

Copies of the *Federal Courts Rules* information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

April 22, 2024

Issued by: _____
(Registry Officer)

TO: GAERTNER BARON PROFESSIONAL CORPORATION

Barristers and Solicitors
604-119 Spadina Ave.
Toronto, ON M5V 2L1
Fax: (416) 260-2700

Per: Arie Gaertner / Karen Sanchez / Maija Pluto

Tel: (416) 260-2100

Emails: Arie@gaertnerbaron.com; Karen@gaertnerbaron.com;
Maija@gaertnerbaron.com

Lawyers for the Respondent

AND TO: DOMINIC SHALE ALEXANDER

20 Deerfield Drive , Unit 1505
Nepean, ON K2G 4L2

The Respondent

NOTICE OF APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the Order of Madam Justice Fuhrer (the Motion Judge) dated April 10, 2024, in Court File T- 925-19 (the “Order”), by which she dismissed the Appellant’s motion to amend the Statement of Defence and Cross-claim to plead sections 269 and 270 of the *National Defence Act*, RSC, 1985, c N-5 (the “Act”).

THE APPELLANT ASKS:

1. That the Order be set aside;
2. That the Appellant be granted leave to amend the Statement of Defence and Cross-claim (SOD) to plead the limitation period set out in section 269 of the *Act*; and,
3. Such further and other relief as this Honourable Court may deem just in the circumstances.

THE GROUNDS OF APPEAL are as follows:

1. The Plaintiff (Respondent) is the former girlfriend of the defendant Dominic Alexander. Mr. Alexander is a former member of the Canadian Armed Forces (CAF).
2. The Plaintiff alleges that Mr. Alexander abused the Plaintiff physically, emotionally, sexually, and psychologically during course of their relationship, which ended in mid-January 2006.
3. In June 2019, the Plaintiff brought an action against Alexander and against the Appellant. The Plaintiff alleges that the CAF is liable to her in negligence, under the *Occupiers Liability Act*, for breach of section 7 of the *Charter*, and for breach of fiduciary duty.
4. Section 269 of the *Act* sets out a two-year limitation period for the benefit of persons performing duties under the *Act*. It bars any action against the Appellant for:

- a. an act done in pursuance or execution or intended execution of the *National Defence Act* or any regulations or military or departmental duty or authority;
 - b. any neglect or default in the execution of this *Act* or any regulations or military or departmental duty or authority; and
 - c. an act or any neglect or default that is incidental to an act, neglect or default described in paragraph (a) or (b).
5. The version of section 269 of the *Act* in force at the time the Plaintiff suffered the injuries allegedly inflicted by Mr. Alexander set out a 6 month limitation period.
6. This action was commenced over 12 years after the Plaintiff ended her relationship with Mr. Alexander.
7. Section 270 of the *Act* sets out a bar against any action 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.
8. Rule 75(1) of the *Federal Courts Rules*, SOR/98-106 provides that a Court may, on a motion, at any time, allow a party to amend a document on such terms that will protect the rights of all parties.
9. The Appellant served the SOD in August 2019. Due to inadvertence, the Appellant did not plead the limitation period set out in section 269 of the *Act* or the statutory bar set out in section 270 of the *Act*.
10. By Notice of Motion dated March 14th 2023, the Appellant sought leave to amend the SOD pursuant to Rule 75 of the *Federal Courts Rules*, SOR/98-106 to plead 270 of the *Act*. The Appellant amended the notice of motion on March 28, 2024 to seek leave to amend the SOD to plead the limitation period set out

in section 269 of the *Act*.

11. The Motions Judge dismissed the Appellant's motion to plead and rely upon either section 269 section 270 of the *Act*.
12. The Motion Judge erred in denying the Appellant leave to plead the limitation period in section 269 of the *National Defence Act*.
13. The Motion Judge properly concluded that the amendment sought by the Appellant to plead section 269 had a reasonable prospect of success, and that it could facilitate the Court's consideration of the merits of the action.
14. However, the Motion Judge erred in concluding that allowing the amendment to plead section 269 would cause the respondent to suffer prejudice that could not be compensable in costs.
15. The Motion Judge erred in failing to acknowledge that granting leave to the Appellant to rely upon the limitation period in section 269 would not have necessitated any additional discoveries or fact-finding on the part of the Plaintiff, and would not have necessitated an adjournment of the trial.
16. The Motion Judge erred in concluding that the Plaintiff's litigation strategy would have been different had she been aware "at the outset of the litigation" that the Appellant intended to rely upon the limitation period in section 269. The applicability of the limitation period is a purely legal argument.
17. The Motion Judge erred in conflating the considerations applicable to the prejudice claimed by the Plaintiff to the failure to plead section 270 of the *Act* earlier in the litigation, with the lack of prejudice to the Plaintiff in the failure to plead section 269 of the *Act*.
18. The Motion Judge erred by distinguishing upon cases where leave was granted to plead Section 269 of the *Act* on the eve of trial.
19. The Motion Judge erred by failing to consider the importance of the amendment

to the application of the *Act* and its provisions to the case at hand and to the real issues in dispute between the parties.

20. The Motion Judge erred by assigning no weight to the prejudice caused to the Appellant by not permitting him to raise the limitation period in section 269 of the *Act*.
21. Such further grounds as counsel may advise and this Court permit.

Dated: April 21, 2024



ATTORNEY GENERAL OF CANADA

Department of Justice Canada

Ontario Regional Office

120 Adelaide Street West, Suite #400

Toronto, ON M5H 1T1

Fax: (647) 973-4328

Per: Sean Gaudet / Melissa Gratta
Adam Gilani / Alyson E Sutton

Tel: (647) 293-4462 / (647) 527-6392
(416) 557-3574 / (437) 423-0106

Email: sean.gaudet@justice.gc.ca
melissa.gratta@justice.gc.ca
adam.gilani@justice.gc.ca
alyson.sutton@justice.gc.ca

Solicitors for the Appellant