

Two Recent Decisions on Motions to Strike Jury Notices During COVID-19

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In December 2020, Justice Nicholson, of the Ontario Superior Court of Justice (“ONSC”), released two decisions, [Solanki v. Reilly](#) (“*Solanki*”)¹ and [Smith v. Muir](#) (“*Smith*”)², addressing motions brought by the plaintiffs to strike jury notices in actions commenced in London.

Justice Nicholson’s decisions provide common sense solutions to the complications that have arisen with respect to jury notices in the COVID-19 climate.

Background

Justice Nicholson, in both *Solanki* and *Smith*, helpfully summarized the Ontario Court of Appeal (“ONCA”) and ONSC decisions that have been released throughout the COVID-19 pandemic and the various approaches taken with respect to motions to strike jury notices.

He notes first that the ONCA, in the 2006 decision of *Cowles v. Balac*³, stated that the right to have an action tried by a jury is important and should not be interfered with without just cause or cogent reason. The relevant test is whether the moving party has shown that the justice to the parties will be better served by the discharge of the jury.

¹ 2020 ONSC 8031

² 2020 ONSC 8030

³ 83 O.R. (3d) 660 (CA)

With the onset of the COVID-19 pandemic, however, the ONCA recognized, in *Girao v. Cunningham*⁴, that the right to a jury trial in a civil action, although fundamental, is not absolute and must sometimes yield to practicality.

Various factors have been recognized by the courts in the many motions to strike jury notices during COVID-19, which assist the presiding motion judge in determining whether justice to the parties will be served by trying the case with or without a jury. These factors, as summarized by Justice Nicholson, include the following

1. Regional or even local differences with respect to the resources available to the court;
2. Regional differences in how the pandemic has affected the community where the trial is to be conducted;
3. The date of the incident giving rise to the action;
4. The time between the motion to strike and the trial date;
5. The number of times a case has been previously adjourned; and
6. The specific circumstances of the parties.

Justice Nicholson then reviewed the various motions and their outcomes, noting there to be two distinct lines of cases. The first line of decisions have used the “wait and see” approach. The motion judges in these decisions concluded that the ultimate decision whether the jury notice will be struck should be postponed until such time as there is greater certainty as to whether the case can proceed with a jury. These motions were largely heard in the Toronto and Central East regions, throughout September, October, and November.

The motion judges in the second line of decisions struck the jury notices. These motions were heard in Ottawa and in the Central South region mostly throughout August and September. Generally, the reasons for granting the motions in these decisions were similar: the East and Central South regions seemed incapable of supporting jury matters, while in-court, non-jury matters were able to proceed. The “wait and see” approach was not favoured in these matters, based on the circumstances in the regions.

One of the decisions heard in Ottawa, *Louis v. Poitras* (“*Louis*”)⁵, was appealed to the Divisional Court⁶, and further to the ONCA⁷. In this decision, Justice Beaudoin, the motion judge, recognized that jury trials were not being scheduled at that time in Ottawa and that

⁴ 2020 ONCA 260

⁵ 2020 ONSC 5301

⁶ 2020 ONSC 6907 (Div. Ct.)

⁷ 2020 ONCA 815

judge alone trials were available in the following six months. As a result, Justice Beaudoin struck the jury notice. On appeal, the Divisional Court overturned Justice Beaudoin's decision, holding that a general assertion of delay was not enough to strike a jury notice.

On further appeal to the ONCA, Justice Brown granted an Order staying the Divisional Court's Order. Justice Brown, citing *R. v. Jordan* and *Hryniak v. Mauldin*, noted that the COVID-19 pandemic has further impacted the operation of the Ontario courts and has only exacerbated the excessive delays experienced in the justice system. Justice Brown had previously rendered a decision in a similar context in *Belton v. Spencer*⁸, wherein he also supported the exercise of regional judicial discretion in the context of striking jury notices.

In reviewing *Louis* and *Belton*, Justice Nicholson recognized that, though Justice Brown appeared to be favouring the exercise of discretion, he did not outright repudiate the "wait and see" approach. Rather, Justice Nicholson interprets these decisions as a recognition that motion judges should be afforded broad discretion to come to solutions that work within the given factual circumstances of a case.

Application

With the above in mind, Justice Nicholson proceeded to consider the specific factual circumstances of *Solanki* and *Smith*. Both of these matters were set to proceed to trial in Spring 2021 in London, Ontario, with the Solanki matter proceeding in January and the Smith matter in March. The matters both involved motor vehicle accidents that occurred several years ago.

Justice Nicholson reviewed the current status of the court in London. At the time the decision was released, London was in the "red" zone, and jury trials had been cancelled for January 2021. Although the London courthouse facilities had been retrofitted to accommodate such trials, Justice Nicholson concluded that it was not realistic to expect a civil jury trial to proceed on February 1, 2021 or shortly thereafter.

⁸ 2020 ONCA 623

Solanki v. Reilly

Justice Nicholson then considered the specific factual circumstances of each matter. In *Solanki*, His Honour recognized that, due to Ms. Solanki's age and failing health, any meaningful access to justice from her perspective was quickly eroding.

The defendant, seeking to maintain the jury notice, argued that the matter could be put off until later in 2021 when jury trials could safely resume. Justice Nicholson disagreed with this position, noting the significant backlog of civil trials created by the COVID-19 pandemic, and that the ONCA has already held that the interests of justice do not favour overburdening the courts at a later date when matters could be dealt with fairly as scheduled.

The difficulty in simply striking the jury notice, however, was the substantial uncertainty in London of whether the case could be heard at all if the jury notice was struck. Although the "wait and see" approach would normally be attractive in a scenario like this, His Honour recognized its impracticality with only 5 weeks until the intended commencement of the trial.

As a result, Justice Nicholson introduced a creative solution. Interpreting Rule 47.02 as not mandating a binary choice between striking or not striking a jury notice, Justice Nicholson ordered the defendant's jury notice be conditionally struck. The trial will proceed as a non-jury trial, unless London is conducting jury trials when the *Solanki* matter is called.

In practicality, this means that if a judge-alone trial cannot be reached for any reason and the matter is traversed, the defendant's jury notice is automatically reinstated, without any further motion.

Smith v. Muir

In *Smith*, the trial was set to proceed in March 2021. Justice Nicholson noted that London had accommodated criminal jury trials in the fall, and that the courtrooms were equipped and prepared to continue jury trials once the lockdown has lifted. It was not possible for the *Solanki* matter to proceed with a jury due to the lockdown, but His Honour noted that it was premature for the same decision to be made with respect to the *Smith* matter.

The plaintiffs' argued against the "wait and see" approach. Justice Nicholson largely dismissed these arguments.

First, he noted that, while the mode of trial is important, the early determination of the mode of trial should not trump the right of the defendant to a trial by jury.

Second, he recognized that counsel may not be willing to conduct a jury trial later in the year due to their concerns about COVID-19, but held that a trial judge has substantial flexibility in determining trial procedure. If counsel is unwilling to participate due to their concerns, a further adjournment is the appropriate remedy, not the striking of a jury notice.

As a result, Justice Nicholson decided to employ the “wait and see” approach, dismissing the motion but granting leave to renew the motion within 10 days of being advised that London jury trials are not proceeding for the relevant period.

Conclusion

The decision to strike a jury notice is case-specific. In many cases, during the current pandemic situation, striking a jury notice is premature and the “wait and see” approach is preferred.

There is reasoned hope that normal court operations will be able to resume later this year. Vaccinations have started in Ontario. The Canadian government anticipates that all people in Canada will be able to receive a vaccine by September 2021, if they wish to be vaccinated. This militates against a finding that a jury trial will cause significant delay.