instructed not to disclose his testimony or discuss it with anyone.

[4] In response to the Crown's motion, Mr. Miller gave evidence that the explosion and the interrogation transformed his life. Among other things, he turned to drugs and alcohol, and stopped playing sports, going to school, attending church, and working. He understands that he experienced concussive shock, a form of traumatic brain injury, and he has been diagnosed as suffering from post-traumatic stress disorder. He stated that he still experiences constant ringing in his ears, and that he suppressed memories of the incident for many years.

[5] The Crown's statement of defence, as initially filed and then amended, pleaded that Mr. Miller's claim was statute-barred under the *Federal Courts Act*, R.S.C. 1985, c. F-7, and the *Civil Code of Québec*, S.Q. 1991, c. 64 (CCQ). Subsection 39(1) of the *Federal Courts Act*

makes provincial laws relating to prescription and limitation of actions applicable in proceedings in the Federal Court in the circumstances that it sets out:

39 (1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.	**39** (1) Sauf disposition contraire d'une autre loi, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale dont le fait générateur est survenu dans cette province.

[6] The Crown sought leave to amend to add a limitations defence based on subsection 269(1) of the NDA, on the basis that it "expressly provided" an exception within the meaning of subsection 39(1) of the *Federal Courts Act*. At the relevant time, subsection 269(1) established a six-month limitation period in the following terms:

269 (1) No action, prosecution or other proceeding lies against any person for an act done in pursuance or execution or intended execution of this Act or any regulations or military or departmental duty or authority, or in respect of any alleged neglect or default in the execution of this Act, regulations or any such duty or authority, unless it is commenced within six months after the act, neglect or default complained of or, in the case of continuance of injury or damage, within six months after the ceasing thereof.	**269** (1) Les actions pour un 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, ou pour une prétendue négligence ou faute à cet égard, se prescrivent par six mois à compter de l'acte, la négligence ou la faute en question ou, dans le cas d'un préjudice ou dommage, par six mois à compter de sa cessation.

[7] Subsection 269(1) was amended in 2013 to provide for, among other things, a two-year limitation period. However, the amended provision applies only in respect of an act, neglect or default occurring after September 1, 2018 (S.C. 2013, c. 24, ss. 99, 114; SI/2018-36).

[8] The Crown also sought summary judgment dismissing the action as time-barred. The parties agreed that the cross-examination of Mr. Miller on his affidavit filed in response to the motion would also serve as his examination for discovery. Counsel advised that the examination of the Crown's representative for discovery also took place before the hearing of the motion.

[9] In careful and thorough reasons, the motion judge granted both leave to amend and summary judgment in favour of the Crown on the ground that the action was statute-barred.

[10] On appeal to this Court, both the discretionary decision of the motion judge to grant leave to amend and his decision to grant summary judgment are subject to review on the standard set out in *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8, 10, 37, [2002] 2 S.C.R. 235; *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at para. 75, [2017] 1 F.C.R. 331. For this Court to intervene, we must be able to identify a palpable and overriding error on a finding of fact or mixed fact and law, or an incorrect decision on a pure or extricable question of law. Applying this standard, I see no basis on which this Court can interfere with the motion judge's decision.

[11] First, I see no error of law on the part of the motion judge in setting out the relevant considerations on a motion for leave to amend. As he stated (at para. 37) by reference to

Valentino Gennarini SRL v. Andromeda Navigation Inc., 2003 FCT 567, 232 F.T.R. 256, and *Canderel Ltd. v. Canada*, [1994] 1 F.C. 3, 1993 CanLII 2990 (C.A.), the Federal Court

> has consistently held that as a general rule, an amendment should be allowed for the purpose of determining the real question in controversy between the parties provided that it would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice […].

[12] He went on, quoting from *Valentino*, to list the factors relevant to the assessment of whether an amendment would cause prejudice that could not be compensated as including the timeliness of the motion to amend, the extent to which the amendment would delay an expeditious trial, the extent to which the original position caused another party to follow a course which is not easily altered, and whether the amendment facilitates the Court's consideration of the merits of the action.

[13] Nor do I see any error on the part of the motion judge, let alone any palpable and overriding error, in applying these factors and concluding that the amendment should be permitted. The motion judge noted (at paras. 39-40) that while no mention was made of subsection 269(1) in either the statement of defence or the amended statement of defence, both alleged that the action was time-barred. Mr. Miller was therefore aware from the outset that the timeliness of his claim would be in issue, and the fact that the amendment to plead subsection 269(1) was sought some two and a half years after the statement of defence was filed was not by itself determinative of whether leave should be granted. The motion judge also took into account (at para. 39) that the case was not ready to be set down for trial and that, unlike the situation in

other cases in which leave to amend was refused, the amendment would not delay an expeditious trial. He found (at para. 42) that

> [i]n the circumstances, including the facts that the action has been brought more than forty years after the event, that much of the evidence relating to the effects of the incident on the Plaintiff is no longer in existence, and that timeliness was pleaded in defence from the outset, […] it would serve the interests of justice to allow the amendment.

[14] On appeal, Mr. Miller submits that granting leave to amend did indeed cause him prejudice, on the basis that his entire case had been structured around the assumption that the governing limitation period was that established by the CCQ. But the motion judge found (at para. 40) that Mr. Miller "was not led to follow a course of action in preparation for trial that could not be easily altered," and this finding is entitled to deference. In any event, Mr. Miller's submissions to this Court do not explain how, in concrete terms, the amendment affected the structure of his case.

[15] Similarly, in my view the motion judge's consideration of the Crown's claim for summary judgment discloses no error of law or fact warranting this Court's intervention. In addressing the parties' arguments, the motion judge first considered (at paras. 43 and following) whether summary judgment could be granted based on a limitation period defence, and answered this question in the affirmative. He canvassed a number of cases in which summary judgment had been granted on this basis, including cases in which the applicable limitation period was that fixed by subsection 269(1). He also referred to *Baron v. Canada*, 2001 FCA 38, 104 A.C.W.S. (3d) 92, in which this Court upheld the granting of summary judgment based on this provision.

[16] Before the motion judge, Mr. Miller relied on the decision in *Duplessis v. Canada*, 2004 FC 154, 129 A.C.W.S. (3d) 92, as supporting the refusal of summary judgment. In that case, the Federal Court denied the Crown's motion for summary dismissal, based on subsection 269(1), of a claim by a former member of the Canadian Forces who had developed PTSD, and who alleged among other things that the Crown had breached the continuing fiduciary obligations that it owed him. The Federal Court concluded that the claim deserved to be tried.

[17] The motion judge noted (at para. 54) that Mr. Miller had, just before the hearing of the motion, amended his statement of claim to plead a continuing breach of fiduciary duty. However, he did not see the reasoning in *Duplessis* as applicable (at para. 55). He found that, unlike in *Duplessis*, there was no ongoing relationship in Mr. Miller's case that could create a fiduciary duty, and Mr. Miller had not met the criteria that, according to decisions of the Supreme Court, a claimant must meet to establish the existence of a fiduciary duty (at paras. 57-58). He also referred to rule 214 of the *Federal Courts Rules*, SOR/98-106, which requires both sides in a summary judgment motion to "put their best foot forward," and stated: "[t]hat means that it is not sufficient for a plaintiff to make bald assertions of liability claims in the hope that they will be established at trial" (at paras. 60-61). He concluded on this issue as follows (at para. 62):

> In this matter, the Plaintiff has not set out specific facts or adduced evidence that would support a finding that there is a genuine issue for trial with respect to the existence of a continuing fiduciary duty owed to him many years after the event and the breach of that duty that should bar the application of the prescription period. The record discloses that there was a tragic accident. Treatment was provided in the immediate aftermath to the injured. The Plaintiff was not among those listed as having been injured. He made no claim for assistance in the immediate or long-term aftermath of the incident. No evidence has been led to establish that in these circumstances, the Plaintiff was owed a continuing fiduciary duty many years after the event.

[18] The motion judge went on to refer (at para. 64) to the statement by the Supreme Court that a trial is not required if a summary judgment motion provides a process that allows the judge to make the necessary findings of fact, allows the application of the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result: *Hryniak v. Mauldin*, 2014 SCC 7 at para. 4, [2014] 1 S.C.R. 87. He stated (at para. 65) that he was "confident that the facts of this matter are sufficiently clear that the action can be resolved on summary judgment." In my view the motion judge's consideration of Mr. Miller's arguments based on *Duplessis* discloses no reversible error.

[19] The motion judge then turned to subsection 269(1) of the NDA. He observed (at para. 69) that Mr. Miller's "principal argument [was] that the courts have rarely enforced s 269 of the NDA and have found numerous reasons to avoid it." He stated that he was unable to accept this argument.

[20] Mr. Miller had also argued that, given the ongoing effects of the explosion and interrogation, he could rely on the concluding portion of subsection 269(1), under which the limitation period "in the case of continuance of injury or damage" expires "six months after the ceasing thereof." The motion judge considered in detail (at paras. 70-79) the case law interpreting this language. He concluded (at para. 80), based on the weight of authority, that he was obliged to "interpret the words 'continuance of injury or damage' as referring to the immediate acts which caused the injury or damage and not their consequences." That authority includes the decision of this Court in *Baron v. Canada* (at para. 4).

[21] The motion judge then considered and rejected two further arguments that Mr. Miller put forward. The first was that the conduct in issue was a criminal act, as found by the Coroner following an inquest into the incident (although the Regular Forces officer conducting the training session was subsequently acquitted of the charge of criminal negligence causing death). Mr. Miller argued that because the conduct was a criminal act, it could not constitute "an act done in pursuance or execution or intended execution of this Act" under subsection 269(1). In support of this argument Mr. Miller relied on a British Columbia decision, *White v. Canada (Attorney General)*, 2002 BCSC 1164, 4 B.C.L.R. (4th) 161, in which it was held (at paras. 81-89) that claims based on sexual misconduct were not subject to subsection 269(1), because sexual assault had nothing to do with any authority conferred by the NDA. The motion judge here in effect distinguished *White*, holding (at paras. 81-86) that both the training of cadets and the conduct of a Board of Inquiry came within the authority conferred by the NDA, so that subsection 269(1) nonetheless applied.

[22] Mr. Miller's second argument was that subsection 269(1) protects only servants of the Crown and not the Crown itself. The motion judge noted (at paras. 87-90) that paragraph 24(*a*) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, permits the Crown to raise "any defence that would be available if the proceedings were a suit or an action between persons in a competent court" ["tout moyen de défense qui pourrait être invoqué […] devant un tribunal compétent dans une instance entre personnes"]. This, he stated, was "an express statement of Parliament's intention that all defences are available to the Crown including those based on limitation periods such as that found in s 269(1)" (citations omitted).

[23] I can identify no error of law on the part of the motion judge in his interpretation of subsection 269(1). However, before this Court Mr. Miller advances an additional argument relating to the interpretation of the provision, one that was not put to the motion judge. He submits that the CCQ "informs" subsection 269(1) (appellant's memorandum, para. 27), and that this means that even though subsection 269(1) "expressly provides for a different prescription period than the CCQ, [it] must be applied within the framework governing prescription in Quebec" (appellant's memorandum, para. 30).

[24] As developed in Mr. Miller's memorandum and elaborated in oral argument, the submission is that the principle of bijuralism requires that the NDA and the *Civil Code of Québec* be read "in harmony," and that this entails "supplementing" the NDA provision by reading into it all of the provisions of the CCQ dealing with prescription, other than the basic three-year prescription period in article 2925. These would include article 2926.1, which establishes a 10 year prescription period for an action for damages for bodily injury resulting from an act which could constitute a criminal offence, running from the date the victim becomes aware that the injury suffered is attributable to that act, and a 30 year prescription period where the injury results from violent behaviour suffered during childhood. The key authority on which Mr. Miller relies in support of this submission is this Court's decision in *Canada (Attorney General) v. St Hilaire*, 2001 FCA 63, [2001] 4 F.C. 289, in which the Court discussed the suppletive role of the civil law where a federal enactment is silent.

[25] I see no merit in this submission. In my view it seeks not to supplement but to supplant subsection 269(1) of the NDA. It is contrary to the plain language of both that provision and subsection 39(1) of the *Federal Courts Act* (quoted above in paragraph 5).

[26] The latter provision, while it makes provincial prescription and limitations laws generally applicable in proceedings in the Federal Court in respect of a cause of action that arises in a province, creates a specific exception where the applicable federal statute expressly establishes a limitation period. The former provision does so; at the relevant time it expressly established a limitation period of six months for the causes of action to which it refers. This Court has held that in these circumstances the limitation period established by the federal statute applies, and a judge of the Québec Court of Appeal (sitting alone) has treated this decision as determinative: *Ingredia S.A. v. Canada*, 2010 FCA 176 at para. 32, 406 N.R. 278; *Procureur général du Canada c. Zen Cigarette inc*., 2017 QCCA 1928 at para. 6, [2017] J.Q. no 17270 (QL).

[27] I acknowledge the motion judge's observation (at para. 30) that if he had come to a different decision on the application of subsection 269(1), the application of the CCQ would have presented a triable issue. But given the terms of subsection 269(1) there is no room for the prescription periods set out in the CCQ to apply to Mr. Miller's claim.

[28] Returning to the issues argued before the motion judge, the next questions that called for his consideration were whether the discoverability principle applied to subsection 269(1) and, if so, when Mr. Miller's claim was reasonably discoverable. As the motion judge explained (at para. 91), discoverability is a judge-made interpretative tool, now sometimes expressly codified

in legislation, for construing limitation statutes: see *Ryan v. Moore*, 2005 SCC 38 at paras. 22-23, [2005] 2 S.C.R. 53. It provides that a cause of action arises when the plaintiff has discovered or ought to have discovered, by the exercise of reasonable diligence, the material facts on which it is based – the occurrence of damage and the identity of those responsible. Before this Court, the parties accepted that the content of the discoverability principle is the same in the civil law as it is in the common law.

[29] Though the motion judge reviewed (at paras. 90-99) Mr. Miller's arguments that the principle applied, the Crown's submissions that it did not, and the authorities marshalled in support of the competing positions, he ultimately did not find it necessary to rule on this question. He concluded (at para. 100) that even if the discoverability principle applied, it would not assist Mr. Miller.

[30] In reasoning towards this conclusion, the motion judge began with the fact that the statement of claim had been issued on June 2, 2015; it followed, applying subsection 269(1) and the discoverability principle, that the action would be out of time if Mr. Miller discovered his claim before December 2, 2014.

[31] The motion judge then reviewed (at paras. 102-106) the evidence bearing on the timing of Mr. Miller's discovery of his claim. The motion judge found it reasonable to assume that, given Mr. Miller's age at the time of the 1974 events, he did not understand their full import or impact when they occurred.

[32] The motion judge took note of Mr. Miller's evidence that, while he had repressed for many years his memories of what had occurred, by 2005 these memories had started to return, and he knew by then that his psychological injuries had affected the course of his life. The motion judge recounted that Mr. Miller began to search the Internet for information about the incident, and in 2006 found a blog post by a fellow former cadet. In 2008, he attended a reunion of former cadets, and began to talk about the incident. The former cadets discussed the possibility of starting a class action, and Mr. Miller exchanged views about this possibility with one of the former cadets. Mr. Miller gave an interview about the incident to a journalist, who published a book on the subject in 2011. He began to see a psychologist in 2013. He attended the 40th anniversary commemoration of the incident in 2014, and gave interviews both to the maker of a documentary film on the incident and to investigators from the Office of the Department of National Defence and Canadian Forces Ombudsman, which published a report on the incident in 2015. Mr. Miller applied for a Veterans Affairs Canada disability pension in 2013. The report of an independent psychological examination conducted in July 2017 attributed to Mr. Miller the statement that eight years earlier he had started to deal with what had happened to him.

[33] Based on his review of the evidence, the motion judge stated (at para. 107) that he was "satisfied that [Mr. Miller] was aware that he had suffered damages as a result of the explosion and subsequent events and that liability for the damages could be attributed to the Defendant Crown at least as early as 2008." He therefore found that the discoverability principle did not prevent the application of the limitation period in subsection 269(1). He concluded (at para. 110) that the action was time-barred, there was no serious issue to be tried, and summary judgment therefore had to be granted dismissing the action.

[34] The time when a cause of action arises and the time when a limitation period begins "are highly factual questions; how they are answered varies from case to case depending on the circumstances and calls for great deference on the part of an appellate court": *Pellerin Savitz LLP v. Guindon*, 2017 SCC 29 at para. 11, [2017] 1 S.C.R 575. In my view, the motion judge's finding on when Mr. Miller's claim was discoverable discloses no palpable and overriding error.

[35] Before this Court, Mr. Miller submits that a letter dated July 28, 2016, sent by the Minister of National Defence and the Vice Chief of the Defence Staff to the victims of the Valcartier incident, should be treated as determinative of the discoverability issue. The letter followed the report of the Ombudsman on the incident released in June 2015, and was followed in March 2017 by the Government of Canada's announcement of a program of financial recognition and health care support for the victims of the Valcartier incident. The letter contained an apology for the pain and suffering caused by the incident. It also included the following paragraph:

> We also understand that some victims have kept silent all these years after being instructed to do so by military personnel. We encourage all those who have been affected by this event to discuss the circumstances of the incident and its after-effects on their lives without restriction – privately and in public forums.

[36] Mr. Miller submits that it was only with the sending of this letter that the instruction not to discuss the incident given to him and others who were interrogated before the Board of Inquiry ceased to have effect, and that his cause of action was, therefore, discoverable only as of the date of the letter.

[37] I cannot accept this submission. While the evidence before the motion judge showed that Mr. Miller suppressed his memories of the incident for many years, it also showed that he recovered certain memories and began to discuss the incident and the possibility of legal recourse well before the letter was sent to him. To treat the date of the letter as the date on which the limitation period began to run would not accord with the evidence and the motion judge's findings.

[38] Mr. Miller submits in the alternative that a statement in his affidavit – a statement on which he was not cross-examined – raises a genuine issue for trial that the date of discoverability was the date on which Mr. Miller commenced his action. That statement, found in paragraph 30 of his affidavit, read as follows: "After careful thought, and much psychological support, I filed an action seeking redress in the Federal Court in June 2015. I was psychologically completely unable to do so prior to that time."

[39] I cannot accept this alternative submission either. Mr. Miller's statement amounts to an expert psychological opinion, one that he is not qualified to give. As his counsel confirmed in oral argument, none of the evidence from psychological experts filed on the motion – the summary of a psychological report dated November 30, 2014, and the July 2017 report of an independent psychological examination conducted in June 2017 – contained an opinion as to when Mr. Miller became psychologically able to bring an action. The proposition set out by the Supreme Court in *Guarantee Co. of North America v. Gordon Capital Corp*., [1999] 3 S.C.R. 423 at para. 31, 178 D.L.R. (4th) 1, applies: "a self-serving affidavit is not sufficient in itself to create a triable issue in the absence of detailed facts and supporting evidence."

[40] Asked in oral argument about the absence of supporting evidence on this issue, counsel for Mr. Miller responded that the issue was one that he planned to deal with at trial. But as the motion judge stated (at para. 61), the obligation rests on both sides in a summary judgment motion to put their best foot forward, and it is not enough to make assertions in the hope that they will be established at trial.

[41] For these reasons, it is my view that the appeal must be dismissed. As did the motion judge, I emphasize that this conclusion does not detract in any way from the effects of the incident on Mr. Miller.

[42] The Crown does not seek costs, and I would not award them.

"J.B. Laskin"
J.A.

“I agree.
Yves de Montigny J.A.”

“I agree.
Judith Woods J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-217-18
(APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE MOSLEY OF THE FEDERAL COURT DATED JUNE 11, 2018, DOCKET NUMBER T-920-15)	
STYLE OF CAUSE:	PHILIP JAMES MILLER v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 4, 2019
REASONS FOR JUDGMENT BY:	LASKIN J.A.
CONCURRED IN BY:	DE MONTIGNY J.A. WOODS J.A.
DATED:	APRIL 1, 2019

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