

## Striking Jury Notices During COVID Depends on Local Conditions

**Brian Sunohara**  
**January 2021**

The Ontario Court of Appeal recently released a decision which shows that striking a jury notice in the context of the COVID-19 pandemic is location-specific and case-specific.

In [\*Louis v. Poitras\*](#), 2021 ONCA 49, the Court of Appeal overturned a decision of the Divisional Court and reinstated the motion judge's order to strike jury notices in an Ottawa action.

### ***Underlying Decisions***

The motion judge stated that there were “extraordinary circumstances” and referred to the following factors in striking the jury notices:

- A limited number of courtrooms in Ottawa have been retrofitted with plexiglass dividers.
- A small number of courtrooms are being prepared for a handful of homicide trials.
- No plan has been finalized for accommodating jury trials.
- Criminal jury trials remain the priority.
- Only a single jury trial will be able to proceed in Ottawa at any given time because only one room is available for jury deliberation.
- The Ottawa court could readily fix civil non-jury trials of three weeks or less within the next six months. A non-jury trial could proceed in three week periods until complete.
- COVID-19 vaccines were in the development stage at the time the motion was heard (August 2020).
- The accident in question occurred over seven years ago.
- The trial was initially scheduled to be held in February 2018. It was then adjourned to April 2020, but could not proceed due to the pandemic.

The motion judge ordered the 10 week trial to proceed in various stages before a judge alone. The trial would commence at the first three weeks available to all counsel and would then continue in subsequent three week periods until complete.

The Divisional Court overturned the decision, stating that it was made with insufficient evidence and was arbitrary.

### ***Court of Appeal's Decision***

The Court of Appeal stressed that an appeal court should not lightly interfere with a decision to strike a jury notice. Further, the Court of Appeal stated that an appeal court should not second-guess a local court's discretionary case management decisions, noting that Superior Court judges are acutely aware of local conditions.

The Court of Appeal did not provide any type of conclusive statement on when a jury notice should be struck in the context of the pandemic, indicating:

[t]here is no single province wide answer to the problems we face in delivering timely civil justice; local conditions will necessarily impact the choice of effective solutions. However, what must remain consistent across the province is that motion and trial judges have the discretion to respond to local conditions to ensure the timely delivery of justice [para. 3].

In a similar vein, the Court of Appeal noted that judicial responses to the pandemic and the availability of court resources vary across the province. Different approaches to striking a jury notice do not demonstrate a conflict in the case law, but rather reflect the due exercise of judicial discretion in differing local circumstances.

Therefore, it is up to the motion judge to consider the local conditions in determining whether or not justice would best be served by striking the jury notice, taking into account the goal of moving cases forward. The Court of Appeal indicated that the motion judge conducted a detailed analysis of the situation in Ottawa.

Based on the circumstances of the case, the Court of Appeal held that the motion judge properly exercised his discretion to strike the jury notices.

### ***Commentary***

In *Louis*, there had already been two adjournments of the trial. The original trial date was 2.5 years prior to the motion. Vaccines were still in the development stage. The Ottawa court was not well-equipped to hear jury trials. Perhaps in those rather unique circumstances, striking the jury notices was understandable.

However, in this author's view, as vaccines become more readily available, fewer jury notices will likely be struck due to COVID-related issues. Based on current circumstances with vaccines anticipated to be available to everyone in Canada by September 2021, it is questionable as to whether jury notices should be struck at all.

If there is delay, it will likely be minimal. Although delay in obtaining a jury trial date can constitute prejudice and be a reason for striking a jury notice, minimal delay arguably does not outweigh a party's substantive right to a jury trial.

In addition, in the case of a lengthy trial, consideration should be given to whether a non-jury trial would actually be completed faster than a jury trial. If a trial is broken up and held over several "tranches", it could be a significant amount of time before the trial is completed and the trial judge delivers reasons. The schedules of the trial judge and counsel should be considered. It may be quicker to wait for the pandemic to subside and to have a jury trial.

Moreover, in this author's view, if a party is complaining of prejudice due to delay, that party should demonstrate what steps he or she took to move the action forward expeditiously prior to the motion and should explain any gaps in the litigation.

Delay needs to be viewed in the broader context of how the case has progressed. Otherwise, the pandemic could be used as a disingenuous ground to strike a jury notice in a matter where a party believes that he or she will be more successful