



Update on trends in civil litigation in Ontario: Motions to strike jury notices

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Introduction

An emerging trend in civil litigation across Ontario is an uptick in motions to strike civil juries. Parties bringing such motions have most commonly touted the potential for prejudice arising from trial delays caused due to the Covid-19 pandemic.

The response to such motions has not been consistent across courts in Ontario. However, a few common denominators have emerged. First, courts have placed particular emphasis on each region's logistical preparedness to conduct jury trials in the climate of a pandemic. Second, courts have recognized the importance of the substantive right to a jury trial. Third, courts have taken a contextual approach to determine the prejudice that would result to the parties in the action.

This article discusses some of the most significant cases seen in 2020 and 2021 that have grappled with the viability of conducting jury trials in these exceptional times.

Summary of recent jurisprudence

At the Superior Court of Justice, judges have tended to favour a "wait and see" approach. While in earlier cases such as *Higashi v. Chiarot*¹, courts initially allowed motions to strike jury notices, these cases heard towards the tail end of 2020 dismissed motions to strike jury notices:

- In *Jiang v. Toronto Transit Commission*, the court denied the plaintiff's motion to strike the defendant's jury notice, reasoning that the Toronto region at the time was offering civil jury trials with appropriate social distancing measures, and thus there would be no prejudice to the plaintiff, nor an access to justice issue to be balanced.²
- In *MacDougall v. Sisley*, the court again dismissed the plaintiff's motion to strike the defendant's jury notice, citing the "wait and see approach".³ Here, the court underscored the history of the case; the trial had already been adjourned on two other occasions, and it was not guaranteed that a non-jury trial would be able to proceed without further delay.
- The decision in *Piette v. Haskins* followed suit.⁴ In *Piette v. Haskins*, it was held that "we should allow the protocol to evolve to see whether it is possible to provide adequate resources to civil jury cases consistent with a rational and reasonable allocation."

¹ *Higashi v. Chiarot*, 2020 ONSC 5523

² *Jiang v. Toronto Transit Commission*, 2020 ONSC 5727

³ *MacDougall v. Sisley*, 2020 ONSC 6632

⁴ *Piette v. Haskins*, 2020 ONSC 6633

- In *Mackenzie v. Pallister*, the court took a contextual approach in its decision to adopt the “wait and see” approach as well, in denying the plaintiff’s motion.⁵ The court clarified the motion was premature as the case was not trial ready and had not been pre-tried yet. Furthermore, the court highlighted that in the Central East Region courts had actively been preparing courtrooms to hear jury trials.
- In *Saadi v. Silva*, the court simply adjourned the jury trial in order to preserve the defendant’s right to a jury, and clarified the significance of a party’s right to a jury trial.⁶ The court also allowed the defendants’ argument that they had tied their litigation strategy to a jury trial as this case related to a personal injury allegation of chronic pain.
- *Smith et al. v. Muir* was another case where the court favoured a “wait and see” approach, citing that it was premature to determine that the case could only proceed by a judge-alone trial.⁷ The plaintiff was given leave to renew the motion within ten days of being advised of the status of London jury trials prior to the trial date assigned to the parties.
- The court took an interesting approach in *Solanki v. Reilly*.⁸ A “conditional striking” of the jury was ordered here and the trial was adjourned to proceed as a non-jury trial in February 2021, unless London is conducting jury trials when the case is called to trial. In coming to its decision, the court acknowledged that Covid-19 related safety measures were expected to be completed in courtrooms in the Southwest Region by December 2020 and that the court remained optimistic that both jury and non-jury trials would be heard in the spring of 2021. However, there was still much uncertainty in the situation of the pandemic, and given the “wait and see” approach favoured by courts in this matter, a conditional and “non-binary” approach was taken. In the judge’s opinion, “there is a middle ground which is consistent with rule 1.04, the principles enunciated in *Hryniak* and *Jordan* as well as the challenge that Covid-19 currently poses”.

As a caveat, a vast majority of these motions were denied on a without prejudice basis. Moving parties are therefore not precluded from taking steps to renew these motions should further delays due to Covid-19 occur, and the door for further litigation on this matter remains open.

Cases appealed to the Court of Appeal, on the other hand, have resulted in decisions striking (or effectively striking) civil juries in upcoming trials:

- In *Belton v. Spencer*, the Court of Appeal applied the *RJR-MacDonald* analysis to deny the appellant’s motion to stay an order striking their jury notice.⁹ In coming to its decision, the court pointed out that the appellant had not demonstrated they would suffer irreparable harm if the stay was not granted. The court emphasized that the right to a civil jury trial is a substantive right, nonetheless, it is a qualified and not absolute right and subject to removal “where justice to the parties will be served better by the discharge of the jury”. Given the Covid-19 pandemic, the court held that the wait time before the matter could return before a civil jury would be “unconscionable”.
- Most recently, in *Louis v. Poitras*, the Court of Appeal upheld the motion judge’s order striking the jury notice of the defendants.¹⁰ In its decision, however, the Court of Appeal placed immense weight on the importance of local conditions while determining whether striking a civil jury would be in the best interests of justice.

⁵ *Mackenzie v. Pallister*, 2020 ONSC 6914

⁶ *Saadi v. Silva*, 2020 ONSC 6700

⁷ *Smith et al. v. Muir*, 2020 ONSC 8030

⁸ *Solanki v. Reilly*, 2020 ONSC 8031

⁹ *Belton v. Spencer*, 2020 ONCA 623

¹⁰ *Louis v. Poitras*, 2021 ONCA 49

Conclusion

As the pandemic progresses, delays deepen, and various jurisdictions oscillate from one state of lockdown to another, defence lawyers in particular can expect to see more of these motions in the near future.

With mass vaccination on the horizon, however, there is a glimmer of hope that courts will continue favouring the “wait and see” approach in order to preserve the substantive right to trial by jury. Given the contextual approach taken by courts across the province, it is likely that parties contesting such motions will be able to succeed in doing so.

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Questions

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