Wellwood v. Ontario Provincial Police et al.

[Indexed as: Wellwood v. Ontario Provincial Police]

102 O.R. (3d) 555

2010 ONCA 386

Court of Appeal for Ontario,
Cronk, Lang and Juriansz JJ.A.
May 28, 2010

Civil procedure -- Dismissal for delay -- Setting aside -- Court having discretion to relieve against failure to satisfy time requirements of rule 37.14(1) -- Plaintiff not moving to set aside orders of registrar dismissing action as abandoned for almost two years -- Plaintiff offering no explanation for inordinate delay -- Expiry of limitation period giving rise to deemed prejudice to defendants -- Master not erring in dismissing motion to set aside dismissal orders -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 37.14(1).

The plaintiff commenced two separate but identical actions for damages for malicious prosecution, negligent investigation and breach of his Canadian Charter of Rights and Freedoms rights in 2004. The first action was dismissed by the registrar as abandoned under rules 77.08 and 77.17(1) of the Rules of Civil Procedure in January 2005, and a similar order was made against the second action in November 2005. In October 2007, the plaintiff brought a motion to set aside the dismissal orders under rule 37.14 of the Rules. The motion was dismissed. The master found that the plaintiff had failed to satisfy the requirements of rule 37.14(1) as the motions were not served forthwith and the first available hearing dates were not named.

In her view, the Rules provided no discretion to relieve against the time requirements of rule 37.14(1). She also went on to consider whether it was just to set aside the dismissal orders under rule 37.14(2), and answered that question in the negative. The plaintiff's appeal to the Divisional Court was allowed and an order was granted permitting the plaintiff to proceed with the second action. The defendants appealed.

Held, the appeal should be allowed. [page556]

Per Cronk J.A. (Juriansz J.A. concurring): The master erred in ruling that she had no discretion to extend the time requirements under rule 37.14(1). She failed to consider her authority under rule 2.03 to relieve against the plaintiff's failure to satisfy the time requirements of rule 37.14(1). However, that error was inconsequential, as the master properly recognized that she had discretion under rule 37.14(2) to set aside the dismissal orders if such an order was just. She appropriately assessed the relevant factors. She did not err in attaching no responsibility to the defendants for the delay in moving to set aside the dismissal orders. Nor did she err in finding that the expiry of a limitation period gave rise to deemed prejudice to the defendants. The expiry of a limitation period can give rise to some presumptive prejudice, the strength of which increases with the passage of time. The delay in prosecuting the second action and in bringing the motions was inordinate. The plaintiff failed to provide a satisfactory explanation for his delay of almost two years in moving to set aside the dismissal of the second action. At some point, the interest in finality must trump the opposite party's plea for an indulgence. The appeal judge failed to address the significance of the finality principle in his prejudice analysis and to apply it to the facts of this case.

Per Lang J.A. (dissenting): It was open to the appeal judge to conclude that the master's reasons demonstrated reviewable error, including by deeming prejudice from the mere expiration of the limitation period. It was both appropriate and necessary for the appeal judge to reweigh the relevant factors to determine whether the registrar's dismissal of the second action should be set aside. In doing so, he was alert to the

concerns arising from the plaintiff's delay in bringing the motion to set aside the dismissal order. However, after considering that factor in the entire context, he concluded that the ultimate balancing of all of the factors favoured the plaintiff. That consideration was available to him in his exercise of discretion.

Cases referred to

Armstrong v. McCall, [2006] O.J. No. 2055, 213 O.A.C. 229, 28 C.P.C. (6th) 12, 148 A.C.W.S. (3d) 229 (C.A.); Clairmonte v. Canadian Imperial Bank of Commerce, [1970] 3 O.R. 97, [1970] O.J. No. 1506, 12 D.L.R. (3d) 425 (C.A.); Finlay v. Van Paassen, [2010] O.J. No. 1097, 2010 ONCA 204, 318 D.L.R. (4th) 686, 188 A.C.W.S. (3d) 675; Kassam v. Sitzer, [2005] O.J. No. 1849 (Div. Ct.), affg [2004] O.J. No. 3431, [2004] O.T.C. 731, 133 A.C.W.S. (3d) 65 (S.C.J.); March D'Alimentation Denis Thriault Lte v. Giant Tiger Stores Ltd. (2007), 87 O.R. (3d) 660, [2007] O.J. No. 3872, 2007 ONCA 695, 47 C.P.C. (6th) 233, 286 D.L.R. (4th) 487, 247 O.A.C. 22; Reid v. Dow Corning Corp., [2002] O.J. No. 3414, 48 C.P.C. (5th) 93, 134 A.C.W.S. (3d) 751 (Div. Ct.), revg [2001] O.J. No. 2365, [2001] O.T.C. 459, 11 C.P.C. (5th) 80, 105 A.C.W.S. (3d) 649 (S.C.J.); Scaini v. Prochnicki (2007), 85 O.R. (3d) 179, [2007] O.J. No. 299, 2007 ONCA 63, 219 O.A.C. 317, 39 C.P.C. (6th) 1, 154 A.C.W.S. (3d) 1075; Worrall v. Powell, [1969] 2 O.R. 634, [1969] O.J. No. 1370 (C.A.), consd

Other cases referred to

Farrar v. McMullen, [1971] 1 O.R. 709, [1970] O.J. No. 1721 (C.A.); Hare v. Hare (2006), 83 O.R. (3d) 766, [2006] O.J. No. 4955, 277 D.L.R. (4th) 236, 218 O.A.C. 164, 24 B.L.R. (4th) 230, 153 A.C.W.S. (3d) 1243 (C.A.); Housen v. Nikolaisen, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31, 2002 SCC 33, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, J.E. 2002-617, 219 Sask. R. 1, 10 C.C.L.T. (3d) 157, 30 M.P.L.R. (3d) 1, 112 A.C.W.S. (3d) 991; L. (H.) v. Canada (Attorney General), [2005] 1 S.C.R. 401, [2005] S.C.J. No. 24, 2005 SCC 25, 251 D.L.R. (4th) 604, 333 N.R. 1, [2005] 8 W.W.R. 1, J.E. 2005-845, [2005] R.R.A. 275, 262 Sask. R. 1, 24 Admin. L.R. (4th) 1, 29 C.C.L.T. (3d) 1, 8 C.P.C. (6th)

199, 138 A.C.W.S. (3d) 852; Tanguay v. Brouse, [2010] O.J. No. 343, 2010 ONCA 73; [page557] Woodheath Developments Ltd. v. Goldman (2003), 66 O.R. (3d) 731, [2003] O.J. No. 3440, 175 O.A.C. 259, 38 C.P.C. (5th) 80, 124 A.C.W.S. (3d) 1073 (Div. Ct.); Ze itoun v. Economical Insurance Group (2009), 96 O.R. (3d) 639, [2009] O.J. No. 2003, 2009 ONCA 415, 73 C.P.C. (6th) 8, 307 D.L.R. (4th) 218, 73 C.C.L.I. (4th) 255, 257 O.A.C. 29, affg (2008), 91 O.R. (3d) 131, [2008] O.J. No. 1771, 292 D.L.R. (4th) 313, 53 C.P.C. (6th) 308, 165 A.C.W.S. (3d) 770, 236 O.A.C. 76, 64 C.C.L.I. (4th) 52 (Div. Ct.)

Statutes referred to

Canadian Charter of Rights and Freedoms

Proceedings Against the Crown Act, R.S.O. 1990, c. P.27, s. 7

Public Authorities Protection Act, R.S.O. 1990, c. P.38 [as am.]

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 2.03, 24, 37.14, (1), (2), 77.08, 77.17(1) [rep. O. Reg. 438/08]

APPEAL by the defendants from the order of Ferrier J., [2009] O.J. No. 235, 66 C.P.C. (6th) 48 (Div. Ct.) allowing an appeal from the order of Master Sproat, [2008] O.J. No. 1473, 2008 CanLII 16200, dismissing the motion to set aside the registrar's dismissal orders.

Judie Im and Sara Blake, for Crown appellants.

Anne E. Spafford, for appellant the Bradford West Gwillimbury/Innisfil Police Services Board (wrongly named as South Simcoe Police Force).

William G. Scott, for respondent.

CRONK J.A. (JURIANSZ J.A. concurring): --

I. Introduction

[1] The respondent, Geoffrey Allan Wellwood, sued the appellants in two separate but identical actions for damages

for malicious prosecution, negligent investigation and breach of his Canadian Charter of Rights and Freedoms rights. Both actions were eventually dismissed by the registrar, as abandoned due to delay.

[2] On review of the dismissal orders before the master, it was accepted that the first action was a nullity as against the Crown since the respondent had failed to comply with the notice requirements of the Proceedings Against the Crown Act, R.S.O. 1990, c. P. 27. The master declined to set aside the dismissal of the second action.

[3] On appeal by the respondent to a single judge of the Divisional Court, the master's ruling was set aside and an order was granted permitting the respondent to amend his pleading and proceed with the second action. [page558]

[4] The appellants appeal to this court in two separate appeals, asking that the order of the Divisional Court judge be set aside and that the master's decision be reinstated. For reasons that follow, I would allow the appeals.

II. Facts

(1) Chronology of events

[5] In July 2000, the respondent was charged with the first degree murder of his wife, Karen Wellwood, who had died in 1999. On January 8, 2004, the murder charge was withdrawn when it emerged that Mrs. Wellwood's death was a suicide and an expert's report regarding the cause of her death had been misinterpreted.

[6] Two lawsuits followed. On July 7, 2004, the respondent provided the appellants with written notice of his damages claim. On the same day, he issued a notice of action against the appellants, claiming damages for malicious prosecution, negligent investigation and Charter breaches. [See Note 1 below] A statement of claim was filed on August 4, 2004 (the "First Action").

[7] The following month, on September 7, 2004, the respondent commenced a second lawsuit against the appellants, in which he

advanced the same claims as those set out in the First Action (the "Second Action"). [See Note 2 below]

[8] The relevant chronology of events is detailed at Appendix "A". The following events are of primary interest.

[9] The statements of claim in the actions were served in mid-December 2004. On January 19, 2005, the registrar dismissed the First Action as abandoned under rules 77.08 and 77.17(1) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 (the "Rules"). He made a similar order in respect of the Second Action on November 25, 2005.

[10] In early 2005, counsel for the Crown appellants and the appellant, the Bradford West Gwillimbury/Innisfil Police Services Board, wrongly named as South Simcoe Police Force (the "Board"), informed the respondent's counsel of errors made in the naming of certain of the defendants in both the First and [page559] Second Actions and requested amendments to the respondent's pleadings to correct the misnomers.

[11] In response, the respondent's counsel advised on March 3, 2005 that he was drafting materials to obtain the necessary amendment order and to set aside the dismissal of the First Action. The requisite motion was scheduled to be heard on each of April 28, July 26, October 4 and November 9, 2005. However, the respondent did not proceed with the motion on any of those dates.

[12] On October 31, 2005, the respondent's counsel provided opposing counsel with motion materials for a consent order correcting the identified misnomers in the respondent's pleadings and setting aside the dismissal of the First Action. Crown counsel declined to consent to the proposed order regarding the First Action, asserting that it was a nullity, and requested amendments to correct misnomers in the respondent's pleading in the Second Action. Counsel for the Board reiterated her request for amendments to correct the misnomers.

[13] On November 9, 2005, the motion originally scheduled for

hearing in late April 2005 was marked in the court records as abandoned. Shortly thereafter, on November 25, 2005, the Second Action was dismissed by the registrar as abandoned.

[14] The respondent took no further steps to advance the matter, or to deal with the dismissal orders, for almost one year. On September 27, 2006, the respondent's counsel sought the appellants' consent to the proposed consolidation of the two actions and the setting aside of both dismissal orders.

[15] The respondent's motions materials were finally served on April 24, 2007. By that time, more than 27 months from the date of the dismissal of the First Action, almost 17 months from the date of the dismissal of the Second Action and approximately 15 and one-half months since the expiry of the applicable limitation period had elapsed. [See Note 3 below]

[16] In his motions materials, the respondent sought orders: (i) setting aside the dismissal orders; (ii) consolidating the two actions; (iii) amending his statements of claim; and (iv) extending the time within which to serve the amended statements of claim (the "Motions"). [page560]

(2) Master's decision

[17] The Motions were argued on October 31, 2007 before the master. The setting aside of the dismissal orders was sought under rule 37.14 of the Rules, which provides in part:

> 37.14(1) A party or other person who,
>
> . . . . .
>
> (c) is affected by an order of a registrar,
>
> may move to set aside or vary the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion.
>
> (2) On a motion under subrule (1), the court may set aside or vary the order on such terms as are just.

[18] The master concluded [at para. 10] that the respondent had failed to satisfy the requirements of rule 37.14(1) "since the motions were not served forthwith and the first available hearing dates were not named". She held that the Motions should be dismissed on this ground alone since, in her view, the Rules provide no discretion to relieve against the time requirements of rule 37.14(1).

[19] Nonetheless, the master went on to consider whether it was just to set aside the dismissal orders under rule 37.14(2). Her reasons confirm that she recognized, correctly, that an order under rule 37.14(2) is discretionary in nature. She was also alert to the four factors identified in Reid v. Dow Corning Corp., [2001] O.J. No. 2365, 11 C.P.C. (5th) 80 (S.C.J.), revd on other grounds [2002] O.J. No. 3414, 48 C.P.C. (5th) 93 (Div. Ct.), as relevant to the determination of whether relief under rule 37.14 should be granted: (i) explanation of the litigation delay; (ii) whether the dismissal order was the result of inadvertence; (iii) whether the motion to set aside was brought promptly; and (iv) whether there is any prejudice to the defendant.

[20] Consistent with this court's decision in Scaini v. Prochnicki (2007), 85 O.R. (3d) 179, [2007] O.J. No. 299 (C.A.), the master also properly directed herself that a contextual approach, which seeks to balance the respective interests of the parties, rather than a rigid application of the Reid factors, is required on a rule 37.14 inquiry. Quoting Scaini, at para. 24, the master stated: "The key point is that the court consider and weigh all relevant factors to determine the order that is just in the circumstances of the particular case." [page561]

[21] The master then undertook an analysis of the factors relevant in this case to the decision whether to set aside the dismissal orders. She held as follows:

(a) timely notice of the claims -- this factor favoured the respondent, as the appellants were put on notice of the claims at an early date and service of the claims was timely;

(b) progress of the litigation -- this factor favoured the

appellants, as no meaningful steps were taken by the respondent, apart from serving the claims and eventually bringing the Motions, to advance the progress of the litigation;

(c) delay in bringing the Motions to set aside the dismissal orders -- this factor favoured the appellants;

(d) explanation for delay/solicitor inadvertence -- the respondent failed to provide an adequate explanation for his delay in bringing the Motions. In particular, he failed to discharge his onus to establish that the delay was inadvertent rather than intentional. This factor also favoured the appellants; and

(e) prejudice and the prospects for a fair trial -- as the applicable two-year limitation period had expired by the time of the Motions, there was deemed prejudice to the appellants occasioned by the respondent's delay in bringing the Motions. Further, in light of the nature of the evidence that would be required to meet the respondent's allegation of malicious or negligent prosecution, the prospects for a fair trial had been compromised with the passage of time. As a result, the master was unable [at para. 41] "to conclude that a fair trial is available". These considerations also favoured the appellants.

[22] The master next sought to balance the competing interests of the parties, to arrive at a just order. She ruled [at para. 43]:

> Taking all of the factors into consideration, I am of the view that delay in bringing the motions, the significant passage of time since the events giving rise to the Actions (Karen's death in 1999, the charges laid in 2000 and the withdrawal of the charges in 2004), the delay in prosecuting the Actions and the deemed prejudice to the [appellants] warrant the dismissal of the motions. In my view, the factors that favour (or might possibly favour) the [respondent] -- being, timely service and notice of the claim and possible solicitor inadvertence, are not sufficient to persuade me that the Registrar's dismissals ought to be set aside. [page562]

[23] Accordingly, the master dismissed the Motions.

(3) Divisional Court judge's decision

[24] By order dated January 21, 2009, the Divisional Court judge allowed the respondent's appeal from the master's decision in part. He set aside the registrar's dismissal of the Second Action and directed that the respondent deliver an amended statement of claim in the Second Action -- naming the correct defendants -- within 20 days. As there was no need to revive the First Action, the dismissal of that action was left undisturbed.

[25] The Divisional Court judge concluded that the master erred in two respects. First, she erred by holding that she had no discretion to extend the time requirements of rule 37.14(1). In the Divisional Court judge's view, the jurisdiction to relieve against these requirements is afforded by rule 2.03, which states: "The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time."

[26] Second, as I describe in more detail later in these reasons, the Divisional Court judge held that the master erred by failing to properly assess the responsibility for the delay occasioned in this case and the prejudice suffered by the appellants. In the Divisional Court judge's opinion, these errors were palpable and overriding, thus requiring appellate intervention.

III. Issues

[27] The grounds of appeal raised by the appellants are encapsulated in the following three issues:

(1) What is the proper standard of review on appeal from a master's discretionary order under rule 37.14?

(2) Did the Divisional Court judge err in his application of the proper standard of review by substituting his findings concerning delay and prejudice for those of the master?

(3) Did the Divisional Court judge otherwise err in his treatment of the master's analysis of delay and prejudice?

IV. Analysis

(1) Standard of review on appeal from master's order

[28] Based on this court's recent decision in Zeitoun v. Economical Insurance Group (2009), 96 O.R. (3d) 639, [2009] O.J. No. 2003, 2009 ONCA 415, it is now settled law in Ontario that [page563] an appeal from a master's decision is not a rehearing. Rather, on questions of fact and mixed fact and law, deference applies and the role of the reviewing court is limited. An appellate court cannot substitute its interpretation of the facts or reweigh the evidence simply because it takes a different view of the evidence from that of the master. On questions of law, the correctness standard applies: see Housen v. Nikolaisen, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31; L. (H.) v. Canada (Attorney General), [2005] 1 S.C.R. 401, [2005] S.C.J. No. 24.

(2) Divisional Court judge's application of standard of review

[29] The appellants contend that the Divisional Court judge erred in his application of the governing standard of review on appeal from the master's order by engaging in a rehearing or reweighing of the evidence and by concluding that his own "ultimate balancing of all of the factors" favoured the respondent. In so doing, the appellants argue, the Divisional Court judge wrongly substituted his own discretion for that of the master, thereby exceeding his appellate jurisdiction and committing reversible error. While I conclude that the appeals should be allowed, I would not give effect to this ground of appeal.

[30] In my view, while he did not have the benefit of this court's decision in Zeitoun, the Divisional Court judge's reasons reveal that he was fully cognizant of the applicable standards of review and, therefore, of the limits on his appellate jurisdiction. He approached his task with those standards at the forefront, beginning his analysis with reference to the appropriate standards and making explicit mention of the Divisional Court's decision in Zeitoun [See Note 4 below] and the Supreme Court's decision in Housen. Further, in his ensuing analysis, he correctly focused on the standards applicable to the issues raised.

[31] However, with respect, and as I will explain, it is my opinion that the Divisional Court judge erred in his assessment of delay and prejudice and, hence, in his conclusion that the master's findings on these issues were tainted by palpable and overriding error. I now turn to consideration of the master's key findings. [page564]

(3) Authority to relieve against time requirements of rule 37.14(1)

[32] I begin with the master's ruling that she had no discretion to extend the time requirements of rule 37.14(1). Before this court, the parties accepted the Divisional Court judge's conclusion that this ruling was an error. I agree.

[33] Rule 2.03 is clear and unambiguous. To repeat, it states: "The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time" (emphasis added).

[34] This rule provides the court with a general discretion to relieve against the time requirements of any of the Rules, at any stage of a proceeding, if one essential precondition is satisfied: the court must first conclude that such relief is necessary in the interest of justice. Nothing in the language of rule 37.14(1) exempts it from what the Divisional Court judge aptly described [at para. 49] as "the overarching discretion afforded to the court by rule 2.03".

[35] The master does not appear to have considered her authority under rule 2.03 to relieve against the respondent's failure to satisfy the time requirements of rule 37.14(1). This omission no doubt led to her erroneous statement [at para. 10] that "there [was] no discretion to be exercised" in relation to those time requirements.

[36] However, on the facts of this case, this error is inconsequential. The master undertook an examination of the events that led to the Motions and specifically considered whether the dismissal orders ought to be set aside under rule 37.14(2). She correctly noted [at para. 21] that: "[T]he setting aside of the Registrar's dismissal orders is

discretionary and requires a consideration of relevant factors." Thus, in the end, the master properly recognized that she had discretion under rule 37.14(2) to set aside the dismissal orders if such an order was just. In these circumstances, her failure to recognize that she also had discretion under rule 2.03 to relieve against rule 37.14(1) is immaterial.

(4) Delay

[37] The Divisional Court judge held that the master appropriately assessed all the relevant Reid factors, with the exception of her consideration of delay and prejudice. With respect to the issue of delay, he concluded that the master made a palpable and overriding error by finding that [at para. 19]: [page565]

> [T]he defendants were not in any way responsible for the delay and, in fact, the defendants were prepared to consent to the relief until the passage of time was too great. This is not one of those cases where the defendants have taken advantage of an administrative dismissal.

[38] The Divisional Court judge disagreed with the master's holding that the appellants were not in any way responsible for the delay. In his opinion, the appellants' decision to defer the delivery of their statements of defence until the respondent had corrected the irregularities in his pleadings, and their own failure to seek a court order correcting those irregularities, contributed to the overall delay. For these reasons, he concluded, in effect, that the master's delay findings were fatally flawed. I disagree, for four reasons.

[39] First, the master's delay findings must be understood in the context of her full reasons. Read as a whole, her reasons confirm that the delay to which she referred was the delay in bringing the Motions to set aside the dismissal orders -- a delay that was entirely attributable to the respondent. In contrast, as is evident from his reliance on the appellants' failure to plead, the delay addressed by the Divisional Court judge was the delay in the progress of the First and Second Actions prior to the registrar's dismissal orders.

[40] The master, however, was concerned with whether the respondent had complied with the time requirements of rule 37.14(1). She noted, correctly, that the respondent did not bring the Motions "forthwith" and ruled that the evidence of his explanation for this failure was "thin".

[41] It was in this specific, post-dismissal context that the master attached no responsibility to the appellants for delay. I see no error in this finding. On the contrary, it was amply supported by the evidence.

[42] Second, the master's characterization of the respondent's purported explanation for the delay in bringing the Motions was generous. In a three-sentence affidavit sworn by him and filed on the Motions, the respondent said only: "It has always been and continues to be my intention to proceed with this action" and that he had instructed his solicitors to move to set aside "the dismissal Order".

[43] In an affidavit sworn by one of the respondent's counsel, this explanation for the delay was offered: "The delay was the product of our performing a number of re-drafts [of the respondent's pleadings and, arguably, Motions materials] in an attempt to deal with [Crown counsel's] concerns while not prejudicing our client's remedies." Later in the same affidavit, the deponent suggested that part of the delay arose when it became necessary [page566] to report the matter to the insurers of the respondent's original counsel. The focus of this suggested explanation was also the delay in bringing the Motions.

[44] Third, the master had appropriate regard to the overall progress of the litigation. In assessing the justice of setting aside the dismissal orders under rule 37.14(2), she addressed this aspect of delay under various headings [at paras. 24-33], including (i) "Whether the claim was served within the prescribed time"; (ii) "Whether there were steps taken in the action"; (iii) "Whether the delay was intentional or contumelious: Solicitor inadvertence"; and (iv) "Delay in Bringing the Motions to Set Aside the Registrar's Dismissal

Orders".

[45] The master outlined the timeline of pertinent events relating to the litigation in some detail. Her reasons indicate that she was aware of the actions taken by the parties to advance the litigation. She considered those actions and the evidence filed, finding that (i) the appellants did not take advantage of an administrative dismissal; (ii) the respondent took no meaningful steps to regularize his pleadings or to bring the Motions on a timely basis; and (iii) importantly, she could not conclude that the respondent's delay was not intentional.

[46] It is true that the master assigned no responsibility for delay to the appellants due to their failure to plead. But the record before the master established that, on notice to the respondent in early 2005, the appellants deferred the delivery of their statements of defence pending the respondent's motion to correct the admitted irregularities in his pleadings. The appellants were assured that the respondent intended to bring the necessary motion. Thereafter, although a corrective motion was scheduled to be heard on at least four prior occasions, the respondent did not deliver appropriate motion materials until late April 2007.

[47] Throughout this entire time frame -- early 2005 to late April 2007 -- no demand was made by the respondent's counsel for delivery of the appellants' statements of defence. Nor did he ever suggest that the deferral of the defence pleadings was unacceptable. On the contrary, based on the communications among counsel, it appears that the deferral of the delivery of defence pleadings was accepted. As events unfolded, the considerable delay in the hearing of the Motions was not occasioned by the appellants.

[48] Finally, I note that under Ontario's Rules for contemporary litigation, the party who commences a proceeding bears primary responsibility for its progress. For this reason, the [page567] initiating litigant generally suffers the consequences of a dilatory regard for the pace of the litigation.

[49] Rule 37.14(1) itself provides a useful illustration of this principle. Under that rule, a delinquent plaintiff bears the consequences of an administrative dismissal of his or her action, itself occasioned by delay, where a motion to set aside the dismissal is not served "forthwith" and the plaintiff fails to name "the first available hearing date" for the motion after the dismissal order comes to the plaintiff's attention.

[50] It would be unusual, although technically possible, for a misnamed defendant to apply to the court to correct the misnomer in the plaintiff's pleading. In this case, the misnomers at issue were drawn to the attention of the respondent's counsel virtually from the outset of the First and Second Actions. I do not read the Rules as obliging the appellants to have done more.

[51] I therefore do not agree that the master made a palpable and overriding error in her delay findings. Indeed, on this record, I can find no fault with those findings.

(5) Prejudice

[52] The Crown appellants filed no evidence of actual prejudice. The Board's counsel filed a brief affidavit sworn by an associate lawyer in which the deponent indicated that Board counsel's litigation file was "closed" in 2006 following the dismissal of the Second Action and, until September 27, 2006, "there was no sign of the Plaintiff taking any steps to have the Dismissal Order set aside".

[53] The appellants' resistance to the Motions on the ground of prejudice was based, first, on the overall delay in the case, including the lengthy passage of time between the date of the last dismissal order (November 25, 2005) and the date on which the Motions were first properly brought (April 24, 2007) and ultimately argued (October 31, 2007); and second, on the expiry of the limitation period (January 8, 2006).

[54] In oral argument before the master, the appellants also appear to have maintained that the revival of the Second Action would lead to prejudice since a defence to the causes of action

advanced by the respondent -- especially the claim of malicious prosecution -- would require evidence not contained in the Crown disclosure brief in the previous criminal case.

[55] The respondent's counsel said in his affidavit filed on the Motions that the Crown disclosure materials had been preserved and were available for use in the civil litigation. He therefore argued that "no prejudice [would] befall the Defendants" if orders setting aside the administrative dismissal orders were granted. [page568]

[56] The master held that the expiry of the limitation period gave rise to deemed prejudice to the appellants. She rejected the respondent's claim that a fair trial was nonetheless available as the Crown disclosure brief had been preserved and necessary evidence was in the appellants' possession. In her opinion, the evidence of other witnesses, including that of a key expert witness who resided in the United States, would be "germane" to the litigation. As well, the allegation of malicious or negligent prosecution [at para. 40] "require[d] different evidence than that which could be found in the Crown disclosure brief". The master was also of the view that the overall passage of time from the date in 2000 when the murder charge was laid and from the date of the withdrawal of that charge in 2004 resulted in prejudice to the appellants.

[57] The master concluded that (i) the delay in bringing the Motions, (ii) the [at para. 43] "significant passage of time since the events giving rise to the Actions", (iii) the delay in prosecuting the civil actions and (iv) the deemed prejudice to the appellants warranted the dismissal of the Motions.

[58] The Divisional Court judge disagreed. He held that the master made a palpable and overriding error by relying on the passage of time and the expiry of the limitation period to support her finding of prejudice. In his view, the absence of evidence of actual prejudice to the appellants and the fact that the appellants received early notice of the respondent's claims favoured the respondent on the requisite balancing exercise under rule 37.14.

[59] The core of the Divisional Court judge's reasoning is set out in the following passages from his reasons [at paras. 75-80, 84]:

> [It] is clear that the expiration of the limitation period is not sufficient to give rise to a presumption of prejudice. Rather, an inordinate delay after the expiration is required for a presumption of prejudice: Woodheath Developments Ltd. v. Goldman (2001), 56 O.R. (3d) 658, at para. 29, [affd (2003), 66 O.R. (3d) 731 (Div. Ct.)].
>
> Prejudice, then, arises not simply because of the passing of a particular, and somewhat arbitrary date. It arises because it is presumed that without notice of a claim, it would be unreasonable for a party to be expected to defend against it after the passing of an undue period of time.
>
> Of course, prejudice also arises with a passage of time so great that a party relies upon the finality implied by it. But it is not the expiration of a limitation period per se that creates the presumption of prejudice.
>
> . . . . .
>
> The point of a limitation period is to ensure that a party who is open to liability is made aware of that liability within a reasonable timeframe. Here, [page569] the party was aware of the action almost from the time the limitation period began to run, because the statement of claim was issued to the correct party, if improperly named. No prejudice can arise where the limitation period was met, and the defendants were made aware of the claim before it expired. . . .
>
> It must also be remembered that it is not merely prejudice that is required, but "unfair" or "significant" prejudice.
>
> . . . . .
>
> [I]n the circumstances here, especially with early notice of the claim and no evidence of actual prejudice, the ultimate balancing of all the factors favours the plaintiff.

(Emphasis added)

[60] With respect, I do not agree with the entirety of this description of the governing principles concerning prejudice. In particular, as I read the applicable authorities, the expiry of a limitation period can give rise to some presumptive prejudice, the strength of which increases with the passage of time. Where the presumption arises, the plaintiff bears the burden of rebutting the presumption, on proper evidence. Where the presumption is so displaced, the onus shifts to the defendant to establish actual prejudice.

[61] It is unnecessary to review the numerous authorities touching on the issue of deemed prejudice due to the expiry of a limitation period in these reasons. Reference to some of the pertinent authorities, many of which were mentioned by the Divisional Court judge, will suffice.

(i) Pertinent jurisprudence

[62] In Kassam v. Sitzer, [2004] O.J. No. 3431, [2004] O.T.C. 731 (S.C.J.), affd [2005] O.J. No. 1849 (Div. Ct.), Master Dash held, at para. 50, that where a plaintiff explains the delay at issue, the administrative dismissal of an action should not be set aside unless (i) the delay or the default has been intentional and contumelious; or (ii) there has been an inordinate and inexcusable delay giving rise to a substantial risk that a fair trial would not be possible; or (iii) there would be actual serious prejudice to the defendant if the action was not dismissed. He continued, at para. 53:

> If the delay is inordinate and is inexcusable, in that it results from the inadvertence, inattention or negligence of counsel (or a self-represented plaintiff), then the court must ascertain whether the delay gives rise to a substantial risk that a fair trial would not be possible. A "substantial risk" may not require proof of actual prejudice. Prejudice will be presumed after passage of a limitation period and it will be presumed that memories of witnesses fade over time. If the defendant has been unaware of a claim being asserted either by notice of the claim or by service of the statement of claim, such that he has been unable to undertake a timely investigation, then this [page570] may be taken into account

> in determining whether there is a substantial risk that a fair trial would not be possible. The plaintiff can overcome the presumption of prejudice for example by evidence that relevant documents have been preserved, key witnesses are available, certain elements of the claim may not be in issue, and in the case of personal injury, that medical evidence of the progress of the injuries is available. The defendant would then have a burden of adducing actual evidence that there is a substantial risk that, as a result of the delay, a fair trial would not be possible.
> (Emphasis added)

[63] The Divisional Court judge distinguished Kassam from this case on the basis that the defendant in Kassam did not receive notice of the claim until after the expiry of the applicable limitation period.

[64] There is no doubt that, in Kassam, the absence of prior notice of the claim strengthened the defendant's assertion of prejudice. However, in my view, properly read, the holding in Kassam of presumptive prejudice on the expiry of a limitation period is not restricted to cases of no prior notice of the claim. Rather, the absence of prior notice is but one factor, albeit a compelling one, to be taken into account when assessing whether the prospects of a fair trial have been compromised.

[65] This court has also considered whether the expiry of a limitation period gives rise to deemed prejudice, however slight. In Worrall v. Powell, [1969] 2 O.R. 634, [1969] O.J. No. 1370 (C.A.), a writ was issued before the expiration of the limitation period but there was a four-and-one-half-year delay in serving the statement of claim. Justice Aylesworth noted, at para. 3, that, in these circumstances, a major factor to be taken into consideration was the expiration of the limitation period "because such expiration raises a presumption of prejudice suffered by the defendants".

[66] Worrall was followed by this court's decision in Clairmonte v. Canadian Imperial Bank of Commerce, [1970] 3 O.R. 97, [1970] O.J. No. 1506 (C.A.). In Clairmonte, Jessup J.A.

recognized, at para. 43, that the nature of some actions, for example negligence actions, will peculiarly hamper the defence "by the erosion of the memory of witnesses through the passage of time" and that, in those types of action, the expiry of a limitation period may be taken as the "legislature's measure" of when a defendant may be presumed to be prejudiced by delay.

[67] Justice Jessup then clarified, at para. 43, with respect to Aylesworth J.A.'s comments in Worrall:

> [T]he force of the presumption mentioned by Aylesworth, J.A., will depend on the time which has passed after the expiration of a limitation period as well as on the nature of the action. While the presumption will speak as a barely audible caution immediately after a limitation period has expired, it [page571] may command with increasing imperativeness on the passage of a substantial time, depending on the cause of action.

(Emphasis added)

[68] The Divisional Court judge in this case relied on Laskin J.A.'s concurring reasons in Clairmonte, at para. 34:

> I say, with respect, that where an action has been commenced within the proper limitation period, there can be no pretence that any right of a defendant to rely on a limitation period is prejudiced, because the course of the action is protracted. His right, if any, is to have the action dismissed if it is not regularly prosecuted to trial; and if he succeeds, it is the plaintiff who will suffer as a result of the intervention of a limitation period. Indeed, to speak of prejudice to the defendant on the basis of the expiry of a limitation period which would protect him only if the application to dismiss the action for want of prosecution succeeded, is to beg the very question that has to be decided; it is to use the results of success on the application as a ground for granting it.

[69] Clairmonte was a case where an action was commenced within a limitation period and the progress of the action

thereafter was protracted, following which the defendant sought to have the action dismissed for delay. Justice Laskin held that, in that situation, the fact of the expiry of a limitation period prior to the dismissal motion was irrelevant. The defendant's cause for complaint concerned the undue delay in prosecuting the live action.

[70] That is not this case. Here, the First and Second Actions were both dismissed, the limitation period expired and inordinate delay transpired before the respondent moved to set aside the dismissal orders. In the case at bar, if the dismissal of the Second Action were to be set aside, the appellants would lose the benefit both of court-sanctioned dismissal orders, which had already been granted in recognition of undue delay by the respondent, and of the expiry of the applicable limitation period.

[71] This court's decision in Armstrong v. McCall, [2006] O.J. No. 2055, 213 O.A.C. 229 (C.A.) is also instructive. In Armstrong, although there was timely notice of the claim, the court gave the defendants the benefit of the presumption of prejudice in deciding "whether delay that is properly described as inordinate and inexcusable has given rise to a substantial risk that a fair trial for the defendant will not be possible" (at para. 20). Further, at para. 11, the court endorsed the description of the test for dismissal of an action for delay articulated by Master Dash and accepted by the Divisional Court in Woodheath Developments Ltd. v. Goldman (2003), 66 O.R. (3d) 731, [2003] O.J. No. 3440 (Div. Ct.), at p. 732 O.R., reasoning in part as follows: [page572]

> The principle to be applied on a motion to dismiss for delay is that the action should not be dismissed unless: (1) the default is intentional and contumelious; or (2) the plaintiff or his or her lawyers are responsible for the inexcusable delay that gives rise to a substantial risk that a fair trial might not now be possible. It is presumed that memories fade over time, and an inordinate delay after the cause of action arose or after the passage of [a] limitation period gives rise to a presumption of prejudice. Where there is a presumption of prejudice, the defendant need not lead actual

> evidence of prejudice and the action will be dismissed for delay unless the plaintiff rebuts the presumption. The presumption of prejudice may be rebutted . . . If the presumption is rebutted then the action may still be dismissed if the defendant leads convincing evidence of actual prejudice.

(Emphasis added)

[72] Armstrong involved a motion under Rule 24 to dismiss an action for delay, rather than a motion under rule 37.14 to set aside an existing dismissal order. Nonetheless, 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 expires gives rise to trial fairness concerns. In my view, this is so even when timely notice of the claim has been provided. This is consistent with the principle, articulated in Clairmonte by Jessup J.A., at para. 43, and quoted by the Divisional Court judge in this case, at para. 73, that the force of prejudice due to delay intensifies with the passage of time.

[73] I have also considered the import of this court's recent decision in Finlay v. Van Paassen, [2010] O.J. No. 1097, 2010 ONCA 204, yet another appeal in which this court was asked to set aside the administrative dismissal of an action. In Finlay, commenting in obiter, at para. 34, Laskin J.A. expressed reservations as to the relevancy in that case of the running of the limitation period, which expired while the action was ongoing. In those circumstances, he commented that the delay in the litigation had no bearing on the running of the limitation period.

[74] But, importantly, unlike this case, the lawsuit in Finlay proceeded without any unreasonable delay before the dismissal order. Further, the motion judge in Finlay held that the conduct of the delinquent litigant in not moving the litigation forward was not deliberate. Again, that is not this case. Here, on the findings of the master, the delay occasioned by the respondent was intentional. That finding was not challenged before this court. Moreover, I reiterate that, in this case, the respondent seeks to deprive the appellants of

the security of the position gained by them from the delay-induced dismissal orders and the subsequent expiry of the limitation period. I note that the limitation period had expired well before the respondent [page573] finally brought his Motions to even correct the misnomers in his pleadings.

[75] Mention must also be made of this court's decision in March D'alimentation Denis Thriault Lte v. Giant Tiger Stores Ltd. (2007), 87 O.R. (3d) 660, [2007] O.J. No. 3872 (C.A.). In March, as in this case, the court was concerned with the question of when a litigant should be permitted to revive an action that had been dismissed for delay. Justice Sharpe, writing for the court, indicated, at para. 21, that the contextual approach mandated by Scaini to determine what is just in the circumstances of the particular case "invites the application of important underlying principles and values of the civil justice system that are inherent in the four Reid factors". In his ensuing discussion of these foundational principles and values, Sharpe J.A. emphasized

(i) that modern civil procedure requires the discouragement of delay and the enhancement of an active judicial role to ensure timely justice. For this important reason, the Reid test requires an explanation for the delay occasioned in the litigation: para. 23;

(ii) moreover, "[T]here is a strong public interest in promoting the timely resolution of disputes." He noted: "Litigants are entitled to have their disputes resolved quickly so that they can get on with their lives. Delay multiplies costs and breeds frustration and unfairness": para. 25;

(iii) that excusing significant delay "risks undermining public confidence in the administration of justice": para. 32; and

(iv) on the other hand, our civil justice system and the requirement of prejudice under the Reid test favour "the goal of having disputes resolved on the merits": para. 34.

[76] These principles are implicated in this case. So, too, is Sharpe J.A.'s elaboration in March, at paras. 37 and 38, of the particular importance of finality in litigation as a consideration in assessing prejudice:

> Finality, like the avoidance of unnecessary delay, is a central principle in the administration of justice. "The law rightly seeks a finality to litigation" and finality is "a compelling consideration".
>
> When an action has been disposed of in favour of a party, that party's entitlement to rely on the finality principle grows stronger as the years pass. Even when the order dismissing the action was made for delay or default and not on the merits, and even when the party relying on the order could still defend itself despite the delay, it seems to me that at [page574] some point the interest in finality must trump the opposite party's plea for an indulgence.

(Emphasis added; citation omitted)

I agree.

[77] Indeed, as Gillese J.A. of this court indicated in Hare v. Hare (2006), 83 O.R. (3d) 766, [2006] O.J. No. 4955 (C.A.), at para. 41, the twin goals of finality and certainty in legal affairs and the prevention of indefinite liability underlie the creation of limitation periods. As she observed, at paras. 41-42:

> [T]he words of this court in Deaville v. Boegeman (1984), 48 O.R. (2d) 725, at 729-30 are usefully recalled:
>
> > When limitation periods were under consideration by the common law courts in the 18th and 19th centuries, the judges described these limitation statutes as "statutes of repose" or "statutes of peace". The emphasis then was as it is today, on the necessity of giving security to members of society. Citizens would not expect to be disturbed once the limitation period had expired. Today when a limitation period has expired it is considered that, generally speaking, a defendant need no longer be concerned about the location or preservation of evidence relevant to the particular claim or relevant to a claim which has not been made. Further, the defendant is, presumably at that stage free to act and plan his life without concern for stale claims or claims of which he has no knowledge which have arisen out of the original incident. When considering the

> purpose of limitation periods, the maxim, although used frequently in other connections, expedit reipublicae ut sit finis litium is appropriate; it is indeed in the public interest that there should be an end to litigation. [Citations omitted]
>
> The Ontario Law Reform Commission explained the need for limitation periods in its Report on Limitation of Actions (Toronto: Department of the Attorney General, 1969) at 9-10:
>
> Lawsuits should be brought within a reasonable time. This is the policy behind limitation statutes. These laws are designed to prevent persons from beginning actions once that reasonable time has passed. Underlying the policy is a recognition that it is not fair that an individual should be subject indefinitely to the threat of being sued over a particular matter. Nor is it in the interests of the community that disputes should be capable of dragging on interminably. Furthermore, evidentiary problems are likely to arise as time passes. Witnesses become forgetful or die: documents may be lost or destroyed. Certainly, it is desirable that, at some point, there should be an end to the possibility of litigation in any dispute. A statute of limitation is sometimes referred to as an "Act of peace".
>
> . . . . .
>
> Apart from the protection they give to potential defendants, limitation statutes enable the courts to function more effectively by ensuring that litigation is not started so long after the event that there are likely to be evidential difficulties. In addition, the commercial world is able to carry on more smoothly. The limitation statutes encourage [page575] early settlements so that the disrupting effect of unsettled claims on commercial intercourse is minimized.

(Emphasis added)

[78] I note that Finlay does not depart in any way from the finality principle emphasized in March and Hare.

[79] Further, on the facts of this case, it is my view that invocation of the finality principle, in the context of full consideration of the other factors relevant to the decision whether to set aside the dismissal orders, was dispositive of the central issue before the master. In particular, I note that the respondent failed to comply with the mandatory requirements of rule 37.14(1); that he failed to provide a satisfactory explanation for his delay in moving to set aside the dismissal orders; and that even when he determined to seek such relief, his motion for relief was not brought promptly. In these circumstances, I conclude that this is the type of case described by Sharpe J.A. in March, in which finality must trump. That said, as the Divisional Court judge held that the master's prejudice analysis was also flawed, I turn to consideration of that analysis.

(ii) Master's assessment of prejudice

[80] In this case, in arriving at her conclusion that justice required the dismissal of the Motions, the master considered the impact of deemed prejudice arising from the expiry of the limitation period. She went on to consider the respondent's assertion that a fair trial was nonetheless possible as all necessary relevant evidence allegedly had been preserved. In rejecting that claim, the master properly considered whether the respondent had discharged his onus to rebut the presumption of prejudice to the appellants. She concluded that he had not. This was sufficient to dispose of the matter, as no requirement for a showing of actual prejudice arose in these circumstances.

[81] But, I emphasize, the master's analysis of prejudice did not end there. The master's prejudice ruling was not anchored solely or even predominately on presumptive prejudice arising from the expiry of the limitation period. Nor was it grounded in her view of the claim of actual prejudice apparently asserted by the appellants in oral argument before the master. Rather, the master's prejudice ruling was also based on her consideration of the "significant passage of time" from the date of the events giving rise to the litigation and the respondent's inadequately explained delay in bringing the Motions and prosecuting the Second Action. These were necessary and significant considerations under the contextual analytical

framework mandated by Scaini. [page576]

[82] Moreover, the master's focus on the overall "significant" passage of time in this case included explicit reference to Sharpe J.A.'s caution in March of the importance of the finality principle when it is sought to set aside an action that has already been dismissed for delay.

[83] In contrast, while the Divisional Court judge referred to March and to a party's right to rely upon the finality implied by the passage of considerable time (at para. 77), he failed to address the significance of the finality principle in his prejudice analysis and to apply it to the facts of this case. With respect, his failure to do so was an error.

[84] With respect to the issue of actual prejudice, I offer these observations. First, as I have already said, in the circumstances of this case, there was no evidential burden on the appellants to demonstrate actual prejudice. Second, as I read her reasons, the master's ruling did not turn on the issue of actual prejudice. Indeed, her consideration of actual prejudice appears incidental to her central reasoning, which I have already described. Third, and in any event, the master observed that the allegation of malicious or negligent prosecution [at para. 40] "require[d] different evidence than that which could be found in the Crown disclosure brief". Although this comment might have been differently worded, I take it as a recognition of the fact that where, as here, negligent investigation and Charter breaches are alleged, the contents of the Crown disclosure brief concerning the prosecution would not fully address the causes of action alleged. I agree. Indeed, I think it self-evident. Finally, the issue of evidence of actual prejudice cannot overtake the requirements of rule 37.14(1). Under that rule, as I have indicated, the obligation to explain the significant delay occasioned in this case fell squarely on the respondent. Simply put, he failed to discharge that controlling burden.

[85] I agree with the master that the delay in prosecuting the Second Action and in bringing the Motions was inordinate. Almost two years passed from the dismissal of the Second Action

to the date of the hearing of the Motions and a delay of about one year and ten months occurred from the expiry of the limitation period to the hearing of the Motions. And more than three years elapsed from the initial commencement of the litigation to the date when the respondent finally sought relief from the court to regularize his pleadings, consolidate the proceedings and set aside the dismissal orders. The respondent demonstrated no sense of urgency to advance the litigation or to move to set aside the dismissal orders. [page577]

[86] Further, I underscore that the respondent failed to adduce a cogent explanation for the delay or sufficient evidence to rebut the presumption of prejudice arising from the delay in bringing the Motions and the expiry of the limitation period. He failed to do so at his peril: see Tanguay v. Brouse, [2010] O.J. No. 343, 2010 ONCA 73.

[87] The respondent also failed to establish that the delay was the result of solicitor inadvertence. Indeed, no such claim was advanced. The master was not satisfied that the delay was unintentional. I repeat, that finding was not challenged before this court.

[88] Given all these considerations, I see no error in the master's reliance on the expiry of the limitation period and the respondent's inordinate delay in holding that there was prejudice to the appellants in this case. Accordingly, I conclude that her order must be restored.

V. Disposition

[89] For the reasons given, I would allow the appeals and reinstate the master's order. The appellants shall submit their brief written submissions concerning costs to the registrar of this court within 14 days of these reasons. The respondent shall deliver his brief responding costs submissions to the registrar within 14 days thereafter.

LANG J.A. (dissenting): --

1. Introduction

[90] According to the plaintiff's statement of claim, his wife, who suffered from depression and alcoholism, had made many attempts to commit suicide. On April 18, 1999, she "was found [dead] in an armchair with the plaintiff's rifle upside down with the front barrel in her mouth". The plaintiff was charged with her murder.

[91] As part of their murder investigation, the police sought the opinion of Dr. Vincent Demaio. Dr. Demaio, who was based in Texas, was considered the leading firearms expert in North America. He gave the police his opinion that Mrs. Wellwood's death was a "probable suicide" and stated that his office would have "ruled this case a suicide". At the invitation of the Crown, the court discharged Mr. Wellwood during the course of the 2004 preliminary inquiry.

[92] Shortly after his discharge, Mr. Wellwood launched the two actions described in Cronk J.A.'s reasons. Both actions, despite misnomers, were acknowledged to be against the same [page578] police and Crown defendants. The allegations against the defendants included claims of negligent investigation and malicious prosecution. Mr. Wellwood's counsel at the time promptly served the defendants with the statements of claim, which contained full particulars of the allegations. [See Note 5 below] The police defendants requested an indulgence in delivering their statements of defence so that they could investigate the allegations.

[93] The delay that followed is well-chronicled in the reasons and appendix to the reasons of Cronk J.A. Those reasons demonstrate that the plaintiff's counsel did not move expeditiously in attending to motions, even though the defendants were prepared to co-operate. The plaintiff's motion to amend the title of proceedings was initially scheduled to be heard on three occasions earlier in the year. However, in November 2005, the motion was marked as abandoned. About two weeks later, the second action was dismissed by the registrar. About ten months later, plaintiff's counsel sought the defendants' consent to the reinstatement of the action. The defendants refused their consent. At that point, plaintiff's counsel advised the defendants he was reporting the matter to

LawPro. A different law firm came on the record for the plaintiff. The new law firm proceeded with the motions to set aside the registrar's order, which the master dismissed.

[94] I have had the benefit of reading the comprehensive reasons of my colleague Cronk J.A. I agree with her that the Divisional Court judge (the appeal judge) correctly identified the master's error regarding her authority to relieve against the dismissal order. In light of the master's alternative consideration of whether the order should be set aside in any event, the appeal judge, also correctly, did not rely on the master's error as a reason to allow the appeal.

[95] I also agree with Cronk J.A. that the appeal judge erred in attributing responsibility for the delay to the defendants, particularly in light of the approach of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, which largely place the burden on a plaintiff to ensure the progress of litigation.

[96] Despite my agreement on these issues, as I will explain, it is my view that it was open to the appeal judge to conclude that the master's reasons demonstrated reviewable error, including by deeming prejudice from the mere expiration of the limitation period. In view of the errors, I conclude that it was [page579] both appropriate and necessary for the appeal judge to reweigh the relevant factors to determine whether the registrar's dismissal of the second action should be set aside. In reweighing those factors, the appeal judge was alert to the concerns arising from the plaintiff's delay in bringing the motion to set aside the registrar's dismissal order. However, after considering that factor in the entire context, the appeal judge concluded [at para. 84] that "the ultimate balancing of all of the factors favours the plaintiff". In my view, this consideration was available to the appeal judge in his exercise of discretion. Accordingly, I would dismiss the appeal.

II. Issues

1. The expiration of the limitation period

[97] After hearing submissions, the master invited counsel to make further submissions about the relevant limitation period. This request for submissions, together with the structure of

the master's reasons, demonstrates that the expiration of the limitation period, and the prejudice the master deemed arose from that expiration, were important components of the balancing she undertook in exercising her decision to refuse to reinstate the action.

[98] The appeal judge took a different view and concluded that, provided an action is commenced within the limitation period, the passage of the date when the limitation period would otherwise have expired is irrelevant. In reaching that conclusion, the appeal judge considered the relevant authorities, including the cases of Worrall v. Powell, [1969] 2 O.R. 634, [1969] O.J. No. 1370 (C.A.); Clairmonte v. Canadian Imperial Bank of Commerce, [1970] 3 O.R. 97, [1970] O.J. No. 1506 (C.A.); Armstrong v. McCall, [2006] O.J. No. 2055, 213 O.A.C. 229 (C.A.); Woodheath Developments Ltd. v. Goldman (2003), 66 O.R. (3d) 731, [2003] O.J. No. 3440 (Div. Ct.); and March D'Alimentation Denis Thriault Lte v. Giant Tiger Stores Ltd. (2007), 87 O.R. (3d) 660, [2007] O.J. No. 3872 (C.A.), discussed in the reasons of Cronk J.A.

[99] In Clairmonte v. Canadian Imperial Bank of Commerce, supra, B. Laskin J.A. pointed out in his concurring reasons that prejudice to the defendant does not arise if the action is brought within the prescribed time. At p. 113 O.R., he explained:

> I say, with respect, that where an action has been commenced within the proper limitation period, there can be no pretence that any right of a defendant to rely on a limitation period is prejudiced, because the course of the action is protracted. His right, if any, is to have the action dismissed if it is not regularly prosecuted to trial; and if he succeeds, it is the plaintiff who [page580] will suffer as a result of the intervention of a limitation period. Indeed, to speak of prejudice to the defendant on the basis of the expiry of a limitation period which would protect him only if the application to dismiss the action for want of prosecution succeeded, is to beg the very question that has to be decided; it is to use the results of success on the application as a ground for granting it.

[100] In Finlay v. Van Paassen, [2010] O.J. No. 1097, 2010 ONCA 204, at para. 34, albeit in obiter, J.I. Laskin J.A. observed:

> I do not see how the running of the limitation period had any relevance to the motion. The action was started well within the limitation period and would be reinstated if the registrar's order were set aside. Moreover, to be relevant, any prejudice from the "expiry" of a limitation period would have to be caused by the delay. In this case, however, to the extent that it can be said the limitation period "expired", it did so in October 2005 while the action was ongoing. The delay itself had no bearing on the running of the limitation period.

[101] My colleague would distinguish this court's decision in Finlay for three reasons. First, my colleague refers to the absence of litigation delay in Finlay prior to the registrar's dismissal. However, the prejudice caused by litigation delay raises different considerations from prejudice deemed to have arisen from the mere expiration of a limitation period. Second, my colleague distinguishes Finlay on the basis that the litigant's delay in that case was not deliberate. However, as I will discuss, there is an evidentiary difficulty with the master's conclusion that the plaintiff's delay in this case was deliberate. Finally, my colleague observes that Finlay did not depart from the "finality" principle emphasized in March and Hare. That is correct. However, the principle of finality, balanced by the objective of deciding cases on their merits, informs the entire context for the analysis. It is not a stand-alone ground. Rather, it is reflected in each of the relevant considerations that influence the decision whether to reinstate the proceeding.

[102] In this case, the appeal judge observed that the action was started and served long before the expiration of the limitation period. The parties continued to correspond about the case until shortly before the registrar's dismissal order. The defendants would not have been notified of the registrar's dismissal of the action because they had not filed statements

of defence. They were not on the record. Thus, it seems that the defendants would have believed the action remained outstanding until the plaintiff wrote seeking their consent to its reinstatement. In those circumstances, the defendants could not have been prejudiced by a limitation period that they knew had been met by litigation they believed to be ongoing. [page581]

[103] In addition, the expiration of the limitation period is irrelevant because once an action is reinstated, it continues as if the dismissal never occurred. It follows that any coincidental expiration of a limitation period between the issuance of the registrar's order and the reinstatement of the action cannot inform the question of whether the action should be reinstated.

[104] For these reasons, I agree with the appeal judge that the mere expiry of a limitation period after an action has been commenced does not give rise to deemed prejudice.

2. Deeming prejudice to the defendants

[105] In this case, the master "deemed" prejudice to the defendants. "Deemed prejudice" simply means that it is reasonable for the court to draw an inference that the defendant was prejudiced by a particular set of circumstances. Once prejudice to the defendant is "deemed", the evidentiary burden shifts to the plaintiff to demonstrate an absence of prejudice. If the plaintiff meets that burden, the evidentiary burden shifts back to the defendant to establish actual prejudice.

[106] In any event, whether prejudice should be inferred in the absence of direct evidence must depend on what is reasonable in light of the issues at stake. For example, it is evident that cases involving eyewitness evidence may be prejudiced by delay for the well-known reason that memories fade over time. Similarly, cases involving record-keeping may be prejudiced, depending upon the state of the defendant's documentary preservation. In both instances, it is a reasonable inference that the passage of time could prejudice the defendant's ability to have a fair trial.

[107] For these reasons, prejudice is inferred in cases arising from incidents such as a motor vehicle accident or a slip and fall because such cases involve eyewitness or documentary evidence that is susceptible to deterioration from the passage of time. However, prejudice is not a reasonable inference in all cases. In this case, the plaintiff sued the police and the state. All the defendants had early and adequate notice of the particulars of the claim in order to undertake any necessary investigations and ensure proper memory preservation and record keeping.

[108] The master seems to have approached this case by concluding that the plaintiffs failed to overcome the inference of prejudice to the defendants. However, the circumstances of the case do not lead to an inference of prejudice. Moreover, the plaintiff provided evidence that there was no prejudice and the defendants failed to respond with evidence of actual prejudice. [page582]

[109] The plaintiff's direct evidence that there was no prejudice went well beyond a mere bald statement. In his affidavit, counsel for the plaintiff stated that the available 14 boxes of disclosure provided by the Crown during the criminal proceedings preserved a "complete evidentiary record". He also swore that he believed that the defendants had "commenced investigations" upon receipt of the plaintiff's claims and had "likely preserved the evidentiary records as well". He swore his belief that "absolutely no prejudice will befall the defendants". This evidence on behalf of the plaintiff stood unchallenged by cross-examination.

[110] Despite this direct evidence of the absence of prejudice, the defendants chose not to address the issue of actual prejudice in their material. Instead, they decided to rely solely on deemed prejudice. In my view, they made this decision at their peril.

[111] In these circumstances, the appeal judge was correct in concluding the defendants called "no evidence of actual prejudice". Moreover, to the extent the master accepted the

defendants' arguments of actual prejudice, those arguments were not supported by evidence. [See Note 6 below]

[112] The master referred to three such arguments in concluding that the plaintiff failed to displace prejudice deemed to arise from the expiration of the limitation period. First, the master concluded [at para. 46] that there were "witnesses whose evidence [would] be germane, notably, the expert in the U.S. whose evidence appears to be key". However, there was no evidence to support this conclusion. If the expert referenced by the master was Dr. Demaio, there was no explanation about the scope of his evidence and certainly nothing to suggest that his evidence would have been compromised in any way by either the expiration of the limitation period or the passage of time. Nor is there any indication in the record of any other witness who would no longer be available as a result of the passage of time.

[113] Second, the master determined [at para. 40] that the civil case would "[require] different evidence than that which would be found in the Crown disclosure brief". The master's reasons do not explain the nature of any "different evidence" and the issue was not addressed in the defendants' responding affidavit or anywhere else in the record. Accordingly, the appeal judge was correct when he noted there was no evidence to support this conclusion. [page583]

[114] Third, the master found that deemed prejudice flowed in part from the fact that so much time had passed from Mrs. Wellwood's death in 1999 and the laying of the charge against the plaintiff until its withdrawal in 2004. However, in my view, that passage of almost five years cannot be attributed to the plaintiff. Surely, in the circumstances of this case, the police and the state cannot rely on prejudicial delay for the time period the plaintiff was facing a murder charge brought against him by the defendants. The plaintiff was powerless to control the time taken by the state in advancing his criminal prosecution.

[115] It follows that the appeal judge was correct in concluding that the absence of evidence of actual prejudice to

the defendants favoured the plaintiff's motion to reinstate the action.

3. Explanation for the delay

[116] In her reasons, the master "combined" consideration of whether the delays in proceeding with the motions and actions were intentional with the question of solicitor's inadvertence. The master concluded that the solicitor's affidavit failed to explain adequately the delay in bringing the motion. She also concluded that the plaintiff failed to provide an explanation of steps he took to inquire about the progress of the action. On this basis, she concluded [at para. 29] that the plaintiff had not discharged his onus to explain that "the delay was not intentional".

[117] The master reached this conclusion even though the plaintiff expressly stated in his affidavit that it had "always been and continues to be my intention to proceed with this action" and, more importantly, that he had instructed his lawyer to move to set aside the dismissal order. This evidence stood unchallenged by cross-examination.

[118] The affidavit of the plaintiff's litigation lawyer was less direct. It referred to delay caused by "re-drafts" of material. This may have been intended to address the issue of solicitor inadvertence, but it did not address the issue of the plaintiff's intention. Moreover, that was not the only evidence. The defendants' filed exhibits on the motion that included correspondence counsel exchanged between January 18, 2007 and May 10, 2007. In that correspondence, the plaintiff's litigation counsel advised the defendants that he was reporting the matter to LawPro and that "[t]his explains our delay". Three months later, new counsel for the plaintiff wrote, stating that he would bring forward the motions to set aside the dismissal. In response, the Crown required "proof" that the new counsel was receiving instructions from the plaintiff (rather than from the plaintiff's former litigation lawyer). A series of letters followed that ended with the [page584] delivery of the plaintiff's affidavit responding to the defendants' challenges by expressly stating his intention to proceed with the action and the motion. Thus, several months of

the delay were explained on the record.

[119] It is also apparent from the record that the plaintiff is the antithesis of a sophisticated litigant who would instruct counsel to delay to gain some tactical advantage or other benefit. He had no apparent motive to delay.

[120] As well, in deciding not to reinstate the action, the master acknowledged [at para. 44] that "the result may be harsh to the plaintiff". She continued, however, to make the observation that the plaintiff may "have a remedy against his solicitor". This court explained in Finlay, at para. 32, why such a potential remedy is not a relevant consideration in determining whether to set aside a dismissal order:

> A judge who refuses to set aside a dismissal order will naturally be concerned that the effect of the refusal will be to deprive an innocent party of its day in court. To protect the claim of the innocent party, the judge will often raise the possibility of a negligence action against the party's own lawyer. Although perhaps understandable, I do not find this helpful. Speculation about whether a party has a lawsuit against its own lawyer, or the potential success of that lawsuit, should not inform the court's analysis of whether the registrar's dismissal order ought to be set aside.

[121] In exercising his discretion, the appeal judge was alive to the issue of delay in bringing the motion. After deciding that the master erred in her conclusion of prejudice, the appeal judge noted [at para. 83] that the absence of an adequate explanation weighed "heavily in favour of the defendants". Indeed, he observed that, given the "little explanation as to why the delay occurred", the periods of inactivity "may well under other circumstances [have tipped] the balance in favour of the dismissal of the appeal". However, after balancing all the other relevant circumstances, including the absence of prejudice, the appeal judge concluded that the appeal should be allowed and the action reinstated.

[122] This was in accordance with Scaini, which requires the court to balance the relevant factors by taking a "contextual

approach". In doing so, the appeal judge recognized that the exercise was one of discretion that required the balancing of the interests of the parties, as well as the public interest in finality in the resolution of disputes. In particular, the appeal judge pointed [at para. 83] to March, at para. 25, and noted the importance of lawyers' adhering to timelines in order to avoid delay that "multiplies costs and breeds frustration and unfairness". [page585]

[123] In arriving at his decision, the appeal judge was influenced by the early notice of the claim and the absence of prejudice to the defendants. These considerations were an appropriate part of the balancing exercise. As J.I. Laskin J.A. stated, at para. 28 of Finlay, prejudice is "invariably . . . a key consideration on a motion to set aside a dismissal order". See, also, Farrar v. McMullen, [1971] 1 O.R. 709, [1970] O.J. No. 1721 (C.A.).

[124] In my view, after taking into account the relevant circumstances, the appeal judge was entitled to conclude [at para. 84] that "the ultimate balancing of all the factors favours the plaintiff".

III. Result

[125] Accordingly, I would dismiss the appeal with the result that the action would be reinstated. I would award costs of the appeal to the respondent.

Appeal allowed.

Appendix "A"

Chronology of Relevant Events [See Note 7 below]

July 7, 2004	-- Respondent's counsel provides notice to the appellants of the respondent's intention to commence a civil action for damages.
	-- A notice of action in respect of the First Action is issued.
August 4, 2004	-- A statement of claim in the First

Action is filed, but not served.

August 9, 2004 -- Crown counsel requests particulars of the respondent's claims.

September 7, 2004 -- A statement of claim in the Second Action is filed, but not served.

November 9, 2004 -- Registrar issues a notice of intention to dismiss the First Action (a "Case Expiry Notice"), as abandoned, under rules [page586] 77.08 and 77.17(1), with a deadline of January 3, 2005.

December 17 and 22, 2004 -- Both statements of claim are served on the appellants.

-- Respondent's counsel advises that he is "in the process of obtaining an Order consolidating the two actions".

January 10, 2005 -- As with the First Action, the registrar issues a notice of intention to dismiss the Second Action, as abandoned, with a deadline of March 7, 2005.

January 18, 2005 -- Crown counsel informs the respondent's counsel that (i) the First Action is a nullity as against the Crown for failure to comply with the 60-day notice requirement of s. 7 of the Proceedings Against the Crown Act (the "PACA") and should be discontinued; (ii) an amendment to the respondent's pleading in the Second Action is required to correctly name the Crown as a proper defendant; and (iii) the Crown defendants would await the delivery

of the respondent's amended pleadings before delivering any defence.

January 19, 2005 -- The First Action is dismissed as abandoned by order of the registrar.

January 28, 2005 -- Counsel for the Board informs the respondent's counsel of the misnaming of the Board in the respondent's pleadings and requests an indulgence for the delivery of the Board's statement of defence pending investigation of the respondent's claims and correction of the misnomer in the respondent's pleadings.

March 1, 2005 -- Not having received a response from respondent's counsel to the January 28, 2005 letter, Board counsel informs respondent's counsel that an investigation into the respondent's claims is continuing and seeks confirmation of an indulgence [page587] for delivery of the Board's statement of defence.

March 3, 2005 -- Respondent's counsel informs the Board's counsel that he would be "drafting materials shortly" to seek the consolidation of the two actions, to set aside the dismissal of the First Action, and to correct the misnaming of the Board in the respondent's pleadings.

-- Respondent's counsel also writes to Crown counsel purporting to confirm Crown counsel's consent to an order setting aside the dismissal of the First Action, contingent on the amendment of the respondent's

pleading.

March 8, 2005 -- Crown counsel responds, maintaining that the March 3, 2005 letter did not accurately portray the Crown defendants' position. Crown counsel indicates that the Crown defendants would consent only to an order setting aside the dismissal of the Second Action on the amendment of the respondent's pleading to correct the identified misnomers, as the First Action was a nullity. Crown counsel also requests notice of the respondent's motion to set aside the dismissal of the Second Action. In fact, at this point, the Second Action was not yet dismissed. Moreover, while the First Action was a nullity as against the Crown, it was not a nullity as against the other named defendants.

May 11, 2005 -- Board counsel informs respondent's counsel that she had yet to receive the motion materials promised on March 3, 2005 and reiterates that she did not propose to deliver a statement of defence until the respondent's pleadings had been regularized. [page588]

April 28, 2005 -- Motion by respondent to amend pleadings in the Second Action adjourned to July 26, 2005.

July 26, 2005 -- Above-described motion again adjourned, to October 4, 2005.

October 3, 2005 -- Above-described motion again adjourned, to November 9, 2005.

October 31, 2005	--	Respondent's counsel provides appellants' counsel with motion materials to amend pleadings, to correct misnomers and to set aside dismissal order in the First Action, among other relief, and requests consent to same.
November 3, 4 and 5, 2005	--	Appellants' counsel again requests amendments to respondent's pleading in the Second Action to correct misnomers. Crown counsel again asserts that the First Action is a nullity and again reiterates her refusal to consent to relief in respect of it. Board counsel repeats that she was awaiting correction of the misnomers prior to delivering a defence.
November 9, 2005	--	Respondent's amendment motion, originally scheduled for hearing in late April or early May 2005, is marked as abandoned in court records.
November 25, 2005	--	The Second Action is dismissed as abandoned by order of the registrar.
January 8, 2006	--	Applicable two-year limitation period expires.
September 27, 2006	--	Respondent's counsel requests appellants' consent to orders consolidating the two actions and setting aside both dismissal orders (the "Motions").
October 2, 2006	--	Crown counsel informs respondent's counsel that she will not consent to an order setting aside the dismissal

of either action as "The plaintiff has delayed too long." She [page589] also reiterates that she would not consent to any order for relief respecting the Second Action without correction of the misnomer she had earlier identified in the respondent's pleading.

October 26, 2006 -- Crown counsel declines consent to proposed orders, in the case of the Second Action due to delay and in respect of the First Action as it was an alleged nullity in respect of the Crown.

-- Parties thereafter agree to November 29, 2006 date for argument of the Motions.

November 27, 2006 -- Motions adjourned on consent to January 22, 2007, as respondent's Motions materials not served in time.

January 22, 2007 -- Motions do not proceed as respondent's Motions materials again not served in time. Crown counsel advises that she will not consent to any further adjournment of Motions (January 18, 2007).

February 20, 2007 -- Board counsel writes to the respondent's counsel, inquiring as to his client's intentions concerning the litigation and noting that although the respondent's counsel had "twice indicated that [he] would be bringing a motion to set aside the dismissal orders", no motion materials had been received.

April 23, 2007	--	Respondent's counsel writes to appellants' counsel, indicating that he would be bringing motions to set aside the dismissals in both actions.
April 24, 2007	--	Respondent serves Motions materials.
May 15, 2007	--	Crown serves responding Motions materials.
May 23, 2007	--	Respondent swears affidavit in support of Motions, but provides no explanation for the delay in bringing the Motions. [page590]
August 24, 2007	--	Case conference held to reschedule Motions.
October 31, 2007	--	Motions argued before Master Sproat.
November 2007 to February 2008	--	Further submissions sought and recieved by Master Sproat concerning applicable limitation period and case authorities.
April 8, 2008	--	Order by Master Sproat dismissing the Motion concerning the Second Action. No order made regarding First Action due to concession that it was a nullity as against the Crown for non-compliance with the notice requirement of s. 7 of the PACA.
January 21, 2009	--	Respondent's appeal from master's ruling allowed in respect of the Second Action by Ferrier J. of the Superior Court of Justice, sitting as a single judge of the Divisional Court.

Notes

Note 1: This notice was issued to protect against the application of the six-month limitation period set out in the Public Authorities Protection Act, R.S.O. 1990, c. P.38.

Note 2: The statement of claim in the Second Action was apparently issued to comply with the 60-day notice requirement for proceedings against the Crown, set out in s. 7 of the Proceedings Against the Crown Act, supra.

Note 3: The limitation period ran, at the latest, from the date of the withdrawal of the murder charge against the respondent on January 8, 2004. Thus, the limitation period had expired by at least January 8, 2006.

Note 4: (2008), 91 O.R. (3d) 131, [2008] O.J. No. 1771 (Div. Ct.).

Note 5: Mr. Wellwood's counsel on this appeal, as well as in the courts below, was different than the counsel who represented him from the commencement of the litigation through and after the registrar's dismissal of the action.

Note 6: While the master relies on "deemed" prejudice, her reasons make reference to specific examples of actual prejudice.

Note 7: Much of this chronology is drawn from the master's reasons, dated April 8, 2008.
