

Insurance

Rulings on motions to strike jury notices during COVID-19: Solanki v. Reilly, Smith v. Muir

By **Matthew Umbrio**

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(February 2, 2021, 8:29 AM EST) -- In two decisions released in December 2020, *Solanki v. Reilly* [2020] O.J. No. 5702 and *Smith v. Muir* [2020] O.J. No. 5701, the Ontario Superior Court of Justice addressed motions brought by the plaintiffs to strike jury notices in actions commenced in London, Ont.

The decisions, authored by Justice Spencer Nicholson, summarize the approaches taken by the courts of Ontario with respect to striking jury notices in the era of COVID-19 and provide common sense solutions to the various complications that have arisen in the current climate.

After analyzing the current state of the law with respect to striking jury notices during COVID-19, Justice Nicholson proceeded to consider the specific factual circumstances of *Solanki* and *Smith*. Both matters were set to proceed to trial in early 2021, with the *Solanki* matter proceeding in

January and the *Smith* matter in March. The matters arose from motor vehicle accidents that occurred several years ago.

Also relevant to Justice Nicholson's analysis was the status of the London court. Although the London courthouse facilities had been retrofitted to accommodate jury trials, London was in the "red" zone and jury trials had already been cancelled for January 2021 at the time these decisions were released. Justice Nicholson concluded that it was not realistic to expect a civil jury trial to proceed on Feb. 1 or even shortly thereafter.

Solanki v. Reilly

In *Solanki*, Justice Nicholson recognized that, due to Chandrabala Solanki's age and failing health, any meaningful access to justice from her perspective was quickly eroding.

The defendant 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 Ontario Court of Appeal 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, even if the jury notice was struck. Although the "wait and see" approach would normally be attractive in a scenario like this, Justice Nicholson recognized its impracticality with only five 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 fall 2020, and that the courtrooms were equipped and prepared to continue jury trials once the lockdown has lifted.

The plaintiffs argued against the “wait and see” approach, seeking a determination on the matter forthwith, but 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, Justice Nicholson 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.

Unlike the *Solanki* matter, Justice Nicholson held that it was premature for the same decision to be made with respect to the *Smith* matter. As a result, he decided to employ the “wait and see” approach, dismissing the motion but granting leave to renew the motion at a later date.

Conclusion

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

At this time, the Canadian government anticipates that everyone in Canada will be able to receive a vaccine possibly by September, if they wish to be vaccinated. Vaccinations have started in Ontario. As a result, there is reasoned hope that normal court operations will be able to resume later this year. This militates against a finding that a jury trial will cause significant delay.

This is part two of a two-part series. Part one: Ontario courts rule on motions to strike jury notices during COVID-19.

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