Federal Court of Appeal | Cour d'appel fédérale

Date: 20241029

Dockets: A-150-24
A-203-24

Citation: 2024 FCA 176

CORAM: **WOODS J.A.**
LASKIN J.A.
MONAGHAN J.A.

Docket: A-150-24

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

MANDY EASTER AND DOMINIC SHALE ALEXANDER

Respondents

Docket: A-203-24

AND BETWEEN:

HIS MAJESTY THE KING

Appellant

and

MANDY EASTER AND DOMINIC SHALE ALEXANDER

Respondents

Heard at Toronto, Ontario, on September 4, 2024.

Judgment delivered at Ottawa, Ontario, on October 29, 2024.

REASONS FOR JUDGMENT BY:	LASKIN J.A.
CONCURRED IN BY:	WOODS J.A. MONAGHAN J.A.

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REASONS FOR JUDGMENT

LASKIN J.A.

I. Introduction

[1] These reasons address appeals by the Crown, which were ordered to be heard together, from two pre-trial orders in the same proceeding. The first appeal, in Court File A-150-24, is from an order of the Federal Court (2024 FC 568, Fuhrer J.) dismissing the Crown's motion under rule 75 of the *Federal Courts Rules*, SOR/98-106, for leave to amend its statement of defence and crossclaim. The second appeal, in Court File A-203-24, is from an order of the same motion judge (2024 FC 845), dismissing as an abuse of process a second motion by the Crown seeking the same rule 75 relief. The original of these reasons will be filed in Court File A-150-24, and a copy in Court File A-203-24. Since the appeals were not consolidated, an original judgment will be placed in each court file.

[2] The underlying action was commenced in 2019 by the respondent, Mandy Easter, against her former common law spouse, Dominic Shale Alexander, and the Crown. In her statement of claim, Ms. Easter alleges that she suffered serious sexual, physical, and psychological abuse at the hands of Mr. Alexander. She pleads that the abuse began in 2002, shortly after he enlisted in the Canadian Armed Forces, and continued from 2004 to 2006, when Ms. Easter resided with him at Canadian Forces Base Petawawa.

[3] Ms. Easter seeks to assign vicarious liability and liability in negligence to the CAF (and accordingly to the Crown) for Mr. Alexander's conduct, and for failures on the part of the CAF

to implement and enforce appropriate measures and policies to protect female partners of CAF members from abuse. She also pleads that the CAF Military Police failed to investigate with due diligence her complaints of sexual, physical, and psychological abuse despite having actual notice of assaults she reported. She describes herself as a victim of "a systemic and pervasive problem that has long victimized partners of military personnel."

[4] Ms. Easter's claims include damages for sexual, physical, and psychological assault, breach of duty of care, and breach of section 7 of the *Canadian Charter of Rights and Freedoms*, as well as punitive damages. Mr. Alexander has not appeared in the action.

II. The Crown's first motion

[5] Some five years after the action was commenced, and some six weeks before the trial was scheduled to begin, the Crown moved under rule 75 for leave to amend its statement of defence and crossclaim to plead the statute bar in section 270 of the *National Defence Act*, R.S.C. 1985, c. N-5 (NDA). That provision protects officers and non-commissioned members of the CAF from liability in respect of anything done or omitted in the execution of their duty under the Code of Service Discipline, unless they acted, or omitted to act, maliciously and without reasonable and probable cause.

[6] A short time later, the Crown amended its motion to add a request for leave to plead the time bar in subsection 269(1) of the NDA. Rule 75 and the statutory provisions in question read as follows (underlining added):

Amendments with leave

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.

Modifications avec authorisation

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.

Limitation

(2) No amendment shall be allowed under subsection (1) during or after a hearing unless

(a) the purpose is to make the document accord with the issues at the hearing;

b) a new hearing is ordered; or

(c) the other parties are given an opportunity for any preparation necessary to meet any new or amended allegations.

Conditions

(2) L'autorisation visée au paragraphe (1) ne peut être accordée pendant ou après une audience que si, selon le cas :

a) l'objet de la modification est de faire concorder le document avec les questions en litige à l'audience;

b) une nouvelle audience est ordonnée;

c) les autres parties se voient accorder l'occasion de prendre les mesures préparatoires nécessaires pour donner suite aux prétentions nouvelles ou révisées.

Limitation period[*]

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

Prescription

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

[*] This is the version of the provision in force at the time of the alleged assaults. The current version sets out a two year limitation period.

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.	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.
Actions barred	**Immunité judiciaire**
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.	**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.

[7] The Crown filed no affidavit or other evidence in support of its motion. In its written representations, it described the failure to plead section 270 of the NDA in its statement of defence simply as an "omission," and section 269 as "an omitted legal defence," but provided no details as to how or why the "omission" occurred. It submitted that permitting the amendments would not require any additional evidence or any change in Ms. Easter's theory of the case.

[8] In response to the motion, Ms. Easter filed affidavit evidence from one of her counsel in the action. Counsel deposed, among other things, that meeting a plea of section 270 of the NDA

would require Ms. Easter to amend her statement of claim to plead particulars of malice on the part of the Military Police, and to gather and marshal evidence to try to demonstrate malice. However, counsel went on, the appropriate time for doing so would have been at the discovery stage of the action, some two years earlier. But Ms. Easter had not fully pursued the malice issue on discovery because malice had not been pleaded. For the same reason, she had not taken steps to locate and secure the evidence of all of the up to 11 Military Police officers who, she alleged, were involved in the events in question. Only three of the 11 were on the Crown's witness list for trial. Had malice been pleaded, counsel deposed, a skip tracer would have been hired to try to find the others.

[9] Ms. Easter's counsel further deposed that the amendments sought would require Ms. Easter to change her litigation strategy late in the litigation, shortly before trial. Among other things, she would, as already explained, have to amend the statement of claim to plead particulars of malice on the part of the Military Police, to try to locate the Military Police officers whose addresses were not known, to examine them under oath, to ensure they were called as witnesses at trial, and to try to gather documentary evidence relating to the CAF's knowledge, training, and condonation of the Military Police's alleged systemic failures to investigate and prosecute claims of intimate partner violence by CAF members. It was unlikely, counsel stated, that these steps could be completed in the time remaining before the trial. Efforts would also have to be made to secure at least five additional days of trial time.

[10] Counsel went on to depose that if the Crown had pleaded section 270 earlier, a claim for breach of section 15 of the Charter would have been added. However, advancing a section 15 claim was no longer feasible, given the available timing.

[11] Counsel also gave evidence concerning the consequences for Ms. Easter of a delay in having her claim tried. These included not only adverse financial consequences—she would continue to be in "a financially precarious position" the longer she waited for the trial—but also the additional mental and emotional anguish that would result from a delay. She explained that Ms. Easter had been diagnosed with depression and post-traumatic stress disorder as a direct result of the matters pleaded in the statement of claim, and she had been mentally prepared for the trial to conclude as scheduled.

[12] The motion was heard by Justice Fuhrer, who had been assigned as the trial judge. She dismissed the motion.

[13] In setting out the basis for doing so, the motion judge began by referring to two of the leading cases in this Court on the test for applying rule 75. As she observed (at paragraph 9 of her reasons),

> [j]urisprudence overlays the … 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 by motion judge]; *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 … at 10.

[14] She went on to state (at paragraph 10), referring to *McCain Foods Limited v. J.R. Simplot Company*, 2021 FCA 4 at para. 20, leave to appeal to SCC refused, 39600 (8 July 2021), among other authorities, that the Court must ask itself, in addition, whether assuming the facts pleaded to be true, the grounds to be pleaded in the proposed amendment have a reasonable prospect of success, or alternatively, fail to disclose a reasonable cause of action.

[15] The motion judge found that while the proposed amendments had a chance of success and could facilitate the Court's consideration of the merits of the action, allowing the amendments would cause prejudice to Ms. Easter that would not be compensable by an award of costs and would not serve the interests of justice. This was so, she stated (beginning at paragraph 13), for a number of reasons.

- The issue of timeliness of the claim had not been raised until the Crown brought its motion, "five years after the action was commenced, with the trial only weeks away." Unlike the position in other cases referred to in argument, in which leave to amend was granted (*Miller v. Canada*, 2018 FC 599 at paras. 41-42, affirmed 2019 FCA 61, citing *Kochems v. Canada*, 2008 FC 960 at paras. 12-14), the Crown had not pleaded the facts supporting the defence in its original pleading. This was a "significant factor" in granting leave in those cases. Here, by contrast, the proposed amendments raised new defences, rather than merely clarifying facts that had already been pleaded.

- The statute bar in section 270 could be overcome only by establishing that a CAF member "acted, or omitted to act, maliciously and without reasonable and probable cause." The motion judge accepted that had Ms. Easter been aware from the outset that the Crown intended to rely on sections 269 and 270, her litigation strategy would have been different. Requiring a party to change its litigation strategy late in the litigation has been recognized as non-compensable prejudice: *Horani v. Manulife Financial Corporation*, 2023 ONCA 51 at para. 36; *Burton v. Docker*, 2023 ONSC 1974 at para. 17.

- The fact that Ms. Easter had posed on discovery certain questions involving the alleged malice did not mitigate the prejudice: malice is but one element of the section 270 defence.

- The alleged omission was not of something "unknowable" to the Crown. From other cases in which sections 269 and 270 had been litigated, it was aware of these provisions, as well as the necessity of pleading facts supporting any attempt to rely on them.

- The proposed amendments did more than clarify facts that had already been pleaded. They raised new defences, and the Crown's original position had caused Ms. Easter to follow a course of action "from which it [was] not easy to pivot at this stage."

- The motion judge was not persuaded by the Crown's argument that an amendment would be timely so long as it was sought before trial. To the contrary, she expressed the view that the later in the life of a proceeding an amendment was sought, the greater the chance of prejudice to the other party.

- Here, permitting the amendments would delay the trial prejudicially to Ms. Easter in a manner not compensable by an award of costs. As stated in *Canderel* at 13, quoting *Ketteman v. Hansel Properties Ltd.*, [1987] A.C. 189 at 220, in a passage the motion judge described as "apt,"

> 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.

- In the context of a long-running case with a trial imminent, the Crown had failed to provide a satisfactory explanation for its "dilatoriness or somnolence in seeking the requested amendments."

[16] The motion judge accordingly dismissed the Crown's first motion. The Crown has appealed to this Court from the motion judge's dismissal order. However, its notice of appeal in this appeal seeks leave to amend to plead only the section 269 limitation period defence, and not the section 270 statute bar.

III. The Crown's second motion

[17] In the weeks before the trial was to commence, the Crown produced what Ms. Easter's counsel described, in an affidavit filed on the second motion as "dozens of materials/documents." Then, 10 days before the scheduled trial start date, the Crown delivered to Ms. Easter as continuous discovery material a document entitled "Corrected Answers to Undertakings." Counsel for Ms. Easter described these answers as "'reversing' [the Crown's] evidence on critical facts which were relied on by the Plaintiff." The document containing them was prepared based on information obtained by the Crown from a third-party witness relating to the existence and activities of a Family Violence Awareness Team at CFB Petawawa, including during the period when Ms. Easter resided there.

[18] Ms. Easter considered it necessary, given the importance of this information and material to her claim, to conduct further discovery. However, there was insufficient time to do so before the trial. Despite the prejudice that would result, she therefore sought an adjournment of the trial for that purpose. The Crown consented. The commencement of the trial was rescheduled from April 2024 to December 2024, and five more trial days were added.

[19] Shortly after the adjournment was granted, the Crown brought a second motion for leave to amend to plead both section 269 and section 270 of the NDA. This time the Crown supported its motion with evidence, in the form of an affidavit from one of its counsel in the matter. Counsel deposed that in the summer of 2019, when she prepared the draft statement of defence and crossclaim, she was not aware of these provisions, and that she did not become aware of them until March 1, 2024, when a Department of National Defence lawyer asked whether the

lawyers involved in this matter had considered pleading section 270. She also stated, on information and belief from lead counsel for the Crown, that he had not been aware of the provisions either, though the affidavit did not specify when he became aware of them.

[20] The motion judge dismissed the second motion, which she specifically found (at paragraph 4 of her reasons) to be an abuse of process. She stated (at paragraph 6) that it involved "evidence and arguments that … should have been raised in the first motion … and, thus, [represented] an impermissible effort to relitigate what already has been litigated."

[21] She went on to state (at paragraph 8) that there was no evidence before the Court "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," and that counsel could only speculate about what the position would have been had the provisions been put to their client at that time. Moreover, the motion judge stated (at paragraph 9), the Court had already determined in the first motion that the alleged omission "[was] not the same as something that was unknowable," and that the proposed amended pleading "raise[d] new defences, rather than clarif[ying] pleaded facts." She stated that she considered "untenable" the Crown's attempt "to draw a distinction between counsel's inadvertent omission and their asserted client's position."

[22] The motion judge then turned to the Crown's submission that the adjournment of the trial and the availability of further discovery were "significant new developments and marked changes in circumstances" from the position at the time of the first motion, so that the proposed amendments would no longer cause non-compensable prejudice to Ms. Easter. While the motion

judge stated that she did not necessarily disagree, she saw this submission as failing to recognize that, as the Crown had acknowledged, the change in circumstances was attributable to the Crown's own conduct that necessitated the adjournment. She was not persuaded that issue estoppel was inapplicable in those circumstances.

[23] In the end, the motion judge made no determination as to whether issue estoppel applied. She referred to the three preconditions for its application set out in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 25—that (1) the same question has been decided; (2) the judicial decision which is said to create the estoppel was final; and (3) the parties or their privies were the same. She stated that regardless of whether these preconditions applied, the abuse of process doctrine applies to pleadings motions: *National Industries Inc. v. Kirkwood*, 2023 ONCA 63 at para. 26. She found (at paragraph 14) that to grant the relief sought by the Crown would violate principles—such as judicial economy, consistency, finality and the integrity of the administration of justice—that the abuse of process doctrine is meant to safeguard, and would encourage litigation by installment or relitigation. In doing so she referred to the leading Canadian authority on abuse of process by relitigation, *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63.

[24] "At its core," the motion judge concluded (at paragraph 15), the second motion sought to reargue the first motion and make arguments that were available at the time of the first motion; it should therefore be dismissed as an abuse of process—or as frivolous and vexatious. These qualities were "underscored," she stated (at paragraph 16), by the pending appeal from the order

on the first motion. Hearing the second motion before the appeal was determined could "foster judicial inconsistency" and waste scarce judicial resources.

[25] As set out above, the Crown has also appealed from the motion judge's order on the second motion. Its notice of appeal seeks leave to plead both section 269 and section 270. On a motion by the Crown for an order consolidating the two appeals, they were instead ordered to be heard, and were heard, together.

IV. Standard of review

[26] The decision whether to grant leave to amend a pleading is discretionary. The standard of review on appeal is therefore the highly deferential standard of palpable and overriding error for questions of fact and mixed fact and law, and correctness for questions of law: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8, 10 and 36; *Bigeagle v. Canada*, 2023 FCA 128 at para. 27, leave to appeal to SCC refused, 40910 (6 June 2024).

[27] A decision to dismiss a proceeding as an abuse of process by relitigation is also discretionary. It too, accordingly, is subject to the appellate standard of review: *Housen*; *Sanofi-Aventis Canada Inc. v. Novopharm Ltd.*, 2007 FCA 163 at para. 13, leave to appeal to SCC refused, 2007 CanLII 45677.

[28] I will discuss in sequence the main issues raised by the Crown in its appeal from the first order, and then those raised in its appeal from the second.

V. The Crown's appeal from the first order

[29] Though in the first motion the Crown sought leave to amend to plead both section 269 and section 270, the Crown's appeal from the order on the first motion is, as I have noted, confined to section 269, the time bar provision of the NDA. In this appeal, the Crown makes four main submissions with respect to the motion judge's treatment of the Crown's request for leave to plead that provision. All but the last also apply to the order on the second motion.

[30] First, the Crown submits that the motion judge erred in law in refusing to allow the amendment on the basis that the provisions of the NDA were not "unknowable" by the Crown. By this logic, it submits, "the Crown would never be granted leave to amend to plead statutory defences."

[31] Second, the Crown submits, the motion judge erred in citing as a ground for dismissing the first motion that the proposed amendments raised distinct defences instead of merely "clarifying the issues in dispute."

[32] Third, the Crown submits that rule 75 requires consideration of what is fair to both parties. But here, it says, the motion judge failed to consider the prejudice caused to the Crown when it was not permitted to raise the time bar and statute bar defences.

[33] And fourth, it submits that the motion judge erred in finding that allowing the Crown to plead section 269 would have delayed the trial, because applicability of the limitation period was a legal issue that required no additional discoveries or evidence to decide.

[34] I will address these points in turn.

[35] First, I see no error of law in the motion judge considering whether the provisions of section 269 were "unknowable" to the Crown. As her reference in this context to *Value Village Market (1990) Ltd. v. Value Village Stores Co.*, [1999] F.C.J. No. 1663 at para. 17, helps to show, this question formed part of her consideration of the timeliness of the Crown's motion.

[36] Timeliness—including any alleged lack of timeliness—is virtually always a relevant factor in a motion for leave to amend: *Apotex Inc. v. Bristol-Myers Squibb Company*, 2011 FCA 34 at paras. 33-37. In *Value Village Market*, the motion judge considered whether the corporate defendant's claim that its representative (a vice president) was unaware of the factual circumstances supporting a proposed amendment mitigated its untimeliness. The Court ultimately rejected this argument because the underlying facts were "reasonably knowable" to the defendant even if not known to its representative. Here, the motion judge engaged in similar, and equally permissible, reasoning when considering the timeliness of the amendments sought.

[37] Moreover, the Crown's submission that if unknowability can be considered, "the Crown would never be granted leave to amend to plead statutory defences," is without merit. In rule 75 motions, all relevant factors are to be considered and balanced, and no single factor is dispositive: *Sanofi-Aventis Canada Inc. v. Teva Canada Limited*, 2014 FCA 65 at para. 17.

[38] Second, I would not accept the Crown's submission that the motion judge erred by treating the proposed section 269 amendment as raising a new and distinct defence, rather than as

merely clarifying the issues already in dispute. This Court accepted in *Merck & Co., Inc. v. Apotex Inc.*, 2003 FCA 488 at para. 33, citing *Ketteman*, that there is "a clear difference" between the two situations, and that more justification for the former was required. In this case no limitations defence at all had been pleaded. Nor did the defence plead facts relevant to timeliness more generally, as the motion judge had noted was the case in *Miller*. Thus there was no reviewable error in the motion judge characterizing as she did the Crown's proposed amendments to the statement of defence to raise timeliness, and plead the limitation defence, for the first time.

[39] Third, it is inaccurate to say that the motion judge failed to consider the impacts of her decision on the Crown. She did so in paragraphs 10 and 11 of the reasons for the first order, and concluded that the proposed amendments had sufficient merit to warrant balancing those impacts against the impacts on Ms. Easter if leave was granted. She proceeded to balance the two sets of interests in paragraph 17 and elsewhere.

[40] Fourth and finally, I see no reviewable error on the part of the motion judge in finding, based on the record then before her, that allowing the Crown to plead section 269 would have delayed the trial. Ms. Easter's response to the Crown's first motion included evidence and submissions on her behalf that if leave was granted to the Crown to amend to plead section 269, she would require an amendment to the statement of claim to plead that if the provision applied to her, it would infringe her rights under sections 7 and 15 of the Charter and could not be saved by section 1. Properly developing this Charter challenge would take more than a month, she

submitted, and it would require an adjournment and additional trial time. It was open to the motion judge to accept this evidence and factor it into her analysis.

[41] As I have noted, the motion judge here was also the trial management judge. She had participated in at least two trial management conferences before deciding the first motion. She had also heard and dismissed Ms. Easter's motion to adduce expert actuarial evidence and call the actuary to testify at the trial.

[42] This Court has recognized the deference owing to case management judges, given their knowledge of the files with which they deal and the palpable and overriding error standard of review that now applies to their discretionary decisions: *Paradissis v. Canada*, 2019 FCA 70 at para. 6, citing *Turmel v. Canada*, 2016 FCA 9 at paras. 9-12. Similar considerations should apply in reviewing orders of trial management judges like the order of the motion judge here. Her assessment of the need for additional evidence to mount a Charter challenge, based on the record as it stood when the first motion was argued, is one to which this Court should defer.

[43] I would dismiss the Crown's appeal from the first order.

VI. The Crown's appeal from the second order

[44] Before addressing the Crown's submissions in the second appeal, I will briefly review some aspects of the doctrine of abuse of process by relitigation. As stated by Arbour J. in *Toronto (City)* at paras. 37-38 (emphasis in original), the doctrine

> engages the inherent power of the court to prevent the misuse of its procedure, in a way that would … bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel ….”
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.

[45] She went on to refer to the “two policy grounds” supporting the doctrine, “namely, that there be an end to litigation and that no one should be twice vexed by the same cause ….” She noted that “[o]ther policy grounds have also been cited, namely, to preserve the courts’ and the litigants’ resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.”

[46] Abuse of process by relitigation shares these policy grounds with issue estoppel: *Toronto (City)* at para. 38; *AB Hassle v. Apotex Inc.*, 2005 FC 234 at para. 93, affirmed 2006 FCA 51. They were expressed more colloquially by Binnie J. in *Danyluk* at para. 18:

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry…. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner.

[47] This is not to say that a court, in exercising its discretion in the particular circumstances of the case, may not conclude that justice would be better served by letting the second proceeding go forward: *AB Hassle* at para. 96. But the primary focus of the abuse of process doctrine “is less on the interest of the parties and more on the integrity of judicial decision

making as a branch of the administration of justice:" *AB Hassle* at paras. 94-96. And "[f]rom the system's point of view, relitigation causes serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is necessary to enhance the credibility and the effectiveness of the adjudication process as a whole:" *AB Hassle* at paras. 94-95.

[48] I turn now to the issues raised by the Crown in the appeal from the second order. Here the Crown makes five main submissions.

[49] First, it submits that the adjournment of the trial was a material change in circumstances that justified granting its motion to revisit the motion judge's first order. This was so, the Crown submits, because the adjournment gave Ms. Easter time to conduct further discovery, and thus addressed the prejudice that she had argued arose from the proposed amendments.

[50] Second, the Crown submits that the motion judge erred by refusing to allow it to "benefit" from the change in circumstances on the basis that, as the Crown had acknowledged, the adjournment was attributable to the Crown's own conduct in the late delivery of the additional productions and revised answers to undertakings. As part of this submission, the Crown says that the motion judge "[ascribed] bad faith" to it and "unjustifiably punished" it, and goes so far as to suggest that the Crown had "intended to orchestrate the adjournment so that it could renew the motion for leave to amend."

[51] Third, the Crown submits that the motion judge erred in asserting that it raised new arguments and put forward new evidence on the second motion that it should have raised on the first motion.

[52] Fourth, the Crown submits that the motion judge should not have "refused to entertain" the second motion until the disposition of the Crown's appeal from the order on the first motion. It says that the existence of the appeal was irrelevant—that it only addressed the refusal to grant leave to plead section 269, and would have been rendered moot if the motion judge granted leave to plead both provisions.

[53] And fifth, the Crown submits that the motion judge erred in failing to consider the Crown's "right to raise statutory defences conferred … by Parliament."

[54] I would not give effect to any of these submissions.

[55] As to the first, in my view the motion judge made no reviewable error in rejecting the Crown's argument that the adjournment fully allayed the prejudice to Ms. Easter that would result from granting leave to amend. This submission ignores the prejudice to Ms. Easter as an individual litigant, of the kind identified in the first motion (at paragraphs 18 and 19 of the reasons), recognized in *Canderel* and supported by the evidence filed by Ms. Easter. Moreover, the evidence of her counsel on the second motion was that if leave was granted to the Crown to plead section 269, time would be required to develop a constitutional case that the limitation period infringed Ms. Easter's Charter rights. If leave was granted to plead section 270, the work

required to respond "would require a significant amount of time, and an additional adjournment of trial would be required" (Sanchez affidavit sworn May 16, 2024, paras. 23-26).

[56] As to the second submission, I can see nothing in the record or the motion judge's reasons that amounts to "unjustifiable punishment" or alleges an attempt at "orchestration" or an exercise in "bad faith." The motion judge's conclusion (at paragraph 11) that "[t]he reason for the adjournment of the trial lies squarely at the [Crown's] feet" is a finding supported by the evidence.

[57] As to the third submission, I see no reviewable error on the part of the motion judge in asserting that the Crown raised new arguments and put forward new evidence on the second motion that it should have raised on the first motion. Among other things, the Crown adduced no evidence at all in support of the first motion, but relied for the factual basis of the motion solely on statements from counsel. That was so despite the fact that the evidence finally filed by the Crown on the second motion all appears to have been available to the Crown before the first motion. The Crown's approach to the evidence gave it a second "bite at the cherry."

[58] I see no merit in the fourth submission either. The scheduling of a hearing is highly discretionary; the motion judge's view as to the appropriate scheduling provides no basis for this Court to intervene. Whether a mootness issue arose would depend on the decision rendered on appeal.

[59] Finally, as to the fifth submission, the Crown submits that the motion judge erred in failing to consider the Crown's "right to raise statutory defences conferred … by Parliament." It is apparent (from paragraph 16 of her reasons) that she did consider what she described as the "public policy argument," but concluded that it would be better in the circumstances not to decide it. Once she had concluded that the second motion was an abuse of process, it was not necessary for her to deal further with the issue.

VII. Proposed disposition

[60] I would dismiss both appeals with costs.

"J.B. Laskin"
J.A.

"I agree.
Judith Woods J.A."

"I agree.
K. A. Siobhan Monaghan J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-150-24 and A-203-24
STYLE OF CAUSE:	HIS MAJESTY THE KING v. MANDY EASTER AND DOMINIC SHALE ALEXANDER
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 4, 2024
REASONS FOR JUDGMENT BY:	LASKIN J.A.
CONCURRED IN BY:	WOODS J.A. MONAGHAN J.A.
DATED:	OCTOBER 29, 2024

APPEARANCES:

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