Ontario Court of Appeal Weighs in on Jury Notices in the Context of the COVID-19 Pandemic

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On September 4, 2020, Justice Sheard of the Ontario Superior Court of Justice released a decision on a motion to strike the defendant's jury notice, in *Belton v. Spencer*.[1] Her Honour, in granting the plaintiff's motion, held that, in order to respond to the additional challenges to access to justice posed by the COVID-19 pandemic, the Court may need to grant Orders striking jury notices to ensure earlier, more efficient, and more affordable trials.

Justice Brown of the Ontario Court of Appeal, dismissed the appellant's motion for a stay and provided further guidance as to whether motions to strike jury notices will continue to be successful in regions where civil jury trials are currently not available due to the pandemic.[2]

Background

The appellant, Katie Spencer ("the Appellant"), was sued by the respondent plaintiff, John Belton ("the Respondent"), in a personal injury action.

The incident occurred in May 2010. The action was set down for trial in May 2017. The trial was originally set to proceed in November 2018, but was adjourned several times, with the trial eventually placed on the October 2020 trial list.

Due to the COVID-19 pandemic, Regional Senior Justice Arrell advised the parties in June 2020 that it was unlikely civil jury trials would proceed in 2020, and that the trial in this action would likely be delayed 12 to 18 months. As a result, the Respondent moved for an Order striking the jury notices, thus allowing the trial to proceed in 2020 before a judge only, which was granted by Justice Sheard.

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[1] *Belton v. Spencer*, 2020 ONSC 5327, 2020 CarswellOnt 12978.
[2] *Belton v. Spencer*, 2020 ONCA 628.

The Appellant filed a notice of appeal to the Ontario Court of Appeal, moving under Rule 63.02(1)(b) of the *Rules of Civil Procedure* for an Order staying the Order of Justice Sheard that struck out the parties' jury notices.[3]

Issues on Appeal

The Appellant sought to have the action stayed "until after the appeal process in this action and the appeal process in other actions involving the identical issue have been exhausted by way of a decision of this Court on appeal or by way of Special Case under Rule 22."[4]

In response, the Respondent soughtto quash the appeal on the grounds that Justice Sheard's Order was interlocutory in nature, and, therefore, any appeal lay with leave to the Divisional Court.

Court of Appeal

Justice Brown noted that the principles applicable to a motion to stay an Order pursuant to Rule 63.02(1) are derived from *RJR-MacDonald Inc. v. Canada (Attorney General)*.[5] In that decision, the Supreme Court of Canada articulated a three-part test to obtain a stay of judgment pending appeal.

Firstly, the Court is to determine whether there is a serious question to be tried. Secondly, the Court is to determine whether the moving party will suffer irreparable harm if the stay is not granted. Finally, the Court is to determine whether the balance of convenience favours granting the stay requested.

These components are interrelated, and the overriding question is whether the moving party has shown that it is in the interests of justice to grant a stay. The factors are "generally designed to assess the prejudice to the parties if the Order sought is granted or refused".

Is there a Serious Question to be Determined on the Appeal?

The Appellant articulated the serious issue to be determined as "concerning the substantive right to trial by jury amidst concern about trial delay associated with the current COVID-19 pandemic".

The threshold for demonstrating a serious question for determination is low. Despite this, Justice Brown stated that the merits of the Appellant's appeal are weak. Notably, he indicated that the substantive right to a jury trial is a *qualified right*. A party's entitlement

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[3] *Rules of Civil Procedure – Ont. Reg. 194*, R.R.O. 1990, Reg. 194, s. 63.02(1)(b).
[4] Belton v. Spencer, 2020 ONCA 628 at para. 19.
[5] *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 SCC 117, [1994] 1 S.C.R. 311.

to a jury trial is subject to the power of the Court to order that the action proceed without a jury, as per section 108(3) of the *Courts of Justice Act*.[6]

Although generally parties are free to exercise the right to jury trial, a judge has rather broad discretion to decide whether the “justice of the parties will be better served by the discharge of the jury”. The right to a jury trial, while fundamental, is “not absolute and must sometimes yield to the practicality”.

As the motion judge is afforded significant discretion to strike out jury notices, the case law has indicated that the appellate review of this exercise of discretion is limited. To justify intervention, the motion judge’s discretion must be shown to have been exercised “arbitrarily or capriciously” or “was based upon a wrong or inapplicable principle of law”.

In this matter, the only allegation of an error of law was that the motion judge did not adopt a “wait and see” approach to the motion to strike. The motion judge held that the reality of the situation, specifically that the court has suspended civil jury selection and jury trials for an indefinite period, meant that no judge would be assigned to hear the action as a jury trial until an indeterminate date in the future.

As a result, Justice Brown held that the motion judge correctly considered, then rejected, the “wait and see” approach, concurring with the motion judge’s statement that if such an approach was taken, “the delay in the scheduling of the trial that the plaintiff seeks to avoid, will have already occurred”.

Further, Justice Brown reviewed the motion judge’s balancing exercise, holding that Justice Sheard’s reasoning did not appear arbitrary nor capricious. Accordingly, Justice Brown regarded the merits of the issue the Appellant sought to have determined as weak.

Jurisdiction of the Court

As part of the serious question component, Justice Brown considered whether the Order of Justice Sheard was interlocutory in nature, such that the appeal should have properly been brought before the Divisional Court with leave. Justice Brown noted that the weight of authority, both from the Court of Appeal and Divisional Court, indicates that an Order striking out a civil jury notice is interlocutory in nature.

The Appellant argued that the right to a civil jury trial is frequently referred to as a “substantive right”, which signifies that an Order striking same would be considered a final order as described in *Ball v. Donais*.[7] In dismissing this argument, Justice Brown explained that such an Order does not deprive the Appellant of a substantive right that

[6] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 108(3).
[7] *Ball v. Donais*, 13 O.R. (3d) 322, 40 A.C.W.S. (3d) 1031.

could be determinative of the entire action. Rather, such an Order merely directs the mode of trial, to which neither party has an unfettered right to determine.

Irreparable Harm

This component focuses on the harm the moving party may suffer if the stay is not granted. Irreparable refers to the nature of the harm, not the magnitude; it is harm that cannot be quantified in monetary terms, or which cannot be cured.

The Appellant argued that the loss of her substantive right to a civil jury trial constituted irreparable harm. Justice Brown dismissed this argument quickly, again noting that a right to a civil jury trial is a qualified right.

Interestingly, Justice Brown stated that the Appellant had not explained, in specific functional terms, what litigation disadvantage she would suffer by having a judge only trial rather than a jury trial. Absent such evidence, Justice Brown did not believe this argument to be indicative of irreparable harm.

The Appellant also argued that if a stay was not granted, her appeal before this court would be rendered moot. It has previously been recognized that irreparable harm may arise where the failure to grant a stay may render an appeal moot. However, in Justice Brown's view, the Appellant took a strategic risk, appealing to the Court of Appeal rather than the Divisional Court, thus jumping over lower levels of appeal.

Justice Brown noted that it is open to an appellant to take such a risk, but an appellant cannot then argue that the possible mootness of their appeal amounts to irreparable harm.

Finally, the Appellant argued that if a stay was not granted, it would be a waste of judicial resources to hold a trial, then hear the appeal on the striking of the jury notice. Justice Brown dismissed this argument out of hand, noting that this contention was speculative and remote.

Balance of Convenience

The final component is to determine which of the two parties will suffer the greater harm from the granting or refusal of the stay. The factors to be considered will vary in each individual case.

The Appellant argued that the balance of convenience favours preserving the *status quo* of the parties' agreement to proceed to trial before a judge and a jury. Justice Brown disagreed with this submission, explaining that it ignores the impact of the COVID-19 pandemic on the Central South Region.

The evidence was undisputed that civil jury trials will not resume in the region for another 12 to 18 months. Requiring the plaintiff to wait another 12 to 18 months would, according to Justice Brown , result in an unconscionable delay.

The Appellant also argued that the Order should be stayed until an appellate court could determine a province-wide solution to the challenges posed by the pandemic on the ability of certain regions to offer civil jury trials. Four decisions involving motions to strike out civil jury notices were referred to, three in the East Region and one in the Toronto Region, as demonstrating conflicting decisions among lower Court judges.

Justice Brown, however, noted that the jury notices were struck out in the three cases in the East Region, largely because of the uncertainty regarding the re-commencement of civil jury trials in the region. In the Toronto decision, Justice Wilson refused to strike the jury notice because the Toronto Region is able to offer civil jury trials.

The above referenced decisions do not conflict – instead, they simply reflect the reality that the resources available for civil jury trials vary from region to region in the province. Justice Brown said that it is not the role of the Court of Appeal to interfere with the various Regional Senior Justices' allocation of resources in their respective regions during this extraordinary time.

Justice Brown ultimately dismissed the motion, holding that staying the Order would only result in further unconscionable delay and would be contrary to the interests of justice.

Takeaway

Justice Brown's reasoning seems to support the trend toward the striking of civil jury notices in regions where the current judicial infrastructure cannot support civil jury selection and jury trials, especially where the region has confirmed that civil jury trials will not return for either a lengthy or indeterminate amount of time.

Although parties to an action have a substantive right to a civil jury trial, the qualified nature of that right, and the ongoing COVID-19 pandemic, have made it such that parties may need to proceed with non-jury trials for the foreseeable future.