

CITATION: Trudel v. Her Majesty the Queen et al, 2015 ONSC 2063  
COURT FILE NOS.: CV-08-369412;  
CV-08-362956  
DATE: 20160324

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Court File No. CV-08-369412

RICHARD TRUDEL, JAMES ALVE and  
RICHARD MALLORY

Plaintiffs

- and -

HER MAJESTY THE QUEEN IN RIGHT  
OF ONTARIO, THE ATTORNEY  
GENERAL OF ONTARIO, THE  
COMMISSIONER OF THE ONTARIO  
PROVINCIAL POLICE, OTTAWA  
REGIONAL POLICE SERVICE BOARD,  
THE CHIEF OF POLICE OF THE  
OTTAWA REGIONAL POLICE, LOU  
OKMANAS, LYLE MacCHARLES,  
RICHARD RIDDELL, HEATHER  
LAMARCHE, CHRISTINA BENSON,  
JOHN RALKO, GARY DOUGHTY, IAN  
DAVIDSON, VIKKIE BAIR, TERRY  
COOPER and DENIS GAUDREault

Defendants

*Bradley Phillips*, Agents for Counsel for the  
Plaintiffs

*Emtiaz Bala and Domenic Polla*, for the  
Defendants, Her Majesty the Queen in Right  
of Ontario and the Attorney General of  
Ontario

*D. Andrew Thomson* for the Defendant,  
Denis Gaudreault

No one appearing for the other Defendants

AND BETWEEN:

Court File No. CV-08-362956

ROBERT STEWART

Defendants

- and -

HER MAJESTY THE QUEEN IN RIGHT  
OF ONTARIO, THE ATTORNEY  
GENERAL OF ONTARIO, THE

COMMISSIONER OF THE ONTARIO )  
 PROVINCIAL POLICE, OTTAWA )  
 REGIONAL POLICE SERVICE BOARD, )  
 THE CHIEF OF POLICE OF THE )  
 OTTAWA REGIONAL POLICE, LOU )  
 OKMANAS, LYLE MacCHARLES, )  
 RICHARD RIDDELL, HEATHER )  
 LAMARCHE, CHRISTINA BENSON, )  
 JOHN RALKO, GARY DOUGHERTY, )  
 GEORGE SINDER, IAN DAVIDSON, )  
 VIKKIE BAIR, TERRY COOPER, and )  
 DENIS GAUDREULT )

Defendants

) HEARD: March 22, 2016

**ENDORSEMENT**

**DIAMOND J.:**

Overview

[1] After having their convictions overturned, a new trial ordered, and the criminal charges against them ultimately stayed, the four individual plaintiffs commenced these two legal proceedings in 2008 against, essentially, the identical set of defendants.

[2] In or around early 2011, the defendants Her Majesty the Queen in Right of Ontario and the Attorney General of Ontario (collectively the "AGO") scheduled a motion for summary judgment seeking an order dismissing the plaintiffs' claims against the AGO in both proceedings. In response to those pending motions for summary judgment, negotiations ensued between the AGO and the plaintiffs with a view to withdrawing the plaintiffs' causes of action against all defendants save for recast claims against the AGO.

[3] Within a few months, the defendant Denis Gaudreault ("Gaudreault") joined those negotiations with a view to extricating himself from both proceedings on a without costs basis.

[4] After several telephone conversations, correspondence and exchanges of draft Orders and draft pleadings between counsel, both the AGO and Gaudreault took the position that a binding settlement was reached between each of them and the plaintiffs in both proceedings resulting in, *inter alia*, the dismissal of the plaintiffs' claims against all defendants except the AGO (with resulting costs consequences) and the issuance of a Fresh as Amended Statement of Claim in one, consolidated proceeding.

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[5] The AGO and Gaudreault now bring contemporaneous motions pursuant to Rule 49.09(a) seeking an order enforcing what they claim to be binding settlement agreements.

Summary of Relevant Facts

[6] For the purpose of disposing of these motions, it is necessary to review the events from March 2011 to March 2012, during which time counsel for the plaintiffs, AGO and Gaudreault participated in negotiations and discussions.

[7] As stated above, in early 2011 the AGO had taken preliminary steps to schedule its motion for summary judgment, including the establishment of a consent timetable for the interim steps leading up to the motion. In response, James Morton ("Morton", then-counsel for the plaintiffs), wrote to counsel for all defendants proposing a Fresh as Amended Statement of Claim which would consolidate both proceedings into one action on behalf of all four plaintiffs. Under cover of his letter to counsel for the defendants, Morton enclosed a Consent, draft Order and draft pleading for review.

[8] The Consent and draft Order provided for the dismissal of Stewart's action and leave to amend the Trudel proceeding to (a) include Stewart as a co-plaintiff, (b) withdraw all allegations against the defendants for negligent investigation and malicious prosecution, and (c) limit the four plaintiffs' causes of actions to "constitutional damages". The draft pleading still included all of the original defendants, but significantly reduced the damages sought by the plaintiffs from the amounts set out in the prayer for relief in the original Statement of Claims.

[9] The AGO submits that Morton's letter was, effectively, an offer to settle the AGO's pending motion for summary judgment. After receiving Morton's letter and enclosures, counsel for the AGO advised Morton by telephone that the draft pleading was agreeable subject to three additional terms:

- (a) the AGO's consent to the draft pleading would be without prejudice to its right to advance a limitation period defence;
- (b) the AGO's costs incurred in the Stewart proceeding (being dismissed but now "merged" with the other proceeding) would not be waived, and
- (c) the individual defendants would be removed from the proceeding as *Charter* damages lay only against the AGO and not individuals.

[10] Morton advised counsel for the AGO that those proposed terms seemed reasonable, and that he would seek instructions from the plaintiffs. Counsel for the AGO confirmed this conversation in subsequent correspondence sent to Morton.

[11] Counsel for the AGO did not hear back from Morton, and phoned him again in September 2011. During that telephone conversation, Morton confirmed that the previous proposed terms (as set out above) were acceptable to him but that he would seek confirmation from the plaintiffs.

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[12] In October 2011, counsel for Gaudreault wrote to Morton and advised that Gaudreault would consent to the settlement "on the same terms and conditions" proposed by the AGO.

[13] Counsel for the AGO did not hear back from Morton for over two additional months. On December 20, 2011, he wrote to Morton requesting an update, stating "please advise of the plaintiffs' intentions in respect of their proposed amendments and what steps will be taken to move this matter along."

[14] On January 6, 2012, Morton sent an email to his client advising as follows (copy in the record redacted for litigation privilege purposes):

"As you know, we want to move this matter ahead. In order to do that, we need to consolidate all of the claims. We recently only obtained the agreement of the various other lawyers for the consolidation.

We did, however, recently received (*sic*) a letter saying that we should not under any circumstances release any of the defendants from the claim and specifically, the personal defendants.

*[Redacted for privilege]*

We would ask therefore that you instruct us to proceed with the matter on the basis that we are going against the Crown only."

[15] When asked on cross-examinations to clarify or further explain the nature of the "agreement" reached with the "various other lawyers for consolidation", Morton could not provide any true substantive response and/or could not recall any particulars.

[16] In any event, each of the plaintiffs responded to Morton's email by confirming their respective instructions to "proceed against the Crown only" and remove the personal defendants from the proceedings.

[17] While I will have more to say about this issue hereinafter, it is not clear whether Morton sought and/or obtained confirming instructions from the plaintiffs with respect to the AGO's position that it was not prepared to waive its costs incurred to date.

[18] On February 28, 2012, Morton delivered a Notice of Motion, consent and revised draft Fresh as Amended Statement of Claim to counsel for the defendants. This time, no draft Order accompanied the Consent even though the Consent referenced an Order in the Trudel proceeding "adding Robert Stewart as a plaintiff and permitting the plaintiffs to file a Fresh as Amended Statement of Claim without prejudice to Her Majesty the Queen in Right of Ontario relying on the limitation period."

[19] The revised draft Fresh as Amended Statement of Claim listed the AGO as the only defendant, and increased the previously reduced damages amounts sought in the prayer for relief.

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[20] On March 1, 2012 (the next day), counsel for the AGO wrote to Morton advising that the Consent was "missing an Order with the terms and conditions required by the AGO" as set out in previous correspondence delivered to Morton's attention. Counsel for the AGO enclosed a draft Order which essentially cut and pasted those terms as follows:

- The proceeding was dismissed with prejudice as against all defendants save for the AGO,
- The plaintiffs were granted leave to amend to deliver a Fresh as Amended Statement of Claim without prejudice to the AGO relying upon a limitation period defence,
- Costs of the "departing" defendants to date shall be costs in the cause to the AGO; and
- Costs of the defence of the prior claim, the preparation of the AGO's productions and the motion for summary judgment in both proceedings shall be costs to the AGO in any event of the cost to be assessed at the conclusion of the proceeding.

[21] Around the same time, counsel for Gaudreault left a voicemail message with Morton requesting confirmation that Gaudreault would be released from both proceedings. On March 6, 2012, Morton returned that message by leaving his own voicemail message with counsel for Gaudreault, and indicated that the plaintiffs "planned to take your client out of the picce and go against Her Majesty". Morton then inquired if counsel for Gaudreault would speak to him about "releases generally" and asked if he was in a position to sign the Consent.

[22] On the same day (March 6, 2012), counsel for the defendants Ottawa Regional Police Service Board, the Chief of Police of the Ottawa Regional Police and Ian Davidson returned the signed Consent to Morton.

[23] On March 8, 2012, counsel for Gaudreault wrote to Morton confirming (a) the agreement reached between them, and (b) that the dismissal against Gaudreault would be on a without costs basis.

[24] Unfortunately, none of the defendants received any further substantive response from Morton. The plaintiffs apparently became very dissatisfied with Morton's services, ultimately leading to the termination of Morton's retainer in the summer of 2012.

#### Rule 49.09 – Legal Principles

[25] As held by the Court of Appeal for Ontario in *Olivieri v. Sherman* (2007) 86 O.R. (3d) 778 (C.A.), a settlement agreement is subject to the general law of contract regarding offer and acceptance. As such, the Court must find that the parties to a purported settlement agreement (a) had a mutual intention to create a legally binding contract and (b) reached agreement on all of the essential terms of the settlement.

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[26] Both the AGO and Gaudreault take the position that there was a binding agreement with regard to all of the essential elements of a settlement. In my view, on the record before me there is little doubt that both counsel for the AGO and Morton agreed upon the following essential terms of a settlement:

- (a) a consolidation of both proceedings,
- (b) the limitation of the plaintiffs' causes of action to claims for *Charter* damages,
- (c) the issuance of a Fresh as Amended Statement of Claim without prejudice to the AGO raising a limitation period defence,
- (d) the dismissal of the plaintiffs' claims against all defendants other than the AGO, and
- (e) the AGO not waiving its costs of the proceedings to date.

[27] However, it is also clear that the entire settlement was conditional upon Morton receiving confirming instructions from the plaintiffs. As such, I must find both offer and acceptance on all essential terms of a settlement, which in my view includes a finding that Morton communicated, either expressly or impliedly, his client's instructions confirming acceptance of the AGO's proposed essential terms of the settlement. As held by Justice Healey in *Timmy v. Campbell* 2014 ONSC 405 (CanLII), acceptance is a "final and unqualified expression of assent to the terms of an offer."

[28] While subsequent statements or proposed new terms that are not intended to vary the essential terms of an offer do not vitiate acceptance, I still must find that the AGO's proposed terms (as found reasonable by Morton) were nevertheless accepted by the plaintiffs.

#### Decision

[29] The AGO properly conceded that term (e) above, which required the plaintiffs to agree to (i) forego their own costs of the proceeding to date and (ii) be liable for the AGO's costs of the proceeding to date, is an essential element of the settlement.

[30] Either expressly or impliedly, I find that Morton's letter and enclosures of February 28, 2012 confirmed his clients' acceptance of essential terms (a), (b), (c) and (d) of the AGO's proposed terms. As set out in the Consent prepared by Morton, the AGO maintained its right to plead a limitation period defence in response to the Fresh as Amended Statement of Claim. In addition, even though no Order was enclosed, it is nevertheless a reasonable inference that (i) the Stewart proceeding would be dismissed and (ii) all claims against the non-AGO defendants were also dismissed (as the style of cause in the Fresh as Amended Statement of Claim listed only the AGO as defendant).

[31] The AGO submits that it is reasonable to further infer that the plaintiffs also agreed to term (e). After reviewing the record and the relevant jurisprudence, I do not find Morton's

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February 28, 2011 letter and enclosures to amount to a final and unqualified expression of assent to the AGO being entitled to its costs.

[32] By seeking to amend their Statement of Claim, the plaintiffs no doubt faced exposure to the defendants' costs to date. That said, Rule 26.01 of the *Rules of Civil Procedure* mandates the Court to grant leave to amend "on such terms as are just, unless prejudice would result that could not be compensated for by costs or adjournment." Accordingly, even though the defendants would have had a strong arguable case for entitlement to their costs incurred as a result of the draft amendments, such a result was not a certainty.

[33] The AGO's proposed settlement included a term granting the AGO the right to costs (albeit both in the cause and in any event of the cause). If the plaintiffs were being asked to commit to paying the AGO's costs, in my view the communication of their acceptance of that term had to be clear and unequivocal.

[34] I am not prepared to infer from Morton's February 28, 2011 letter and enclosures that the plaintiffs agreed to that settlement term. At that stage, I find that while the other essential elements were agreed upon, the issue of costs was still at the formation, and not formalization, stage.

[35] While there is little evidence from Morton with respect to the circumstances surrounding the events of late February/early March 2011, there is evidence in the record that Morton only sought confirming instructions from the plaintiffs with respect to continuing the consolidated action against the AGO solely. It does not appear that the plaintiffs were requested to consider their costs exposure to the AGO in the circumstances, and indeed their written instructions to Morton make no mention of the issue of costs at all.

[36] While the lawyers may have enjoyed a meeting of the minds on the essential terms of the settlement, any formal settlement was always conditional upon the plaintiffs' instructions. I do not have the necessary evidence in the record to enable me to make the inferences requested by the AGO, and as a result its motion is dismissed.

[37] However, I do not come to the same conclusion with respect to Gaudreault's motion. Morton's February 28, 2011 letter and enclosures were, at most, silent on the issue of costs. Counsel for Gaudreault confirmed that he was willing to sign Morton's Consent to an Order dismissing the proceedings as against Gaudreault on a without costs basis. All of the essential terms of settlement between the plaintiffs and Gaudreault were therefore met and agreed upon. Accordingly, I grant Gaudreault's motion and order that the plaintiffs' claims against him in both proceedings are hereby dismissed on a without costs basis.

#### Costs

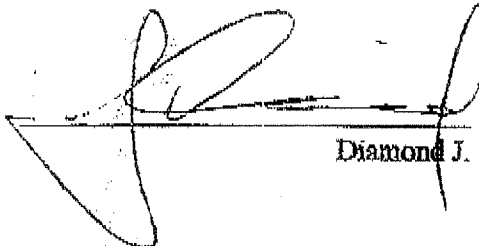
[38] At the conclusion of the hearing of the motions, counsel for the AGO and counsel for the plaintiffs made a joint submission that the successful party as between them be awarded costs of the motion in the all-inclusive amount of \$12,000.00. I therefore order the AGO to pay the plaintiffs their costs of the AGO's motion in the amount of \$12,000.00 within 30 days.

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[39] Gaudreault also sought costs of his motion in the all-inclusive amount of \$12,000.00. The plaintiffs opposed Gaudreault's request, submitting that the time spent was unreasonable and properly allocated to other motions previously brought in these proceedings.

[40] As per the Court of Appeal for Ontario's findings in *Beucher v. Public Accountants Council (Ontario)* (2004) 71 O.R. (3d) 291 (C.A.), the fixing of costs is a discretionary decision under section 131 of the *Courts of Justice Act*. That discretion is generally to be exercised in accordance with the factors listed in Rule 57.01 of the *Rules of Civil Procedure*. These factors include the principle of indemnity for the successful party, the expectations of the unsuccessful party and the complexity of the issues. Overall, the Court is required to consider what is "fair and reasonable" in fixing costs, and it is to do so with a view to balance and compensation of the successful party with the goal of fostering access to justice.

[41] I have reviewed Gaudreault's Bill of Costs. Gaudreault's motion essentially employed a "me too" approach with the AGO carrying the heavier load. In my view, not all of the time spent by counsel for Gaudreault is recoverable on this motion, and in the circumstances of the case, I order the plaintiffs to pay Gaudreault his costs of this motion in the all-inclusive amount of \$7,500.00 within 30 days.



Diamond J.

Released: March 24, 2016



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**COURT FILE NOS.:** CV-08-369412;  
CV-08-362956  
**DATE:** 20160324

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**Court File No. CV-08-369412**

RICHARD TRUDEL, JAMES AUVE and RICHARD MALLORY

*Plaintiffs*

**- and -**

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO,  
THE ATTORNEY GENERAL OF ONTARIO, THE  
COMMISSIONER OF THE ONTARIO PROVINCIAL  
POLICE, OTTAWA REGIONAL POLICE SERVICE  
BOARD, THE CHIEF OF POLICE OF THE OTTAWA  
REGIONAL POLICE, LOU OKMANAS, LYLE  
MacCHARLES, RICHARD RIDDELL, HEATHER  
LAMARCHE, CHRISTINA BENSON, JOHN RALKO,  
GARY DOUGHTY, IAN DAVIDSON, VICKIE BAIR,  
TERRY COOPER, and DENIS GAUDREAU

*Defendants*

**AND BETWEEN:**

**Court File No. CV-08-362956**

ROBERT STEWART

*Plaintiff*

**- and -**

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO,  
THE ATTORNEY GENERAL OF ONTARIO, THE  
COMMISSIONER OF THE ONTARIO PROVINCIAL  
POLICE, OTTAWA REGIONAL POLICE SERVICE  
BOARD, THE CHIEF OF POLICE OF THE OTTAWA  
REGIONAL POLICE, LOU OKMANAS, LYLE  
MacCHARLES, RICHARD RIDDELL, HEATHER  
LAMARCHE, CHRISTINA BENSON, JOHN RALKO,  
GARY DOUGHTY, IAN DAVIDSON, VICKIE BAIR,  
TERRY COOPER, and DENIS GAUDREAU

*Defendants*

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**ENDORSEMENT**

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*Diamond J.*

**Released: March 24, 2016**