289-597-1485

WagnerSidlofsky LLP
BARRISTERS

181 University Avenue, Suite 1800
Toronto, Canada M5H 3M7
Tel: 416.366.6743
Fax: 416.364.6579

www.wagnersidlofsky.com

Fax

TO:

FIRM\COMPANY	ATTENTION	FAX #
John Weingust, Q.C. Barrister & Solicitor	John Weingust,	(416) 340 0064

FROM: Madalina Kinnear/ Bradley Phillips

RE: James Sauve, Robert Stewart, Richard Trudell and Richard Mallory
Our File No. 039744-1042

DATE: August 24, 2015

COMMENTS: Please find enclosed the Endorsement of Master Brott dated August 21, 2015.

NUMBER OF PAGES INCLUDING THIS ONE: 10

IF YOU DO NOT RECEIVE ALL PAGES,
PLEASE CONTACT MADALINA KINNEAR
AT (416) 366-6743

CITATION: Trudel v. Her Majesty The Queen, 2015 ONSC5284
COURT FILE NO.: CV-08-369412
DATE: August 21, 2015

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **TRUDEL et al., Plaintiffs/Responding Parties**

AND:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO et al., Defendants/Moving Parties

BEFORE: **MASTER RONNA M. BROTT**

COUNSEL: **Bradley Phillips, Agents for counsel for the Plaintiffs**

Emtiaz Bala, for the Defendant HMQ et al.

D. Andrew Thomson, for the Defendant Denis Gaudreault

HEARD: **June 11, 2015**

ENDORSEMENT

[1] The plaintiffs Richard Trudel ("Trudel"), James Sauvé (Sauvé), Richard Mallory ("Mallory") and Robert Stewart ("Stewart") were charged, convicted and sentenced to two concurrent terms of life imprisonment without eligibility for parole arising from the murders of two individuals that occurred on January 18, 1990.

[2] On January 30, 2004 the Court of Appeal quashed the convictions of Trudel and Sauvé and new trials were ordered. On January 12, 2007 their charges were stayed due to excessive pre-trial delay. By that date, Trudel and Sauvé had been incarcerated for 16 years.

[3] On January 26, 2007 the Court of Appeal quashed the convictions of Stewart and Mallory and on February 27, 2007 the Crown elected to stay the charges against them on the grounds that their case was indistinguishable from the claims against Trudel and Sauvé. Stewart and Mallory had been incarcerated for 16 years as well.

[4] Stewart commenced an action in September 2008. Sauvé, Trudel and Mallory commenced this action in December 2008. In both actions, the plaintiffs claim for damages arising from, inter alia, alleged abuse of process, false imprisonment,

negligence, malicious prosecution and wrongful convictions. The actions proceeded and at the Status Hearing in May 2011, a consent timetable was obtained and an Order was made to complete certain steps and to set the actions down for trial by May 5, 2012. On May 7, 2012 the actions were dismissed by the Registrar pursuant to Rule 48.

[5] The plaintiffs' motion to set aside the Registrar's dismissal orders of May 7, 2012 ("set aside motion) and the defendants' cross-motion to enforce a partial settlement of the action ("settlement motion") were initially returnable August 12, 2014. The plaintiffs filed seven affidavits in support of the motions. The defendants conducted cross-examinations of each of the plaintiffs on their respective affidavits on August 19, 2013 and on September 12, 2013 they conducted a cross-examination of solicitor Morton, who had acted for all four plaintiffs commencing March 15, 2011. The plaintiffs did not cross-examine any of the defendants.

[6] On August 12, 2014 the parties attended before Justice Myers to argue the set aside and settlement motions. Just prior to entering the courtroom, Mr. Weingust and Mr. Susin (a lawyer and individual who had provided some legal assistance to the plaintiffs prior to Mr. Morton's retainer) provided to LawPro counsel, (counsel to Mr. Morton), five documents that they wished to have included in the court record. Justice Myers encouraged the parties to settle both motions and he then called a recess to permit the parties to seek instructions. When they returned to the courtroom the motions were adjourned on consent to September 11, 2014 to permit the parties time to obtain settlement instructions.

[7] On August 21, 2014 the plaintiffs and their counsel met to discuss the proposed settlement of the motions. On September 4, 2014 plaintiffs' counsel delivered to the defendants, a draft of a "supplementary affidavit" of Sauvé. On September 8, 2014 plaintiffs' counsel advised Justice Myers of service of the supplementary affidavit and the defendants' objection to its filing.

[8] On September 11, 2014 Justice Myers ordered that the set aside motion and the motion to quash the supplementary affidavit shall be heard by a Master, and he stayed the Crown's cross-motion seeking to enforce a settlement.

[9] The motion to quash the supplementary affidavit was heard on March 5, 2015. By Reasons dated April 10, 2015 the defendants' motion to quash the supplementary affidavit was dismissed.

[10] The plaintiffs now bring this motion to set aside the Registrar's order dated May 7, 2012, dismissing the within action.

LAW

[11] *Reid v Dow Corning Corp* [2001]O.J. No. 2365 (S.C.J. – Master), reversed on other grounds [2002] O.J. No. 3414 (Div. Ct.) ("Reid"), sets out the relevant factors to be considered in determining whether a Registrar's Dismissal Order should be set aside.

(1) *Explanation of Litigation delay:* The Plaintiff must adequately explain the delay in the progress of the litigation from the institution of the action until the deadline for setting the action down for trial as set out in the status notice. She must satisfy the court that steps were being taken to advance the litigation toward trial, or if such steps were not taken to explain why...If either the lawyer or the Plaintiff made a deliberate decision not to advance the litigation toward trial then the motion to set aside the dismissal will fail.

(2) *Inadvertence in Missing the Deadline*: The Plaintiff or her lawyer must lead satisfactory evidence to explain that they always intended to set the action down within the time limit set out in the status notice, or request a status hearing, but failed to do so through inadvertence.

(3) *The Motion is Brought Promptly*: The Plaintiff must demonstrate that she moved forthwith to set aside the dismissal order as soon as the order came to the Plaintiff's attention.

(4) *No Prejudice to the Defendant*: The plaintiff must convince the court that the Defendant has not demonstrated any significant prejudice in presenting its case at trial as a result of the Plaintiff's delay or as a result of the steps taken following the dismissal of the action.

[12] Courts have held that the evaluation of the factors should be made on a contextual basis to determine the Order that is most just in the circumstances of each case. It is not necessary that a Plaintiff satisfy all four of the *Reid* factors to succeed on a motion to set aside a dismissal order.

Scaini v. Prochnicki, [2007] 85 O.R. (3d) 179 (ONCA)

Marché D'Alimentation Denis Theriault Ltee et al.v. Giant Tiger Stores Ltd., (2007), 87 O.R. (3d) 660 (ONCA)

Finlay v. Van Paassen, 2010, ONCA 204

Wellwood v. Ontario Provincial Police, 2010, ONCA 204

Aguas v. Rivard Estate, 2011, ONCA 494

Vaccaro v. Unifund, 2011 ONSC 5318

Explanation of Litigation Delay

[13] A key factor in determining whether or not a Registrar's dismissal order should be set aside is whether the plaintiff has provided a reasonable and sufficient explanation for the litigation delay.

[14] The Statement of Claim in the Stewart action was issued by the self-represented plaintiff on September 22, 2008. The Statement of Claim in this (the "Sauvé action") action was issued by the self-represented plaintiffs on December 24, 2008.

[15] The Crown's Statement of Defence in the Stewart action was delivered on February 19, 2009 and in the Sauvé action on March 2, 2009. The Statement of Defence of Mr. Okmenas was delivered on April 6, 2009.

[16] The starting point for providing an explanation for litigation delay commences from the date of service of the Statement of Defence (*Kara v Arnold*, 2014 ONCA 871). Accordingly, the alleged delay in issue on this motion includes the period from March 2009 to May 2012, which on its face, is not inordinate.

[17] From March to September 2009 the plaintiffs in the Sauvé action sought to and ultimately, on consent, amended the Statement of Claim. As well, they brought a motion for substituted service. In August 2010 the plaintiffs served their Affidavit of Documents and throughout 2010 sought delivery of the defendants' Affidavits/List of Documents. In February 2011 the Crown, because of the large volume of material, advised that it could only be delivered by June 2011.

[18] Until March 15, 2011 when Mr. Morton was formally retained to act for all plaintiffs in both actions, the self-represented plaintiffs sought legal assistance and guidance from the Innocence Project as well as from Mr. Weingust and Mr. Susin, both of whom had some experience in malicious prosecution actions. Plaintiffs' counsel attended at the Status Hearing in May 2011 on behalf of all party plaintiffs. All parties consented to the timetable.

[19] In June 2011, Mr. Morton circulated and sought consent to a proposed Fresh as Amended Statement of Claim in the Sauvé action which sought to add Stewart as a plaintiff and further, to pursue solely Charter damages. As well, he was prepared to dismiss the Stewart action. Discussions amongst counsel for the plaintiffs, Crown and the defendant Gaudreault by phone, email and correspondence ensued through to March 2012. At that time, Sauvé advised Mr. Morton that he was terminating his retainer and was retaining Mr. Weingust as counsel. On April 24, 2012 Mr. Weingust advised all parties that he would be acting from Mr. Stewart as well as Mr. Sauvé. He did not serve a Notice of Change of Solicitor. On May 11, 2012 Mr. Weingust conducted a review of the Court file and learned that the actions had been dismissed days earlier. In June 2012 Mr. Trudel and Mr. Mallory advised solicitor Morton that they had retained alternate counsel as well.

[20] The defendants take issue with the plaintiffs' explanation of the first period of delay in the Stewart action. In *Dew Point Insulation Systems Inc. JV Mechanical Ltd.* [2009] O.J. No. 5446, the Divisional Court addressed the challenges to the administration of justice in light of a dramatic increase in self-represented litigants, and noted the delicate balance which courts must consider. "On the one hand, the court must try to accommodate a self-represented litigant's unfamiliarity with the court process; on the other hand, they must also respect the rights of the represented party and not become an advocate for the self-represented litigant." These two actions should be viewed together. Although there is no

formal order for trial together, it has been clear to all parties, at least during Mr. Morton's retainer and until April 2012 when two plaintiffs retained one new counsel and the other two retained other counsel, that the actions should proceed together or one following the other. All parties were working toward amending the Sauvé Statement of Claim, at a minimum, with a view to adding Stewart as a plaintiff in the Sauvé action and dismissing his action. For the defendants to assert that the initial delay in the Stewart action should now be reason to refuse to set aside a dismissal of that action is inappropriate and unfair.

[21] Further, the Crown relies on caselaw to the effect that counsel's explanation of a busy practice with personal matters interfering with that practice, falls short of a sufficient explanation for taking steps to move the action forward. It is true that in some instances that 'excuse' has been unsuccessful in establishing an explanation for the delay but I am satisfied that the plaintiffs did take steps to advance the litigation and they have satisfactorily explained the delay. Although the litigation might have proceeded a little bit quicker, there is no evidence of any intentional delay by the plaintiffs. First the plaintiffs awaited receipt of the defendants' List of Documents and then the plaintiffs' solicitor awaited a response from defence counsel regarding the proposed amendments. The defendants themselves contributed to some delay.

Inadvertence

[22] The plaintiff must lead satisfactory evidence to explain that the deadline to set the action down for trial was missed as a result of inadvertence. In *Brock University v Gespro Ont. Incl. 2013 ONSC 2900 (Master)* Master Wiebe found that when a plaintiff attends a status hearing and then there is a breach of that Order, it is really a "second kick at the can." The Divisional Court in *Klaczkowski Blackmont Capital Inc.*, 2015 ONSC 1650 (Div.Ct.) does not apply this reasoning. Rather, the Divisional Court considered the length of the delay, the explanations offered by the appellants (Plaintiffs) for that delay, the contribution of the respondent to the delay…and the issue of prejudice.

[23] It is the defendants' assertion that the plaintiffs and their counsel have failed to provide evidence of their inadvertence in failing to comply with the Status Hearing Order. In their view, from March 2012 onwards, while "under the mistaken assumption that Weingust would represent all four Plaintiffs, Morton stopped performing any services whatsoever." The defendants impute intentionality.

[24] By April 2012 Mr. Weingust had advised all counsel that he had been retained by Stewart and Sauvé. It is possible that Mr. Morton assumed that Mr. Weingust had delivered Notices of Change of Solicitor but he continued nonetheless to be solicitor of record for Trudel and Mallory. Therefore, the defendants' assertion that Mr. Morton deliberately and intentionally stopped performing is unsubstantiated – certainly with respect to Trudel and Mallory. Further, the fact that Mr. Morton inadvertently neglected to confirm the status of Mr. Weingust's Notices of Change of Solicitors cannot and should not be interpreted to be intentional or deliberate.

[25] Solicitor Morton's evidence is that he neglected to diarize the date on which the action had to be set down for trial. The defendants assert that on May 2, 2012, Mr. Weingust

"made a specific request" to solicitor Morton to set the action down but despite the Crown undertaking to produce this letter, there is no record of it. In *Habib v Mucaj*, [2012] O.J. No. 5946 (C.A.) the Court held that on a motion to set aside an administrative dismissal order, the court should be concerned primarily with the rights of the litigants, not with the conduct of their counsel (unless counsel's acts are deliberate). Here the litigants clearly demonstrated an intention to pursue their claims. They were in regular contact with Mr. Morton, while also seeking input from Mr. Weingust.

[26] The caselaw differentiates between a solicitor's possible negligence and a solicitor's deliberate acts. If deliberate, courts have tended to tip the balance in the defendant's favour on the issue of inadvertence. Not so with possible negligence.

[27] Here, solicitor Morton was on the record for approximately one year during which time he attempted to seek agreement on the amendment to the Statement of Claim. He neglected to enter the set down date in his tickler system. He did not deliberately refrain from either extending the set down date or setting the action down for trial.

[28] Based on *Habib*, I am satisfied that solicitor Morton's inactivity, even if bordering on negligent, was inadvertent and not deliberate. Furthermore, heeding the practical realities, and relying on *Elkhouli v Senathirajah* et al. 2014 ONSC 6140 quoted in *Klaczkowski*, at para 27 and 28, "if a meritorious claim is dismissed because a solicitor missed a deadline to set the matter down for trial, as happened in this case, this only leads to new litigation because the plaintiff must sue his or her former counsel to obtain a remedy....The *Rules of Civil Procedure*, and in particular rule 48.14 are intended to foster timely, accessible justice, not to spawn new lawsuits against counsel who have made an inadvertent procedural mistake."

Was the Motion Brought Promptly

[29] The defendants do not take issue with this factor.

Prejudice to the Defendant

[30] The plaintiff bears the onus of demonstrating an absence of prejudice to the defendants' ability to present its case at trial. The defendants assert that the elapsed time from the events giving rise to the litigation to present is in and of itself evidence of actual prejudice. The murders did occur in 1990 but these actions are malicious prosecution actions. The acts giving rise to these actions continued through to 2006 after the plaintiffs had been incarcerated for sixteen years. The key witnesses will be the defendants, the investigating officers and the lawyers who prosecuted them. There is no evidence from the defendants that they are unavailable, nor has the Crown provided any evidence that any of their necessary witnesses are not available.

[31] I agree with the plaintiffs that there is no evidence of actual prejudice. The individual defendants have not filed any affidavit evidence on this motion.

[32] The defendants also submit that where the limitation period has expired, prejudice is presumed. Citing *Wellwood v Ontario (Provincial Police)*, 2010 ONCA, 102 OR (3d) 555 – "As the memories of witnesses fade over time, the passage of an inordinate length of time after a cause of action arises or after an applicable limitation period gives rise to trial fairness concerns". In these actions the limitation periods expired in 2009.

[33] The defendants have had notice of the claim for many many years and have had every opportunity to carry out – and have carried out - a full and complete investigation. Documentation has been preserved. The Crown has acknowledged that it has in its possession the following:

(a) Disclosure during the plaintiffs' criminal trials;

(b) Transcripts of the proceedings of all preliminary inquiries, criminal trials and appeals;

(c) All documentation filed at the criminal trials and appeals;

(d) Correspondence between the prosecutors and defence counsel during the course of the proceedings;

(e) Memos, notes, written records of interviews of, or information received from witnesses in preparation for, or in anticipation of their giving testimony in the plaintiffs' criminal trials and appeals.

[34] In my view, any presumption of prejudice has been rebutted. There is no substantial risk that there cannot be a fair trial.

[35] The defendant Gaudreault supports the position of the Crown, seeking to have the within motion dismissed. He asserts that because the plaintiffs had agreed, prior to the administrative dismissal, to abandon all claims against him, it would be prejudicial for Mr. Gaudreault to have to continue to participate in this litigation. As Justice Myers ordered, the plaintiff's motion to set aside the dismissal shall be decided prior to the hearing of the motion by the defendants to enforce an alleged settlement. Mr. Gaudreault's allegation that the failure to discontinue the action against him does not, in my view, amount to prejudice. His continued involvement will be determined at the settlement motion.

Other Relevant Factors

[36] Rule 48.14 was recently amended to extend the time for dismissal for delay from two years to five years after the filing of a Statement of Defence. This factor has been considered to be a relevant factor in *Elkhouli* and *Kraczkowski*.

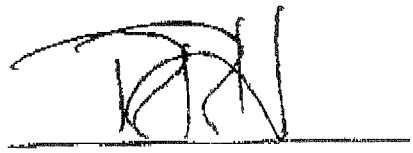
Summary

[37] For a Registrar's Order of Dismissal to be set aside, it is not necessary that a plaintiff meet each of the four *Reid* factors. Courts have consistently applied a contextual approach in exercising their discretion to balance the interests of the parties to make the order that is most just in the circumstances. These plaintiffs were imprisoned for sixteen years. They endured inexcusable delay as a result of, inter alia, "inappropriate conduct of the Crown (as noted by the criminal court) and destruction of evidence which had been in the exclusive control of the police and inexplicably destroyed since the order for retrial". In my view, taking into account the *Reid* factors and the Rule 48.14 amendment, the most just order is one which sets aside the Registrar's Order and permits the plaintiffs to proceed with this litigation. To deny these plaintiffs their right to proceed would be clearly unjust.

COSTS

[38] Because the plaintiffs were successful, in the ordinary course, the plaintiffs would be entitled to their costs as costs follow the event. However, a court can exercise its discretion, particularly where a party is seeking the court's indulgence, as on this motion. In assessing costs, the court is to consider rule 57 factors including inter alia, complexity, conduct of counsel in lengthening or shortening the hearing and what an unsuccessful party might expect to have to pay.

[39] Counsel have agreed that costs of the motion to strike the supplementary affidavit of Sauvé and the costs of this motion should be dealt with together. If counsel cannot within 30 days agree on the issue of costs, they shall within 45 days exchange costs outlines and within 60 days exchange and deliver costs submissions of a maximum of three pages.



MASTER RONNA M. BROTT

Date: August 21, 2015.

Court File No. [illegible]

RICHARD TRUDEL, JAMES SAUVE and RICHARD MALLORY
Plaintiffs

and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, et al.
Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at TORONTO

MOTION RECORD
(Returnable May 23, 2013)

BLANEY McMURTRY LLP
Barristers and Solicitors
1500 - 2 Queen Street East
Toronto, ON M5C 3G5

Bradley Phillips (LSUC#43552T)
Tel: (416) 593-1221
Fax: (416) 593-5437

As agents for Steinberg, Morton, Hope and Israel,
Lawyers for the Plaintiff

August 21/2015

Order to go in accordance with Endorsement (typewritten) attached

[signature]
Master Ronna Brott