

CANADA / JUDGMENT

Dufour v. Canada

2024 FC 1936

COURT

Federal Court

DECIDED

2 December 2024

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Dufour v. Canada

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Federal Court Decisions

Date

2024-12-02

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2024 FC 1936

File numbers

T-2005-06

Notes

A correction was made on November 28, 2025

Decision Content

Date: 20241202

Docket: T-2005-06

Citation: 2024 FC 1936

[ENGLISH TRANSLATION]

Ottawa, Ontario, December 2, 2024

PRESENT: The Honourable Justice Régimbald

BETWEEN:

LOUIS DUFOUR

Plaintiff

and

HIS MAJESTY THE KING

Defendant

CORRECTED JUDGMENT AND REASONS

I. Background [1] Louis Dufour [plaintiff] honourably served in the Canadian Armed Forces [CAF] from September 6, 1988, to March 7, 2000. He was posted to Croatia and Kosovo, Turkey, Afghanistan, and Haiti. Suffering from post-traumatic stress disorder following the events he witnessed while stationed in Croatia and Kosovo, Mr. Dufour was released from the CAF in 2000 for inappropriate conduct. Ten years later, in 2010, this finding was replaced by a finding of mental health disorder, making Mr. Dufour eligible to receive medical pension benefits for his service in the CAF.

[2] In the meantime, on November 16, 2006, the plaintiff brought an action [Action] against the Crown. This Action was stayed sine die in October 2010 pending a decision by this Court in another case involving the plaintiff. That decision was rendered in January 2014. Since then, however, Mr. Dufour has done nothing to move his case forward.

[3] Following a management conference requested by the Court in April 2024, the stay of the case was lifted.

[4] The defendant brings this motion for an order under Rule 167 of the Federal Courts Rules (SOR/98-106) [Rules] to dismiss for delay the plaintiff's Action filed on November 16, 2006.

[5] The defendant argues that the delays in this proceeding, which are inordinate, were all caused by Mr. Dufour. Moreover, the defendant submits that, although prejudice is to be presumed after a long delay, the prejudice caused to him is real, given that all the witnesses who might have defended his position have withdrawn and that their recollection of the events relevant to this case may be diminished after so many years.

[6] While he acknowledges the delay, Mr. Dufour opposes the dismissal of his Action, asserting that the periods of delay are excusable and that allowing the Action to proceed does not prejudice the defendant.

[7] For the reasons that follow, the motion is granted and the Action is struck.

II. Facts [8] On November 16, 2006, Mr. Dufour brought the Action in which he alleges that:

(a) he was a member of the CAF from September 6, 1988, to March 7, 2000;

(b) the reason for his release is a ground of liability for the Crown (unsuitability for further service);

(c)he suffered various harms as a result of his military service and release on grounds of unsuitability.

He seeks a remedy for these alleged harms under section 24 of 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, in the amount of \$3,320,000.

[9] On July 30, 2010, the Crown served and filed a statement of defence. In it, among other things, the Crown:

(a)confirmed that the plaintiff was a member of the CAF from September 6, 1988, to March 7, 2000;

(b)confirmed that the plaintiff was posted to Croatia and Kosovo in 1992 and to Haiti in 1996 and 1997;

(c)confirmed that the plaintiff was released on grounds of unsuitability for further service;

(d)noted that the plaintiff never validly challenged on judicial review the legality of his release on grounds of unsuitability for further service, despite the fact that the plaintiff appears to collaterally challenge the grounds for his release throughout his Action; and

(e)denied that the plaintiff was entitled to a remedy because his proceeding is time-barred (all of the alleged events occurred prior to March 2000 and the proceeding was not commenced until November 2006) and because he seeks compensation for events that led to the payment of a pension, whereas such proceedings are prohibited under section 9 of the Crown Liability and Proceedings Act, RSC 1985, c C-50.

[10] Following the service and filing of this statement of defence, Mr. Dufour applied for and obtained a stay of his Action sine die so that the Court could first determine an application for judicial review under the Access to Information Act, RSC 1985, c A-1, in file T-1298-10. That application was dismissed by this Court on January 14, 2014 (*Dufour v Canada (Attorney General)*, 2014 CanLII 11524 (FC)).

[11] Subsequently, and notwithstanding the fact that the proceeding was stayed sine die pending the Court's decision (which was finally rendered on January 14, 2014), the plaintiff did nothing to reactivate his case. Rather, the Court took it upon itself to summon the parties to a management conference, which was held on April 22, 2024, that is, more than 10 years after the plaintiff's application for judicial review in T-1298-10 was dismissed.

[12] Following the management conference, the Court lifted the stay of the file. The Crown therefore asks the Court to dismiss the proceeding for delay under Rule 167 of the Rules.

III. Analysis A. The test to be applied on a motion to dismiss for delay under Rule 167 [13] Rule 167 provides as follows:

Dismissal for delay

167 The Court may, at any time, on the motion of a party who is not in default of any requirement of these Rules, dismiss a proceeding or impose other sanctions on the ground that there has been undue delay by a plaintiff, applicant or appellant in prosecuting the proceeding.

Rejet pour cause de retard

167 La Cour peut, sur requête d'une partie qui n'est pas en défaut aux termes des présentes règles, rejeter l'instance ou imposer toute autre sanction au motif que la poursuite de l'instance par le demandeur ou l'appellant accuse un retard injustifié.

[14] The test for determining if a dismissal for delay should be granted under Rule 167 is described as follows in *Sweet Productions Inc v Licensing LP International SÀRL*, 2022 FCA 111 at paragraph 35:

[E]xisting Federal Court jurisprudence has laid out a three-pronged test for determining if a proceeding should be dismissed for delay. The Court must determine whether: (1) there has been an undue delay; (2) whether the delay is excusable; and (3) whether the defendants (respondents) are likely to be seriously prejudiced by the delay.

(*Sweet Productions Inc v Licensing LP International SÀRL*, 2022 FCA 111 at para 35 [*Sweet Productions*]; *Vermillion Networks Inc v Green Circle Ideas Inc*, 2024 FC 579 at para 17 [*Vermillion*], *aff'd Vermillion Networks Inc v Green Circle Ideas Inc*, 2024 FC 1455 [*Vermillion #2*]; *Nichols v Canada*, (1990) 36 FTR 77, [1990] FCJ No 567 (FC) [*Nichols*].)

(1) The length of the delay is significant and undue [15] Rule 167 is silent on the length of delay required to trigger a determination of undue delay. Instead, the Court has discretion to assess the individual circumstances of each proceeding and the conduct of the parties to those proceedings to determine whether the delay is undue. What is inordinate delay in one proceeding may not be in another (*Vermillion* at para 25).

[16] With respect to inordinate or undue delay, it is the total period of delay from the commencement of a proceeding (and therefore since the appeal was filed and served) that is relevant, since it is that delay, and not the delay since the last step has been taken in the proceeding, that matters for the purposes of analyzing the consequences of the delay (*Vermillion* at para 26; *Behnke v Canada (Department of External Affairs)*, [2000] FCJ No 1166 (FC) at para 25 [*Behnke*]).

[17] As for the inordinateness of a delay, the longer the delay, the greater the likelihood of serious prejudice at the trial, including to the witnesses' ability to accurately recall the facts of the case (*Nichols* at para 9).

[18] In this case, the delay is clearly very long. Not only did Mr. Dufour commence his Action in 2006, but there have been no further developments in over 10 years, following the conclusion of another case on which the plaintiff relied to obtain a sine die postponement of his Action.

(2) The delay is not excusable [19] The plaintiff has filed no evidence justifying the delay.

[20] At the management conference in April 2024, Mr. Dufour stated that he wanted to go forward and resolve his proceeding, and justified the delay as follows:

[translation]

LOUIS DUFOUR:

As I'm sure you'll understand, I know that, for me, the advantage in waiting so many years, as I see it, is that the personnel involved in these matters are gone. So, by the same token, they were never prejudiced, they will never have the government... never adversely affected their health or their family, like what happened to me.

That's why I told myself that, essentially, I have a better chance of seeing my case handled fairly if I wait than if it happens now.

...

It's just because of that. Because if you can put any pressure... The Army can put pressure on just about anybody, let me tell you, that's why I waited.

(Transcript of the case management conference of April 22, 2024, defendant's motion record at 135–136 [emphasis added].)

[21] The plaintiff is therefore citing strategy to justify the delay. He has held off on perfecting his record until the defendant is no longer (or less) able to defend himself for lack of witnesses, thus putting pressure on the defendant to settle the dispute. This is not a valid reason that this Court can endorse.

[22] In addition, in his written submissions, the plaintiff refers to a number of factual elements, including other legal proceedings and court files, that prevented him from moving his Action forward. However, the factual elements described in Mr. Dufour's written and oral submissions have not been entered into evidence by way of a sworn affidavit in the context of this motion. Moreover, even if the evidence were properly before the Court, it is neither sufficient nor compelling enough to excuse the delay. The plaintiff has not shown how or why he has been unable to move his Action forward, nor has he presented any steps he has taken to this end. Although Mr. Dufour may have been busy with other matters, there is no tangible evidence showing why he could not have taken other steps at the same time to perfect his Action.

- [23] Second, there is no evidence that Mr. Dufour was unable to move his Action forward because of medical issues. In the absence of evidence, the Court cannot accept an argument of inability on the part of the plaintiff (TSD Holding Inc v Vancouver Fraser Port Authority (Port Metro Vancouver), 2024 FC 1376 at paras 75–76 [TSD Holding]; Behnke at para 24).
- [24] Finally, Mr. Dufour cannot criticize the defendant for failing to take steps to move the matter forward, since, as the plaintiff, he bears that obligation (Vermillion at para 38; St Hilaire v Canada (Attorney General), 2020 FCA 87 at para 5). More importantly, it was the plaintiff who asked the Court to stay the Action sine die.
- [25] Consequently, the plaintiff has failed to demonstrate that the delay in this case—more than 10 years since the Court rendered its decision in T-1298-10 on January 14, 2014—is excusable.
- (3) The defendant is likely to be seriously prejudiced by this delay [26] With respect to serious harm arising from the delay, the Court can presume that there is prejudice where the delay is inordinate or undue. The defendant is not required to lead evidence of actual prejudice suffered. In paragraph 35 of Sweet Productions, the Federal Court of Appeal held that the test is whether the defendant is likely to be seriously prejudiced by the delay. In Vermillion, an inordinate and largely unexplained delay of seven years was sufficient for the Court to infer serious prejudice, without resorting to “the fiction of discovering prejudice” (Vermillion at paras 58–59; Universal Graphics Ltd v Canada, 1997 CanLII 16683 (FC) at paras 10–11 [Universal Graphics Ltd]; TSD Holding at para 80).
- [27] Prejudice is likely to occur where the delay might have an impact on the witnesses’ ability to accurately recall the facts in dispute or where witnesses have died or have left a job, causing the employer (who is a party to the dispute) to no longer have control over them (Kearns v Chrysler Canada Ltd, (1996) 70 CPR (3d) 289, [1996] FCJ No 1484 (FCA) at para 7 [Kearns]; Nichols; Canada v Aqua-Gem Investments Ltd, [1991] 50 FTR 115 (TD), aff’d [1993] 2 FC 425; Waterside Cargo Co-operative v Canada (National Harbours Board), (1986) 3 FTR 189, [1986] FCJ No 921 (FC) [Waterside Cargo Co-operative]; Behnke at paras 28, 30–32; Vermillion #2 at para 68). That is the case here.
- [28] Thus, the Court tends to penalize an unjustified delay by dismissing the action when the delay is intentional, when it is likely to seriously prejudice the defendant, or when there is no reason to believe that the proceeding will be able to effectively move forward (Interbox Promotion Corp v 9073-0433 Québec Inc, 2004 FC 144).
- B. The delay caused by the plaintiff is inordinate and prejudices the Crown [29] In my view, the delay in this case is inordinate and undue, and it prejudices the defendant.
- [30] The plaintiff’s action is based entirely on events that occurred in the course of his military career, which ended in 2000. He commenced his proceeding in 2006 and has done nothing to perfect the record since 2014. It was only because of the Court’s initiative that the plaintiff came forward to indicate that he still wished to proceed with his Action.

- [31] The delay is very long, and the Court has dismissed proceedings with much shorter delays (Vermillion; Universal Graphics Ltd; Bellefeuille v Commercial Transport (Northern) Ltd (TD), 1994 CanLII 3510 (FC); Delisle c Canada (Procureur général), 1996 CanLII 12378 (CF); Bahrami v Canada (Minister of Citizenship and Immigration), 1998 CanLII 7880 (FC)).
- [32] The evidence establishes a high potential for prejudice in this case. The evidence adduced by the Crown shows that the 18-year delay since the commencement of the proceeding means that the potential witnesses for the Crown named in the statement of defence filed in 2010 were all released from the CAF at least 5 years ago, and all the potential witnesses who were not named in the statement of defence but who served as witnesses or investigators in connection with the events that led to Mr. Dufour's release had also all been released from the CAF by 2023.
- [33] It is well established that a party is prejudiced by a delay attributable to the other party when a key witness has left its service or is no longer under its control (Waterside Cargo Co-operative).
- [34] Indeed, the plaintiff is relying on the absence of witnesses to justify the delay. He says he has obtained an [translation] "advantage in waiting so many years" because all the prospective witnesses are now gone (transcript of the case management conference of April 22, 2024, defendant's record at 135–136). Based on the applicable test, that is neither justification nor a valid excuse for the delay. Quite the opposite. The plaintiff appears to want to stretch the delay out as much as possible for strategic purposes, something that this Court cannot endorse.
- [35] Moreover, it seems clear to me that the witnesses' recollection of events may no longer be very accurate more than 24 years after the fact, thus constituting prejudice (Nichols; Kearns; Behnke). Indeed, I accept the defendant's argument that the recollection of the Crown's potential witnesses—who were never contemporaneously examined for discovery and who were never inconvenienced by the events or even aware that those events were the subject of a proceeding—would be all the more impaired today since there is no indication that the plaintiff's case ever had any bearing on them.
- [36] Finally, I accept the defendant's argument that the delay in this case may have a significant impact on the documentary evidence. Although the direct documentation has been preserved, other documents, including applicable CAF policies, may have been destroyed in accordance with the document retention policy, which requires that they be retained for a period of 10 years. However, the plaintiff filed his Action in 2006, based on events alleged to have taken place in 2000 or earlier. It is very likely that relevant documentation has been destroyed, prejudicially affecting the Crown.

[37] Consequently, I find that there has been inordinate delay on the part of Mr. Dufour in moving his Action forward, that the delay is inexcusable, and that the Crown is prejudiced by the delay caused by the plaintiff's failure to move his case forward. The Sweet Productions test is therefore met, and the Action is dismissed.

IV. Conclusion [38] Because of the delay and the prejudice caused, the defendant's motion to dismiss is granted, and the plaintiff's Action is dismissed for delay under Rule 167.

JUDGMENT IN T-2005-06

THE COURT'S JUDGMENT is as follows:

1. The defendant's motion to dismiss is granted, and the plaintiff's Action is dismissed for delay.

"Guy Régimbald"

Judge

Certified true translation

Vera Roy, Senior Jurilinguist

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:

T-2005-06

STYLE OF CAUSE:

LOUIS DUFOUR v HIS MAJESTY THE KING

PLACE OF HEARING:

VIDEOCONFERENCE

DATE OF HEARING:

November 25, 2024

REASONS AND JUDGMENT BY:

RÉGIMBALD J

DATED:

DECEMBER 2, 2024

APPEARANCES:

Louis Dufour

For the plaintiff

(ON HIS OWN BEHALF)

Vincent Veilleux

Benjamin Chartrand

For the defendant

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