Federal Court Cour fédérale

Date: 20180611

Docket: T-920-15

Citation: 2018 FC 599

Ottawa, Ontario, June 11, 2018

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

PHILIP JAMES MILLER

PLAINTIFF

and

HER MAJESTY THE QUEEN

DEFENDANT

JUDGMENT AND REASONS

I. Introduction

[1] The Defendant, Her Majesty the Queen in Right of Canada, brings this motion for an Order granting leave to amend the Amended Statement of Defence and for summary judgment to dismiss the Plaintiff's claim as time-barred pursuant to the limitation period in s 269(1) of the *National Defence Act*, RSC 1985, c N-5 [*NDA* or the Act], or, in the alternative, the prescription period found in art 2925 of the *Civil Code of Québec* [CCQ].

[2] The Plaintiff's Amended Statement of Claim was accepted for filing on May 13, 2018 immediately prior to the hearing of this motion. In that Claim, the Plaintiff seeks Special, General, Aggravated and Punitive Damages for negligence and for breach of a fiduciary duty arising from a tragic incident at Canadian Forces Base Valcartier, Québec on July 30, 1974.

[3] The Defendant acknowledges that it has a moral obligation to assist survivors of the Valcartier incident, including the Plaintiff, but submits that the action is statute barred.

[4] The Plaintiff has represented himself during the preliminary stages of the action. For the purpose of responding to the Defendant's motion, he retained the services of a lawyer. That lawyer had not previously been solicitor of record. However, by virtue of Rule 123 of the *Federal Courts Rules*, SOR/98-106 and by filing and serving the Plaintiff's Motion Record and signing the Plaintiff's Memorandum of Fact and Law, he is deemed to be solicitor of record for the Plaintiff. On the hearing of the motion, the solicitor appeared as counsel and made oral submissions on behalf of the Plaintiff.

[5] For the reasons that follow, the Defendant's motion is granted. This decision does not address the merits of the Plaintiff's claim that he suffered injuries as a result of the negligence of the Defendant's servants but whether the claim is now, as a matter of law, time-barred.

II. **Background**

[6] This description of the background facts and context is taken from the motion materials filed by the parties. I do not consider it necessary to describe the evidence in detail as much of it

is not relevant to the issues which the Court must address on this motion. I make no findings on the evidentiary or other issues which might arise if the matter were to proceed to trial.

[7] The Valcartier incident is described in the minutes and verdict of a Coroner's Inquest and in the report of an investigation conducted by the Ombudsman for the Department of National Defence [DND] and the Canadian Forces. The Coroner heard evidence in October 1974 and released his report and verdict on March 11, 1975. The Ombudsman's report was released in June 2015. Both documents are in the motion record.

[8] At the time of the incident, teenage army cadets were attending a six week summer camp at Valcartier for training by regular and reserve members of the Canadian Armed Forces. This training was authorized by the Minister of National Defence. Due to inclement weather, 137 of the cadets, members of "D" Company, were in an indoor facility being instructed in the safe handling of explosive munitions. A live grenade was mistakenly included in a box of inert or "dummy" ordinance that the cadets were permitted to handle. The pin on the live grenade was pulled by one of the cadets and it exploded. Six cadets died and sixty-five others were immediately injured. The injured were transported to the base hospital and local civilian facilities for treatment. The Plaintiff was not listed among the injured, did not receive medical treatment and was not hospitalized.

[9] Following the incident, the Canadian Forces held a Board of Inquiry, the Military Police and the Sûreté du Québec conducted a joint investigation, and the Québec Coroner's Office convened an inquest. The Military Board of Inquiry heard testimony from cadets and others who

were present. The cadets were instructed to not divulge or discuss their testimony with anyone. The Board concluded that none of the cadets were to blame. Its report was classified as confidential.

[10] The Quebec Coroner found that the death of the 6 cadets was attributable to the negligence of the Regular Forces officer conducting the training session. The officer was charged with criminal negligence causing death. He was acquitted at trial on June 21, 1977.

[11] DND paid the funeral expenses for the six cadets who were killed. Immediate medical care was provided to the injured through the base hospital and local provincial facilities. But, the Ombudsman found, no mechanisms were put in place for cadets to access any additional medical or psychological care that they may have required and which may not have been available through their provincial coverage. With the exception of the immediate care received at the time of the incident, the cadets were not assisted nor were they compensated under any DND policies or regulations in effect at the time. Although the Act gave the Canadian Forces control and supervision over cadet organizations and the cadets received a small stipend for their attendance at the camp, they had no status other than as civilians on Crown land. As a result, they were ineligible for any form of compensation or benefits available to serving members of the Forces.

[12] The Ombudsman considered that the manner in which the cadets were interrogated by the Military Board of Inquiry had left many of the younger cadets feeling responsible, distraught and further traumatized.

[13] The lack of processes or mechanisms for recourse led to 14 legal actions against DND by or on behalf of dead and injured cadets. According to the record, none of the actions went to trial: they were resolved by out-of-court settlements and *ex gratia* compensation payments for injuries ranging from psychological harm to death.

[14] The Ombudsman noted that some of the Canadian Forces members who were present at the time of the incident, or who were among the first responders, had received treatment, benefits or compensation for physical and psychological injuries due to their military status. Some of the cadets had later received treatment for Post-Traumatic Stress Disorder [PTSD] as a result of their subsequent status as members of the Canadian Forces or the Royal Canadian Mounted Police.

[15] As former members of "D" Company reconnected in later life and shared their stories, they came to learn that some individuals had been assessed and treated for mental health issues under the programs available to Forces or RCMP members. Most were not eligible for such programs as they had not later joined the military or the RCMP. When they learned of this, 51 of the former cadets submitted complaints to the Ombudsman. Some of the complainants had independently sought the assistance of mental health care therapists. Through interviews with 49 former cadets, including the Plaintiff, the Ombudsman's investigators learned that 33 of them believed that they continued to be affected by the 1974 incident and continued to suffer from some form of psychological trauma. And they were aware that former cadet colleagues who were eligible as veterans of the Forces or of the RCMP had access to benefits not covered by provincial healthcare plans.

[16] The Ombudsman recommended that DND immediately offer assessments to all those who claimed to have been adversely or permanently affected by the incident to determine the physical and psychological care required and, based on those assessments, to fund a reasonable care plan and provide immediate and reasonable financial compensation.

[17] The Plaintiff was a 15 year old boy from the West Island area of Montreal at the time of the incident. In his affidavit filed in response to the Defendant's motion, he describes himself as doing well in high school sports and academic programs with plans to continue on to university. He was considered to be of high intelligence with strong aptitudes in mathematics and mechanical sciences.

[18] The Plaintiff was cross-examined on his affidavit for both the motion and, by agreement, for discovery in the action.

[19] The Plaintiff's evidence is that the 1974 incident had a profound effect on his life, changed his behavior and limited his ability to obtain post-secondary education or to maintain meaningful and stable employment. He understands that he suffered concussive shock when the grenade exploded. His ears rang loudly following the explosion and a ringing in his ears has persisted to this day. He suffered from constant nightmares of the event. The only medical help he was offered by DND during the remaining three weeks of the camp was a prescribed narcotic; to help him sleep. During those weeks, he was interrogated by military personnel about the cause of the explosion. Two of those interrogations took place in an underground bunker. It appears from the Ombudsman's Report that the bunker was chosen because of its size and coolness in the

heat of the summer. But the atmosphere no doubt had an intimidating effect on the young cadets. They were also repeatedly warned not to speak to anyone outside the military about what had happened.

[20] After his return home, the Plaintiff says that he stopped playing sports and his performance at school deteriorated. His parents attempted to obtain help for him through provincial social services but he refused to cooperate with the aid workers. He engaged in behaviour that brought him into conflict with the law. The Plaintiff's parents are now deceased, he is estranged from his siblings and he has no school records or other contemporary documents that relate to his deteriorating performance or involvement with social services.

[21] As time passed, the Plaintiff says that he managed to suppress the memories of the 1974 incident until 2005 when he started to believe "that something horrible had happened to [him] and it was likely at CFB Valcartier". He vaguely recalled the incident and started looking for answers. Through an online source he met up with others who were present at the time of the incident and began to communicate with them. He attended a reunion meeting at CFB Valcartier in the summer of 2008.

[22] In 2011, the Plaintiff was interviewed by a La Presse reporter for a book about the 1974 incident. In that interview, the Plaintiff explained how the incident changed his life and that he had never received support. In the same year, the Plaintiff discussed obtaining compensation from DND with other former cadets who had been present at the time of the incident.

[23] In June 2013, the Plaintiff was subject to a comprehensive vocational evaluation as part of the process of settling an action relating to a 2011 motorcycle accident. The Plaintiff reported to the evaluator that he was "seeing a psychologist for symptoms of [PTSD] arising from a reported traumatic event occurring in 1974." He did not describe the nature of the traumatic event but told the evaluator that it was why he did not pursue post-secondary education.

[24] From mid-2012 to mid-2014, the Plaintiff met with Dr. Richard Kaley, a psychologist. Dr. Kaley conducted a series of clinical tests intended to ascertain the full scope of the Plaintiff's mental health problems and to produce a report for the possible purposes of litigation. The Plaintiff attended support groups for persons suffering from PTSD on Dr. Kaley's recommendation. He and Dr. Kaley visited Valcartier in May 2014. Dr. Kaley sought funding from DND and Veterans Affairs without success. On July 30, 2014, the Plaintiff was interviewed for a documentary on PTSD and the Valcartier incident and also by investigators from the Ombudsman's office.

[25] On June 3, 2015, the Plaintiff filed a notice of civil claim for the underlying action.

[26] On July 28, 2016, the Minister of National Defence, the Honourable Harjit S. Sajjan and the Vice Chief of the Defence Staff, Lieutenant-General Guy R. Thibault issued a joint statement expressing apologies for the pain and suffering the survivors of the Valcartier grenade incident had experienced. The statement acknowledged that some victims had kept silent since the incident after being instructed to do so by military personnel. The statement encouraged all those

who have been affected by this event to discuss the circumstances and its after-effects on their lives without restriction. It ended with this paragraph:

> Your well-being has had our close attention, and that of our senior leaders, for many months. Please know that we remain focused on ensuring that the health care needs of the victims of this tragedy are met, and that they receive the recognition they deserve for their pain and suffering.

[27] In November, 2016, Dr. Kaley proposed a comprehensive treatment plan for the Plaintiff and other survivors of the Valcartier incident which required funding. According to the Defendant's Motion Record, DND has introduced a program to provide financial recognition and health care support to the former cadets who were present when the grenade exploded. The Defendant asserts in its Memorandum of Fact and Law that the Plaintiff has access to this program.

[28] On June 16, 2017, the Plaintiff met with Dr. Iris Jackson for the purposes of preparing an Independent Psychological Evaluation for the purposes of this litigation. The Plaintiff told Dr. Jackson that he started to deal with the Valcartier incident of 1974 "eight years ago".

III. **Issues**

[29] As noted above, in addition to the motion for summary judgment, the Defendant seeks leave to amend its Statement of Defence. Having considered the parties' written and oral submissions, I would describe the issues as follows:

A. Should the Court allow the Defendant to amend their statement of defence?

B. Can this Court consider the prescription of an action on a motion for summary judgment?

C. Is the action time-barred pursuant to s 269(1) of the NDA?

i. Can the Plaintiff rely on the "continuance of injury or damage" to bar the application of s 269(1)?

ii. Does a cadet training exercise and a Canadian Forces Board of Inquiry fall within "an act done in pursuance or execution or intended execution of this Act" pursuant to s 269(1) of the NDA?

iii. Do the words "any person" in s 269(1) apply to the Defendant Crown?

iv. Does the discoverability rule apply to s 269(1) and if so, when was the plaintiff's claim reasonably discoverable?

[30] In view of the conclusion that I have reached on the application of s 269(1), I do not consider it necessary to consider whether the prescription periods in the CCQ apply. Had I reached another conclusion relating to s 269(1), I would have found that the question of whether the CCQ applied would have to be determined at trial based on a more complete evidentiary record given the different prescription periods and the number of exceptions that are provided for in the CCQ.

IV. <u>Relevant Legislation</u>

[31] The relevant provision of the *Federal Courts Act*, RSC 1985, c F-7, is found below:

Prescription and limitation on proceedings	**Prescription — Fait survenu dans une province**
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	**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

any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.	à toute instance devant la Cour d'appel fédérale ou la Cour fédérale dont le fait générateur est survenu dans cette province
[…]	[…]

[32] The relevant provisions of the *Crown Liability and Proceedings Act*, are as follows:

Liability	**Responsabilité**
3 The Crown is liable for the damages for which, if it were a person, it would be liable	**3** En matière de responsabilité, l'État est assimilé à une personne pour :
(a) in the Province of Quebec, in respect of	**a)** dans la province de Québec
(i) the damage caused by the fault of a servant of the Crown, or	**(i)** le dommage causé par la faute de ses préposés,
(ii) the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and	**(ii)** le dommage causé par le fait des biens qu'il a sous sa garde ou dont il est propriétaire ou par sa faute à l'un ou l'autre de ces titres;
[…]	[…]
Defences	**Moyens de défense**
24 In any proceedings against the Crown, the Crown may raise	**24** Dans des poursuites exercées contre lui, l'État peut faire valoir tout moyen de défense qui pourrait être invoqué :

(a) any defence that would be available if the proceedings were a suit or an action between persons in a competent court; and	**a)** devant un tribunal compétent dans une instance entre personnes;
(b) any defence that would be available if the proceedings were by way of statement of claim in the Federal Court.	**b)** devant la Cour fédérale dans le cadre d'une demande introductive.

[33] The relevant provisions of the *Federal Courts Rules*, SOR/98-106, are found below:

Amendments with leave	**Modifications avec autorisation**
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.	**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.
Limitations	**Conditions**
(2) No amendment shall be allowed under subsection (1) during or after a hearing unless	**(2)** L'autorisation visée au paragraphe (1) ne peut être accordée pendant ou après une audience que si, selon le cas :
(a) the purpose is to make the document accord with the issues at the hearing;	**a)** l'objet de la modification est de faire concorder le document avec les questions en litige à l'audience;
(b) a new hearing is ordered; or	**b)** une nouvelle audience est ordonnée;
(c) the other parties are	**c)** les autres parties se

given an opportunity for any preparation necessary to meet any new or amended allegations.

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

Leave to amend

76 With leave of the Court, an amendment may be made

(a) to correct the name of a party, if the Court is satisfied that the mistake sought to be corrected was not such as to cause a reasonable doubt as to the identity of the party, or

(b) to alter the capacity in which a party is bringing a proceeding, if the party could have commenced the proceeding in its altered capacity at the date of commencement of the proceeding, unless to do so would result in prejudice to a party that would not be compensable by costs or an

Autorisation de modifier

76 Un document peut être modifié pour l'un des motifs suivants avec l'autorisation de la Cour, sauf lorsqu'il en résulterait un préjudice à une partie qui ne pourrait être réparé au moyen de dépens ou par un ajournement :

a) corriger le nom d'une partie, si la Cour est convaincue qu'il s'agit d'une erreur qui ne jette pas un doute raisonnable sur l'identité de la partie;

b) changer la qualité en laquelle la partie introduit l'instance, dans le cas où elle aurait pu introduire l'instance en cette nouvelle qualité à la date du début de celle-ci.

adjournment.

Motion by a party	**Requête d’une partie**
213 (1) A party may bring a motion for summary judgment or summary trial on all or some of the issues raised in the pleadings at any time after the defendant has filed a defence but before the time and place for trial have been fixed.	**213 (1)** Une partie peut présenter une requête en jugement sommaire ou en procès sommaire à l’égard de toutes ou d’une partie des questions que soulèvent les actes de procédure. Le cas échéant, elle la présente après le dépôt de la défense du défendeur et avant que les heure, date et lieu de l’instruction soient fixés.
[…]	[…]
Facts and evidence required	**Faits et éléments de preuve nécessaires**
214 A response to a motion for summary judgment shall not rely on what might be adduced as evidence at a later stage in the proceedings. It must set out specific facts and adduce the evidence showing that there is a genuine issue for trial.	**214** La réponse à une requête en jugement sommaire ne peut être fondée sur un élément qui pourrait être produit ultérieurement en preuve dans l’instance. Elle doit énoncer les faits précis et produire les éléments de preuve démontrant l’existence d’une véritable question litigieuse.
If no genuine issue for trial	**Absence de véritable question litigieuse**
215 (1) If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.	**215 (1)** Si, par suite d’une requête en jugement sommaire, la Cour est convaincue qu’il n’existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence
Genuine issue of amount or question of law	**Somme d’argent ou point de droit**

(2) If the Court is satisfied that the only genuine issue is

(a) the amount to which the moving party is entitled, the Court may order a trial of that issue or grant summary judgment with a reference under rule 153 to determine the amount; or

(b) a question of law, the Court may determine the question and grant summary judgment accordingly.

(2) Si la Cour est convaincue que la seule véritable question litigieuse est :

a) la somme à laquelle le requérant a droit, elle peut ordonner l'instruction de cette question ou rendre un jugement sommaire assorti d'un renvoi pour détermination de la somme conformément à la règle 153;

b) un point de droit, elle peut statuer sur celui-ci et rendre un jugement sommaire en conséquence.

Powers of Court

(3) If the Court is satisfied that there is a genuine issue of fact or law for trial with respect to a claim or a defence, the Court may

(a) nevertheless determine that issue by way of summary trial and make any order necessary for the conduct of the summary trial; or

(b) dismiss the motion in whole or in part and order that the action, or the issues in the action not disposed of by summary judgment, proceed to trial or that

Pouvoirs de la Cour

(3) Si la Cour est convaincue qu'il existe une véritable question de fait ou de droit litigieuse à l'égard d'une déclaration ou d'une défense, elle peut :

a) néanmoins trancher cette question par voie de procès sommaire et rendre toute ordonnance nécessaire pour le déroulement de ce procès;

b) rejeter la requête en tout ou en partie et ordonner que l'action ou toute question litigieuse non tranchée par jugement sommaire soit instruite ou que l'action se

the action be conducted as a specially managed proceeding.	poursuive à titre d’instance à gestion spéciale.

[34] The relevant provisions of the *NDA* are as follows:

Boards of Inquiry	**Commissions d’enquête**
Convening boards	**Mises sur pied**
45 (1) The Minister, and such other authorities as the Minister may prescribe or appoint for that purpose, may, where it is expedient that the Minister or any such other authority should be informed on any matter connected with the government, discipline, administration or functions of the Canadian Forces or affecting any officer or non-commissioned member, convene a board of inquiry for the purpose of investigating and reporting on that matter.	**45 (1)** Le ministre, de même que toute autre autorité nommée ou désignée par lui à cette fin, peut, dans les cas où il lui importe d’être renseigné sur toute question relative à la direction, la discipline, l’administration ou aux fonctions des Forces canadiennes ou concernant un officier ou militaire du rang quelconque, charger une commission d’enquête d’examiner la question et d’en faire rapport.
Powers	**Pouvoirs de la commission d’enquête**
(2) A board of inquiry has, in relation to the matter before it, power	**(2)** La commission d’enquête dispose, relativement à la question dont elle est saisie, des pouvoirs suivants :
(a) to summon any person before the board and compel the person to give oral or written evidence on oath and to produce any documents and things under the person’s control that it considers necessary for the full investigation	**a)** assigner des témoins, les contraindre à témoigner sous serment, oralement ou par écrit, et à produire les documents et pièces sous leur responsabilité et qu’elle estime nécessaires à une enquête et étude complètes;

and consideration of that matter;	
(b) to administer oaths;	**b)** faire prêter serment;
(c) to receive and accept, on oath or by affidavit or otherwise, any evidence and other information the board sees fit, whether or not the evidence or information is or would be admissible in a court of law; and	**c)** recevoir et accepter les éléments de preuve et renseignements, fournis sous serment, sous forme d'affidavit ou par tout autre moyen, qu'elle estime indiqués, qu'ils soient ou non recevables devant un tribunal;
(d) to examine any record and make any inquiry that the board considers necessary.	**d)** procéder à l'examen des dossiers ou registres et aux enquêtes qu'elle juge nécessaires.
Access to on board recordings	**Précision**
(3) For greater certainty, a board of inquiry may have access to an on-board recording, as defined in subsection 22(1) of the Aeronautics Act, only if it is made available under that Act.	**(3)** Il est entendu que la commission d'enquête n'a accès aux enregistrements de bord au sens du paragraphe 22(1) de la Loi sur l'aéronautique que s'ils sont mis à sa disposition au titre de cette loi.
Cadet Organizations	**Organisations de cadets**
Formation	**Constitution**
46 (1) The Minister may authorize the formation of cadet organizations under the control and supervision of the Canadian Forces to consist of persons of not less than twelve years of age who have not attained the age of nineteen years.	**46 (1)** Le ministre peut autoriser la constitution, sous l'autorité et la surveillance des Forces canadiennes, d'organisations de cadets dont l'âge se situe entre douze et dix-neuf ans.

Training, administration, provision and command

(2) The cadet organizations referred to in subsection (1) shall be trained for such periods, administered in such manner and provided with materiel and accommodation under such conditions, and shall be subject to the authority and command of such officers, as the Minister may direct.

Instruction, administration et approvisionnement

(2) Le ministre peut fixer les périodes d'instruction des organisations de cadets, la manière dont elles sont administrées, les conditions auxquelles matériels et logement leur sont fournis, et désigner les officiers sous l'autorité et le commandement desquels elles sont placées.

Not part of Canadian Forces

(3) The cadet organizations referred to in subsection (1) are not comprised in the Canadian Forces.

Exclusion des Forces canadiennes

(3) Les organisations de cadets ne font pas partie des Forces canadiennes.

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 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.

[…]

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 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.

[…]

V. **Analysis**

A. *Should this Court allow the Defendant to amend its Statement of Defence?*

[35] The Defendant seeks leave to amend its Statement of Defence pursuant to Rule 75 of the *Federal Courts Rules.* The amendment would permit the Defendant to argue that the limitation period found at s 269(1) of the *NDA* bars the Plaintiff's action. The Defendant argues that this does not result in an injustice to the Plaintiff since the proposed amendment was provided to the Plaintiff more than four months before the hearing of this motion. In addition, it does not require additional discoveries or fact-finding, and will not result in a delay. The Defendant contends that the amendment is necessary to determine a real question in controversy between the parties, and thus should be allowed.

[36] The Plaintiff submits that the limitation period in the *NDA* was well known to the Defendant and that they did not attempt to plead it until now. This matter proceeded for almost two years under a different limitation period in a different statute. Hence, in the Plaintiff's view, he is prejudiced due to the delay. Moreover, he submits, raising another limitation period at this stage is an abuse of Rule 75. The Plaintiff cites in support of his position *Valentino Gennarini SRL v Andromeda Navigation Inc*, 2003 FCT 567 at paras 29-34, 122 ACWS (3d) 857 [*Valentino*].

[37] As Rouleau J stated in *Valentino* at paragraph 29, this 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: *Canderel Ltd v Canada*, [1993] FCJ No 777, 157 NR 380, [1994] 1 FC 3 (FCA) [*Canderel*]. Justice Rouleau further stated:

> "[…] Factors relevant to the assessment of whether an amendment would cause prejudice to the other party that cannot be compensated by an award of costs include 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: *Scannar Industries Inc. et al. v. Canada (Minister of National Revenue)* (1994), 172 NR 313 (FCA), 49 ACWS (3d) 245."

[38] The amendment in *Valentino* was refused as the motion had been brought one day before the scheduled trial dates and could have been filed many months earlier. The amendment was not sought to particularize points in controversy but rather to introduce a distinct and entirely new cause of defence. Further, the proposed amendment would inevitably have delayed the trial and caused prejudice to the Plaintiff that could not be compensated for by an award of costs.

[39] In this matter, the action was filed on June 2, 2015 and the original Statement of Defence was filed on July 2, 2015 and an amended version was filed on December 18, 2015. While no mention was made of s 269(1) of the *NDA* in either version, the Statement of Defence and Amended Statement of Defence both alleged that the action was time-barred. The Defendant's intent to rely on the *NDA* limitation period was first raised during case management proceedings in November 2017. This motion was then filed on January 4, 2018. The case is not ready to be set down for trial and the amendment would not delay an expeditious trial. The limitation period

is a question of law that would have to be addressed before the Defendant Crown could be held liable.

[40] I do not accept that the Plaintiff was prejudiced by the approach the Defendant initially took to the limitation issue. He was aware that the timeliness of his complaint would be an issue at trial from the outset. He could not have assumed prior to filing his claim that the Defendant would initially rely only on the provincial limitation period. The motion for summary judgment could have been brought solely on that basis given the facts pleaded and the evidence in the public record of when the Plaintiff became aware of the harm caused by the Valcartier incident. The Plaintiff was not led to follow a course of action in preparation for trial that could not be easily altered. He had to be prepared to address the limitation period issue, albeit under the Quebec Code rather than the NDA. This is not a case such as *Valentino,* where the motion to amend was brought on the opening day of the trial. Or *Canderel,* where it was made on the fifth day of the hearing.

[41] This case is analogous to *Kochems v Canada*, 2008 FC 960, 169 ACWS (3d) 124, wherein Justice Snider allowed the defendant to amend their Statement of Defence and to add a statute of limitation as a ground of defence, since the facts supporting the ground were already included in the pleadings. At paragraph 13, she observed that the Plaintiff presented no principled reason for rejecting the request. The sole basis for objection was the fact that it was made six months after the Statement of Defence had been filed. While timeliness is a relevant factor, Justice Snider noted, it was not determinative. I am of the same view in this matter.

[42] In 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, I consider that it would serve the interests of justice to allow the amendment.

B. *Can this Court consider the prescription of an action on a motion for summary judgment?*

[43] The Plaintiff argues that limitation period arguments should only be brought at the summary judgment stage on claims that can be characterized as “borderline frivolous, weak or unquantifiable.” He cites, as an example of such a claim, *Awan v Canada (Attorney General),* 2010 BCSC 942, [2010] BCWLD 8301, a case of an army cadet injured while demonstrating a game during field training. The claim in *Awan* was dismissed at trial on two grounds: the *NDA* prescription period and the failure to prove negligence. I can find no support in the decision for the proposition that the *NDA* prescription period applied only because the claim was not particularly serious.

[44] The Plaintiff contends that “no Canadian court in modern times has dismissed a serious case against the Crown with serious damages of this kind, due to a limitation period argument raised on a summary judgment motion.” He argues that any factual or legal doubt concerning a limitation period should be referred to the trial judge, as limitation periods deserve strict interpretation against the party invoking them and attempting to extinguish another’s rights: *Berardinelli v Ontario Housing Corp*, [1979] 1 SCR 275 at 280, 90 DLR (3d) 481.

[45] Such a finding was made in *Huska v Canada*, 2003 ABQB 278, [2003] 8 WWR 582. *Huska* concerned a traffic accident involving a member of the Canadian Armed Forces operating a motor vehicle owned by the military. The Crown applied for summary judgment alleging that the action was time barred pursuant to s 269(1). The Alberta Court of Queen's Bench held that there was a triable issue on the question of whether the duties which the employee was performing at the time of the accident fell within the scope of s 269(1) or were of a private or subordinate nature. The evidence before the Court on that question was ambiguous. In my view, *Huska* is of little assistance in determining the issues on this motion. There is no ambiguity in the record in the present matter that the officers who were conducting cadet training at Valcartier in 1974 were acting within the scope of their military duties.

[46] The Defendant argues that there is no reason not to apply s 269(1) in a motion for summary judgment. Section 269(1) has survived constitutional challenge and been applied in granting summary relief: *Patterson Estate v Storry*, 2002 ABQB 127, [2002] 6 WWR 183 [Patterson]; *Scaglione v. McLean* (1998), 1998 CanLII 14667 (ON SC), 38 O.R. (3rd) 464 (Gen Div)).

[47] A party may bring a motion for summary judgment pursuant to Rule 213(1) of the *Federal Courts Rules*. A party responding to the motion must set out specific facts and adduce the evidence showing that there is a genuine issue for trial; Rule 214. The Court shall grant summary judgment where it is satisfied that there is no genuine issue for trial: Rule 215(1). The burden rests with the party presenting the motion but both parties must put their best foot

forward: *MacNeil Estate v Canada (Department of Indian and Northern Affairs)*, (2004), 2004 FCA 50, 316 NR 349.

[48] The general principles governing summary judgment in the Federal Court were laid out by Justice Tremblay-Lamer in *Granville Shipping Co v Pegasus Lines Ltd SA* (1996), [1996] 2 FC 853, [1996] FCJ No 48:

> "1. the purpose of the provisions is to allow the Court to summarily dispense with cases which ought not to proceed to trial because there is no genuine issue to be tried (*Old Fish Market Restaurants v. 1000357 Ontario Inc. et al*, [1994] F.C.J. No. 1631, 58 C.P.R. (3d) 221 (TD));
>
> 2. there is no determinative test (*Feoso Oil Limited v. Sarla*) but Stone J. A. seems to have adopted the reasons of Henry J. in *Pizza Pizza Ltd. v. Gillespie* (Pizza Pizza). It is not whether a party cannot possibly succeed at trial, it is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial;
>
> 3. each case should be interpreted in reference to its own contextual framework (*Blyth* and *Feoso*);
>
> 4. provincial practice rules (especially Rule 20 of the Ontario Rules) can aid in interpretation (*Feoso* and *Collie*);
>
> 5. this Court may determine questions of fact and law on the motion for summary judgment if this can be done on the material before the Court (this is broader than Rule 20 of the Ontario Rules of Civil Procedure) (*Patrick*);
>
> 6. on the whole of the evidence, summary judgment cannot be granted if the necessary facts cannot be found or if it would be unjust to do so (*Pallman* and *Sears*);
>
> 7. in the case of a serious issue with respect to credibility, the case should go to trial because the parties should be cross-examined before the trial judge (*Forde* and *Sears*). The mere existence of apparent conflict in the evidence does not preclude summary judgment; the court should take a "hard look" at the merits and decide if there are issues of credibility to be resolved (*Stokes*)."

> See also *Garford Pty Ltd. v. Dywidag Systems International, Canada, Ltd.*, 2010 FC 996 at para 2

[49] In *Baron v R*, [2000] FCJ No 263 (Fed TD), 95 ACWS (3d) 655 [*Baron (FC)*], the plaintiff alleged negligence, wrongful arrest and detention and intentional interference with economic relations, in addition to claims pursuant to the *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. The complaints arose from actions of the Military Police against the plaintiff, a member of the Armed Forces, in relation to incidents that occurred in 2015. He launched his action beyond the six months contemplated by s 269(1) of the NDA. The defendant sought summary judgment under the former Rule 215 of the *Federal Court Rules*, *1998*, arguing that the action was time barred. The motion was granted with respect to the tort claims but allowed to proceed to trial on the alleged violation of the plaintiff's *Charter* rights : *Baron (FC)* at para 37; aff'd *Baron v R,* 2001 FCA 38, 104 ACWS (3d) 92 [*Baron (FCA)*].

[50] *Baron (FCA)* has been cited by the Federal Court in support of the proposition that it can consider limitation periods on a motion for summary judgment: see *George Oriental Carpet Warehouse v R*, 2011 FC 1291 at para 14, 399 FTR 296; *Ingredia SA v Canada*, 2009 FC 389 at para 42, 359 FTR 305. A motion by the Crown defendant for summary judgment on the ground that the action was statute barred by virtue of s 269(1) of the *NDA* was granted in *Hamm v R,* 2007 FC 597 at paras 53-64.

[51] The Plaintiff relies on *Duplessis v R,* 2004 FC 154, 129 ACWS (3d) 92 [*Duplessis*], wherein Mr. Justice Hugessen denied a Crown motion for summary judgment in an action by a

former soldier claiming damages for his release from the Armed Forces as a result of the PTSD he developed during peacekeeping duties in the former Yugoslavia. The claim alleged general systemic and policy failures, breaches of fiduciary obligations and *Charter* violations in addition to negligence on the part of individual servants and agents of the Crown for whose acts the Crown was alleged to be vicariously liable.

[52] Justice Hugessen found that the material facts alleged in support of all of the different grounds of the claim were inextricably intertwined and impossible to separate on the motion. He concluded that the claim could be read as alleging a continuing failure on the part of the Crown to carry out its alleged duties to the plaintiff. Some of the alleged failures were posterior to the date which was six months before the action was taken and were alleged to have continued. As the alleged failures were said to be systemic, operational and policy-based and included breaches of fiduciary duty, Justice Hugessen determined that it was not appropriate to permit the Crown to rely on the s 269(1) prescription period on a motion for summary judgment.

[53] In addition, Justice Hugessen expressed doubt, at para 12, that s 269(1) could be employed to insulate the Crown from a *Charter* based claim unless the limitation was justified under s 1 of the *Charter*.

[54] In the Amended Statement of Claim accepted for filing on May 13, 2018, the day before the hearing of the motion, the Plaintiff makes no *Charter* based claims but alleges, in addition to claims founded in negligence, that he was owed a fiduciary duty by the Defendant and that the duty was breached. The claim of a fiduciary duty and breach thereof is not particularized in the

Amended Statement. In his Memorandum of Fact and Law, at paragraph 38, the Plaintiff submits that as he alleges continuing failures on the part of the Crown to carry out its duties to him, the Crown is excluded from the protection of s 269(1) of the *NDA* according to *Duplessis*, above.

[55] The facts of this matter are considerably different from those addressed by Justice Hugessen in *Duplessis.* The Plaintiff in that case was a veteran of 24 years in the Armed Forces who was on active duty at the time he suffered the initial injuries and remained in the Forces when the alleged systemic and policy failures occurred. He was on service and disability pensions when the claim was filed. In those circumstances, Justice Hugessen found that the allegation of a breach of a continuing fiduciary duty on the part of the Defendant deserved to be tried. In my view, the same cannot be said in the present matter. There was no on-going relationship between the Plaintiff and the Defendant Crown which could be described as creating a fiduciary duty.

[56] The hallmarks of a fiduciary duty were set out in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574:

> Relationships in which a fiduciary obligation has been imposed seem to possess three general characteristics:
>
> > (1) The fiduciary has scope for the exercise of some discretion or power.
> >
> > (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> >
> > (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. [p. 136]

[57] The principles of fiduciary duty were elaborated upon by the Supreme Court in *Galambos v. Perez*, 2009 SCC 48, [2009] 3 SCR 247, [*Galambos*] and *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 SCR 261 [*Elder Advocates*]. There are two main categories of fiduciary duty: (1) *per se* or status fiduciary duty that flows from the nature of the relationship such as doctor-client, solicitor-client or a trust; and (2) what is described as an *ad hoc* or fact based contextual duty. The *per se* or status duty does not apply in the present circumstances. For an *ad hoc* fiduciary duty to arise:

> "[…] the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame*: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control."
>
> *Elder Advocates*, above at para 36.

[58] While the categories of fiduciary duty are not closed, the Supreme Court observed that cases in which these requirements with respect to a government are met will be rare and claims that fail to satisfy them should not be allowed to proceed in the speculative hope that they may ultimately succeed: *Elder Advocates*, above at paras 47 to 54.

[59] I note that in *White v Canada (AG)*, 2002 BCSC 1164 at para 89, 115 ACWS (3d) 709, 47 BCLR (4th) 161 [*White*], an application for certification of a class action arising from the treatment of cadets enrolled in a program at a Canadian Forces base, a claim for breach of fiduciary duty by DND for the actions of Crown servants at the base was held to be unfounded.

While the reasons for this conclusion are not provided, it appears that the claim was not supported by the evidence.

[60] Rule 214 of the *Federal Courts Rules* provides as follows:

Facts and evidence required	**Faits et éléments de preuve nécessaires**
214 A response to a motion for summary judgment shall not rely on what might be adduced as evidence at a later stage in the proceedings. It must set out specific facts and adduce the evidence showing that there is a genuine issue for trial.	**214** La réponse à une requête en jugement sommaire ne peut être fondée sur un élément qui pourrait être produit ultérieurement en preuve dans l'instance. Elle doit énoncer les faits précis et produire les éléments de preuve démontrant l'existence d'une véritable question litigieuse

[61] As noted above, on motions for summary judgment both parties must put their best foot forward. That 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.

[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.

[63] The July 28, 2016 statement by the Minister of National Defence and Vice-Chief of the Defence Staff may reflect the recognition of a present day moral responsibility on the part of the Government to provide care and treatment to the surviving cadets but that recognition doesn't amount to the acceptance of an ongoing fiduciary duty that would bar the grant of summary judgment because of the prescription period.

[64] The Supreme Court of Canada has held 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, apply 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, [2014] 1 S.C.R. 87.

[65] I am confident that the facts of this matter are sufficiently clear that the action can be resolved on summary judgment. And will now turn to the application of the prescription period.

C. *Is the action time-barred pursuant to s 269(1) of the NDA?*

[66] Subsection 39(1) of the *Federal Courts Act* provides that the laws relating to prescription and limitation in force in a province between subject and subject apply to any proceeding in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province except as expressly provided by any other Act.

[67] Subsection 269(1) of the *NDA* expressly provides for a limitation period:

Limitation period	**Prescription**
269 (1) No action, prosecution	**269 (1)** Les actions pour un

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.	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.

[68] At the time of the incident in 1974, this provision was found in s 227(1) of the *National Defence Act (1970),* RS, c 184, s 1 [*NDA (1970)*]. The authority to convene Boards of Inquiry was found in s 42 of the *NDA (1970)* and the Minister's authority with respect to cadets was set out in s 43 of the *NDA (1970)*. Consequently, the Defendant submits, it is clear that the prescription period now found at s 269(1) of the *NDA* applies and the Plaintiff's action was not commenced within six months of the "act" contemplated by the statute.

[69] The Plaintiff's principal argument is that the courts have rarely enforced s 269 of the *NDA* and have found numerous reasons to avoid it. This Court is unable to accept that argument.

i. Can the Plaintiff rely on the "continuance of injury or damage" to bar the application of s 269(1) of the *NDA*?

[70] The Defendant submits that the phrase "continuance of injury or damage" means that there must be a continuing act in order for the prescription period to not begin to run from the

date of the event causing the injury or damage. In the present matter, the Defendant argues, there are two finite acts; the grenade explosion at the cadet training camp and the Plaintiff's interviews before the Canadian Forces Board of Inquiry. I have assumed for the purposes of this motion that the manner in which the inquiry was conducted could serve as the basis of a valid claim for damages given the age of the Plaintiff at that time.

[71] The Plaintiff submits that he continues to suffer from injuries caused by the 1974 incident to this day. As outlined in his Amended Statement of Claim and his affidavit, this would include ringing in his ear, PTSD, depression, personality disorders and related difficulties. In his view, the question is not when he discovered that he was suffering such injuries or damage but rather whether they have actually ceased. Thus, he argues, the limitation period has not begun to run since his injuries have continued.

[72] The phrase "in the case of the continuance of injury or damage" is derived from the *Public Authorities Protection Act, 1893*, 56 & 57 Vict. c6. That statute was incorporated into Canadian law through the adoption of similar legislation by the provinces and in federal statutes such as s 269(1) of the *NDA*. The meaning of the phrase was discussed in *Ihnat v Jenkins*, [1972] 3 OR 629 (Ont CA), 29 DLR (3d) 137 [*Ihnat*], in relation to s 11 of the *Public Authorities Protection Act*, RSO 1970, c 374.

[73] The plaintiff in *Ihnat* argued that the limitation period had not begun to run since he continued to suffer damages relating to his arrest and imprisonment on a charge subsequently withdrawn by the Crown. The trial judge dismissed the action on the ground that it was statute

barred. The Ontario Court of Appeal agreed with the reasoning below and dismissed the appeal. In his judgment for the Court, Mr. Justice MacKay held that there was “direct authority in England at a time when the English statute was identical in language with the Ontario statute”. He referred to Bankes L.J. in *Freeborn v Leeming*, [1923] 1 KBD 160 (CA), who in turn cited Halsbury L.J. in *Carey v Bermondsey Borough Council* (1903), 67 JP 447 at pp 169-171, 20 TLR 2 (CA):

> Lord Halsbury dealt with the argument as follows: “In my opinion the judgment of Channell J. in this case was right. The language of s. 1 of the Public Authorities Protection Act, 1893, is reasonably plain, and it is manifest that "continuance of the injury or damage" means the continuance of the act which cause the damage. It was not unreasonable to provide that, if there was a continuation of an act causing damage, the injured person should have a right to bring an action at any time within six months of the ceasing of the act complained of. But that is wholly inapplicable to such cases as the one before us, where there was no continuance of the act complained of, and where the only suggestion is that, in consequence of the negligent act, the plaintiff is not in such a good physical condition as she was before the accident.”
>
> *Ihnat v Jenkins*, above at 631-632.
>
> [Emphasis added]

[74] This line of reasoning has been relied upon in a number of cases involving limitation periods in statutes in which the identical or near identical phrase appears: *Colbourne v Labrador East Integrated School Board* (1980), 114 DLR (3d) 742, 4 ACWS (2d) 458; *Nicely v Waterloo Regional Police Force* (1991), 2 OR (3d) 612 (Ont Div Ct), 79 DLR (4th) 14; *Skewes v Children's Aid Society of Hamilton-Wentworth (Regional Municipality)* (1982), 38 OR (2d) 578 (Ont HC), 138 DLR (3d) 124 [*Skewes*].

[75] Justice MacKay's analysis in *Ihnat* has also been applied in interpreting the same language in the limitation period found at s 269(1) of the *NDA*: *Smith v Baltzer*, 2001 NBBR 183, 110 ACWS (3d) 921 [*Smith*]; *S(K) v McLean*, 38 OR (3d) 464, [1998] OJ No 800 [*S(K)*].

[76] In *S(K)*, the defendant Crown brought a motion to strike out the statement of claim on the ground that the action was barred by the *NDA* limitation period. The action alleged an attempted sexual assault in July 1982 at a Canadian Forces base. Some fourteen years later the assault was reported and the individual named defendant was charged and convicted of indecent assault. The Court held that the *NDA* limitation period was available to the defendant Crown with respect to vicarious liability for the actions of the individual defendant. On the issue of the "continuance of injury" , the Court held, at page 474, that "[w]hile there may be ongoing harm here, the limitation period in s. 269(1) has expired. The continuance of an injury or damage in that provision refers to continuing acts in breach of a duty, not the ongoing effects of a single act in the past", citing *Ihnat,* above; *Skewes*, above.

[77] *Smith*, above, concerned an action for damages resulting from a car-pedestrian collision on or near CFB Gagetown. The plaintiff alleged negligence on the part of the employees of an on-base bar who served him alcohol in excessive quantities and by members of the Military Police who failed to take any precautions when he was in no condition to walk home. The plaintiff argued that the limitation period continued to run because he had ongoing physical and mental injuries. He relied on a decision of a Senior Prothonotary of this Court in *Keddy v R* (1992), 55 FTR 110 (Fed TD), 34 ACWS (3d) 617 [*Keddy*], which held that "continuance of injury or damage" refers to the loss which the plaintiff suffers.

[78] The Court in *Smith* noted that it did not appear that cases such as *Ihnat*, above, and *Skewes*, above, had been brought to the attention of the Senior Prothonotary and declined to follow *Keddy*.

[79] A similar conclusion was reached by Mr. Justice Strayer of this Court in *Way v R*¸ [1993] FCJ No 374 at para 11, 40 ACWS (3d) 508 [*Way*]. He noted that there was ample authority to the contrary of the position expressed in *Keddy*:

> [11] Further, with respect I do not agree with the conclusion of the learned Associate Senior Prothonotary in *Keddy* that such is the effect of subsection 269(1). There appears to be ample authority in England and in Canada that the words "in the case of continuance of injury or damage" refer to the duration of the wrongful acts or omissions complained of, and not of their consequences. […] The interpretation adopted in *Keddy* would, it seems to me, ignore the great problems of proof involved in suing years after the events complained of, as well as leaving indefinitely uncertain the position of potential defendants. Nor do any policy considerations appear to apply here such as led the Supreme Court of Canada recently in K.M. v. H.M. […] to extend to a plaintiff the right to commence an action for incest some 11 years after it had finished, the plaintiff not having understood the responsibility of the defendant until years later after she began therapy. The implications of the *Keddy* decision would be that even an adult victim of wrongful acts, though under no legal disability, could wait indefinitely to bring an action as long as he or she was still suffering some consequences of those wrongful acts. I am not convinced that subsection 269(1) should be given that broad an effect, even if it were applicable to actions against the Crown.
>
> [Emphasis added. Footnotes to citations deleted]

[80] The weight of authority is against the position taken by the Plaintiff. Accordingly, I have concluded that I must interpret the words "continuance of injury or damage" as referring to the immediate acts which caused the injury or damage and not their consequences. The allegedly

wrongful acts or omissions in question are therefore the causes of the explosion and the conduct of the subsequent Board of Inquiry. They do not include the claims of injury or harms of a long-standing nature.

ii. Does a cadet training exercise and a Canadian Forces Board of Inquiry fall within "an act done in pursuance or execution or intended execution of this Act" pursuant to s 269(1) of the *NDA*?

[81] Section 269(1) of the *NDA* applies to "an act done in pursuance or execution or intended execution of this Act or any regulations or military or departmental duty or authority." The Defendant submits that the present claim falls within the scope of the prescription period, as the Plaintiff's action relates to injuries suffered at a cadet training camp and at the Canadian Forces Board of Inquiry. The camp and inquiry were, the Defendant submits, carried out "in pursuance or execution or intended execution" of s 46 and s 45 of the Act, respectively.

[82] The Defendant relies on *White*, above, where the Supreme Court of British Columbia referred to a cadet training activity as an example of an activity that comes within s 269(1):

> [89] Military and departmental duty and authority relate to those matters comprehended by the *National Defence Act*. If, for example, the harm complained of occurred to a cadet as a result of a negligently run training exercise, s. 269(1) might apply, as training is specifically contemplated by the *National Defence Act* and relates to its purposes. Sexual assault, on the other hand, obviously is neither contemplated by the *National Defence Act* nor is it related to its purposes and accordingly any duty or authority which is invoked to deal with it is not of a "military or departmental" nature.

[83] Based on *White,* the Plaintiff submits that a criminal act would not fall within the purview of s 269 as it would not relate to the purposes of the Act or fall within the intended execution of

any authority under the Act. The Plaintiff submits that the negligent handling of the live grenade constituted a crime, as the Coroner found, and the officer in charge was prosecuted for that offence. The officer was in fact acquitted of that charge. In any event, I note that in *S(K)* above, the defendant Crown was allowed to rely on the prescription period notwithstanding that the actions of its employee, the individual defendant, had been found to constitute a crime.

[84] In my view, neither a conviction for criminal negligence nor a conclusive finding of negligence on the civil standard would oust the application of the prescription period in s 269(1): *Baron (FC)*, above.

[85] It is clear that the training of cadets at the Valcartier camp in 1974 fell within the scope of the authority granted the Minister of National Defence under the predecessor to s 46 of the Act. Similarly, I am satisfied that it is clear that the Board of Inquiry, cited as another source of the Plaintiff's damages claim, was convoked and carried out under the predecessor to s 45 of the Act.

[86] Accordingly, I am of the view that the acts done by the Defendant's servants which serve as the basis for the Plaintiff's claims were "in pursuance or execution or intended execution of this Act" as stated in s 269(1).

iii. Do the words "any person" in s 269(1) apply to the Defendant Crown?

[87] Section 269(1) provides that "no action, prosecution or other proceeding lies against any person". The Plaintiff submits that this protects individuals and not the Crown itself. He refers to

a statement in the *Canadian Encyclopedic Digest* [CED] that the limitation "does not purport to relate to the Crown, but rather relates to the service personnel in whatever court those personnel are sued." There is no authority cited in the CED for this statement. *Way,* above, is cited by the CED as authority for the following sentence: "[i]f a shorter limitation period protects the Crown, the Crown cannot be sued even if its servant can be sued."

[88] While the Plaintiff has framed his action as claims against the Defendant Crown, it is clear that he seeks to establish liability for the acts and omissions of the Crown's servants and employees within the Canadian Armed Forces, the Department of National Defence and the Department of Veterans Affairs.

[89] Section 3 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, is the basis upon which the Plaintiff can claim against the Crown for the damages caused by its servants. It states that the Crown is liable for damages for which it would be liable if it were a person in the province of Quebec:

Liability	**Responsabilité**
3 The Crown is liable for the damages for which, if it were a person, it would be liable	**3** En matière de responsabilité, l'État est assimilé à une personne pour :
(a) in the Province of Quebec, in respect of	**a)** dans la province de Québec:
(i) the damage caused by the fault of a servant of the Crown, or	**(i)** le dommage causé par la faute de ses préposés,
(ii) the damage resulting from	**(ii)** le dommage causé par le fait des

the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and	biens qu'il a sous sa garde ou dont il est propriétaire ou par sa faute à l'un ou l'autre de ces titres;

[90] Subsection 24(a) of the *Crown Liability and Proceedings Act* states that the Crown may raise any defence that would be available if the proceedings were a suit or an action between persons in a competent court. This is 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): *Baron (FCA)* above; see also *Patterson,* above, at paras 36-38. Accordingly, the Plaintiff's argument on this issue must also fail.

iv. Does the discoverability rule apply to s 269(1) and if so, when was the plaintiff's claim reasonably discoverable?

[91] Discoverability is an interpretative tool for construing limitation statutes. It is a judge-made rule that has in some instances been codified by statute. It provides that a cause of action arises when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence: *Central Trust Co v Rafuse,* [1986] 2 SCR 147, 31 DLR (4th) 481; *M(K) v M(H)*, [1992] 3 SCR 6, 96 DLR (4th) 289.

[92] The Defendant submits that the discoverability rule does not apply to all cases and its applicability is dependent on the wording of the limitation statute. In the Defendant's view, the discoverability rule does not extend the prescribed period when time runs from an event which

clearly occurs without regard to the injured party's knowledge: *Ryan v Moore*¸ 2005 SCC 38 at para 23, [2005] 2 SCR 53[*Ryan*].

[93] The Plaintiff relies on *Babington-Browne v Canada (Attorney General)*, 2015 ONSC 6102, 258 ACWS (3d) 811[*Babington-Browne*], in which the rule was found to apply to s 269(1) citing *Peixeiro v Haberman*, [1997] 3 SCR 549, 151 DLR (4th) 429 [*Peixeiro*] as having recognized a general rule of discoverability even where the plain language used in a statute would appear to exclude its operation.

[94] The Defendant submits that the Court in *Babington-Browne* placed too much importance on *Peixeiro* as *Ryan* was released subsequently and failed to take into consideration all of the relevant factors concerning the application of s 269(1).

[95] The Defendant further argues that the rule of discoverability does not apply when the statute fails to refer to an individual's knowledge: *Plontnikoff v Saskatchewan*, 2004 SKCA 59 at para 38, 249 Sask R 42; *Fehr v Jacob*, [1993] 5 WWR 1 at 9, 39 ACWS (3d) 693 [*Fehr*]. In the present matter, the Defendant argues, the Court should consider the public policy behind s 269(1) to determine whether the rule of discoverability applies*: Des Champs v Conseil des écoles séparées catholiques de langue française de Prescott-Russell*, [1999] 3 SCR 281 at para 1, 177 DLR (4th) 23; see also *Patterson* above at paras 7-8, where the Court briefly discussed the public policy underlying s 269(1).

[96] *Ryan* was an action for damages against the driver of a car who died before the action was initiated. Provincial legislation provided for a general limitation period of two years but for shorter periods where a party was deceased and the party's estate was under administration. The plaintiff was unaware that the defendant was deceased when the claim was filed and sought to rely on the longer general limitation period. The Supreme Court of Canada held that there was no legal doctrine to preclude the application of the shorter limitation period.

[97] In discussing the discoverability rule at para 23 of *Ryan*, Justice Bastarache stated that it must not be applied systematically without a thorough balancing of the competing interests. Justice Bastarache cited with approval the following statement from the Manitoba Court of Appeal in *Fehr*:

> "[…] Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. <u>But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed.</u>" [Emphasis added by Bastarache J.]

[98] The Defendant submits that s 269(1) establishes a time that runs from an act done in pursuance of the NDA. Nothing in the plain meaning of the words or the surrounding context suggests that the time does not begin to run until the Plaintiff has discovered the cause of action, the Defendant argues. This is in my view correct. However, section 269(1) also provides that in the "case of continuance of injury or damage" , the action must be commenced within six months after the ceasing thereof. That concluding language seems to leave the door open to the

application of the discoverability rule when the injury or damage stemming from the cause of action persists and the claimant becomes aware of it only at a later date.

[99] *Babington-Browne*, above, was a case involving the death of a British officer in the crash of a Canadian Forces helicopter in Afghanistan. The action was initiated two years later. On a motion for summary judgment, the Superior Court of Ontario found, at para 7, that it would take clearer language than that found in s 269(1) of the *NDA* to oust the applicability of the discoverability principle. The Court held that the claim was not discoverable until a Canadian Forces Board of Inquiry had reported its findings attributing fault for the crash. While the decision was appealed on other grounds, that finding was not challenged: *Babington-Browne v Canada (Attorney General)*, 2016 ONCA 549 at para 4, 269 ACWS (3d) 282.

[100] Assuming for the purposes of this motion that the discoverability rule applies to the limitation period in s 269(1), I have reached the conclusion that it does not assist the Plaintiff. The question is primarily factual and arises when the material facts on which it is based have been discovered or ought to have been discovered by the exercise of general diligence: *Central Trust* above at para 77. Once the Plaintiff knows that some damages have occurred and has identified the tortfeasor, the cause of action has accrued and the time begins to run: *Peixeiro*, above at para 18.

[101] The Plaintiff’s Statement of Claim was issued on June 2, 2015. Applying the discoverability principle and s 269(1) to the facts of this matter, the Plaintiff is out of time if he discovered his claim and did not issue it before December 2, 2014.

[102] In his evidence, the Plaintiff described the immediate impact of the explosion including the effect on his hearing and the events of the three weeks following the incident during which he was questioned on several occasions by the Board of Inquiry including twice in the underground bunker. While the Plaintiff may have understood the basic nature of these events it is reasonable to assume that he did not understand their full import or their effect upon him as he was only 15 years old at the time.

[103] The Plaintiff states that for many years he repressed the memories of the Valcartier incident but by 2005 those memories had begun to return. He says that at about this time he knew that he had psychological injuries that accounted for how his life had unfolded. He was encouraged by his wife to seek treatment. It appears that he did so some time later but did not continue with his first counsellor.

[104] The Plaintiff began to search the Internet for information about the incident and in 2006 found a blog post from a fellow former cadet. He made contact with the former cadets and attended a reunion in 2008 at which they told him their stories. He began to talk about the incident. The former cadets discussed starting a class action. The Plaintiff exchanged communications with another former cadet about the prospects of such an action.

[105] He told a journalist that the incident had changed his life considerably. The journalist published a book about the incident, based in part on the Plaintiff's recollections, in 2011. Between 2012 and 2014, the Plaintiff attended numerous sessions led by Dr. Kayley, the psychologist. At the outset he was not a patient. Dr. Kayley issued a report on November 30,

2014 fixing the date at which he began to provide psychological services to the Plaintiff as May 2013. In July 2014, the Plaintiff attended the 40th anniversary commemoration of the Valcartier event and gave two interviews regarding the incident one of which was featured in a documentary film. The second interview was given to the investigators of the Office of the DND Ombudsman.

[106] As part of a vocational evaluation for the purposes of an insurance settlement in July 2013, the Plaintiff reported that he was seeing a psychologist for symptoms of PTSD arising from a traumatic event in 1974. He reported that due to that event, he did not attend college and that his future employment goals and opportunities were negatively impacted. The Plaintiff applied for a Veterans Affairs Canada disability pension on August 23, 2013. In an independent psychological evaluation conducted in July 2017, the Plaintiff reported that he had started to deal with what had happened to him eight years before.

[107] Based on these facts, I am satisfied that the Plaintiff 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. Accordingly, I find that the discoverability principle does not bar the application of the limitation period in s 269(1) of the *NDA*.

VI. **Conclusion**

[108] As was stated by counsel for the Defendant at the conclusion of the hearing, the bringing of this motion for summary judgment was not intended in any way to diminish the tragic events

that occurred at Valcartier in 1974 or the effects those events had on the Plaintiff throughout his life. It is indeed unfortunate that the traumatic impact of the explosion, witnessing the deaths and grievous injuries of his friends and the subsequent interrogations was not adequately recognized at the time and suitable treatment immediately provided. This is not meant to discount the efforts his parents made to arrange counselling for him through provincial social services or to blame the Plaintiff for not taking advantage of it as the harm had already been done.

[109] In the circumstances, it is only natural to express sympathy to the Plaintiff for what he has experienced. It is to be expected that the Minister of National Defence will follow through on his statement of July 28, 2016 and ensure that an adequate program is in place to provide treatment and, if necessary, compensation for what the survivors of the 1974 Valcartier incident have experienced.

[110] That said, the Court has carefully considered the arguments advanced by the parties on this motion and has concluded that the Defendant may amend its Statement of Defence to include the prescription period in s 269(1) of the *NDA* as a ground of defence and that the action is time-barred as a result. In light of that finding, there is no serious issue to be tried and the action must therefore fail and judgment granted in favour of the Defendant.

VII. **Costs**

[111] The Defendant’s Notice of Motion requested costs on the claim and on this motion. In its Memorandum of Fact and Law, however, the Defendant stated that it did not seek costs on this

motion or for any previous steps in the action. In the particular circumstances of this matter, I would not have exercised my discretion to award them to the Defendant in any event.

[112] At the close of the hearing, the parties indicated that they had agreed that the amount of $ 2,500 would be appropriate if costs were awarded. The Court agrees that is a reasonable amount and recommends that the Defendant Crown reimburse the Plaintiff for the costs he has incurred to date and in particular to retain counsel to argue the motion. This would be consistent with the program announced by Minister Sajjan in July 2016. The action and motion for summary judgment has served to clarify the injuries suffered by the Plaintiff and the moral responsibility of the Defendant Crown. However, as the Defendant has been wholly successful on this motion, the Court considers that the discretion afforded it under the Rules does not extend to issuing an order to that effect.

JUDGMENT IN T-920-15

THIS COURT'S JUDGMENT is that:

1. The Defendant's Motion to amend the Amended Statement of Defence and to dismiss the Plaintiff's claim as time-barred is granted;

2. Summary Judgment is granted in favour of the Defendant; and

3. No costs are awarded for this or for any previous stages of the action.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-920-15
STYLE OF CAUSE:	PHILIP JAMES MILLER V HER MAJESTY THE QUEEN
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MAY 14, 2018
JUDGMENT AND REASONS:	MOSLEY, J.
DATED:	JUNE 11, 2018

APPEARANCES:

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