

## Personal Injury

# Justice delayed is justice denied: Time to strike jury notices | Patrick Brown and Ryan Marinacci

By Patrick Brown and Ryan Marinacci



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(July 15, 2020, 11:26 AM EDT) -- In Ontario, the current standstill on civil juries due to the COVID-19 pandemic has once again brought into the spotlight an issue that is all too familiar to the courts: justice delayed is justice denied. Indeed, civil jury matters will continue to be deferred until *at least* September, as Chief Justice Geoffrey B. Morawetz announced in the Notice to the Profession dated June 25. Without a realistic end in sight to the ongoing suspension of civil jury trials, parties in jurisdictions across Ontario are preparing motions to strike jury notices.

These motions will likely be argued as Attorney General Doug Downey considers amendments to the *Courts of Justice Act* that could eliminate civil juries altogether given the ongoing COVID-19 pandemic.

Although a step in the right direction, forthcoming amendments, if any, would do little for those individuals whose current legal disputes have in effect been suspended indefinitely pending the resumption of civil jury matters. Hence the need for parties to strike jury notices now, particularly as the prospect looms of a second wave of the pandemic in the fall.

In *Cowles v. Balac* 2006 34916, Associate Chief Justice Dennis O'Connor described the test for striking a jury notice under R47.02(2) as follows: "A party moving to strike a jury bears the onus of showing that there are features in the legal or factual issues to be resolved, in the evidence, or in the conduct of the trial which merit the discharge of the jury. In the end, a court must decide whether the moving party has shown that justice to the parties will be better served by the discharge of the jury: *Graham, supra*."

Because of COVID-19, the balance tips heavily in favour of discharging juries in order to better serve justice as between the parties. And this is no surprise. The opening words of Justice Andromache Karakatsanis in *Hryniak v. Mauldin* 2014 SCC 7 are particularly prescient in light of current circumstances: "Ensuring access to justice is the greatest challenge to the rule of law in Canada today."

When the decision in *Hryniak* was released in 2014, the unanimous court saw a culture shift toward the expanded use of summary judgments as necessary "to create an environment promoting timely and affordable access to the civil justice system."

Continuing that same culture shift today towards its logical conclusion requires courts to strike jury notices. This is necessary to promote timely and affordable access to justice, and also to give effect to the guiding principle enshrined in R1.04 of the *Rules of Civil Procedure*, which states, "These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."

Striking jury notices will result in the most expeditious and least expensive determination of civil proceedings.

As to expeditiousness, there is no question that the use of jury trials will lead inevitably to additional

delays due to COVID-19 as reflected in the Notices to the Profession. It has been nearly four months since Ontario courts suspended regular operations, including jury matters, effective March 17. Jury matters will remain suspended at least another two months until September — and likely even longer — creating an immense backlog of matters to be heard when regular operations do resume.

These delays are substantial. By contrast, in dismissing the motion to strike the jury notices in *MacLeod v. Canadian Road Management Company* 2018 ONSC 2186, Justice Frederick L. Myers wrote: “If I knew that striking the jury would necessarily result in a much earlier, more efficient, or more affordable trial, I would be more inclined to find that the interests of justice require me to strike the jury notices now. However, neither the evidence before the court nor my own internal inquiries lead me to believe that striking the jury notices will speed up or materially shorten the trial.”

Here, everyone knows that the continued use of civil juries will cause insurmountable delays, including Downey himself. And even when jury matters do resume, in addition to the backlog, criminal trials will likely take precedence over civil matters. This is due to Charter s. 11(b) concerns and the Supreme Court of Canada’s landmark decision in *R. v. Jordan* 2016 SCC 27 on unreasonable delay.

Indeed, COVID-19 and the resultant de facto indefinite suspension of jury matters has laid bare all of the concerns raised by Justice Myers:

... Systemic issues like the insufficient judicial compliment, resource deployment away from civil cases as a result of *R. v. Jordan*, 2016 SCC 27 (CanLII), and other pervasive funding concerns affect the realities facing civil litigants. The court’s ability to provide long civil jury trials in an expeditious, affordable, proportionate way may be suffering as a result. Where this is so, the systemic realities may impair access to civil justice. The right to a civil jury trial might therefore have to yield in appropriate cases in order to provide the parties with an expeditious, affordable, and proportionate resolution that is fair and, especially, one that is “just” as we currently comprehend that term.

As to expenses, civil jury trials are almost twice the cost to run than those with a judge alone. In addition to taking double the time of a judge alone trial, a jury trial is doubly expensive too.

Clerks march jurors back and forth to the jury room, process the jury rolls, direct and instruct jurors. Jurors have been bused from one judicial centre to another due to courtroom space constraints. Those practising in areas of civil litigation subject to jury trials will attest not only that the courtroom is filled with additional staff to deal with the jury, but also that the trial takes twice as long as a result.

In turn, there are increased expenses related to added clerks, judges having to manage jurors, and of course each juror being away from their own job. Indeed, many members of the public — those subject to jury duty — simply cannot afford to sit on jury trials that last for weeks, if not months in civil cases. And this is without even accounting for the added costs of social distancing measures, increased sanitation and use of personal protective equipment.

As Justice Myers wrote, “The court must react to the realities facing civil litigants and the civil justice system.” Today, the reality of social distancing and COVID-19 means that there is not even a remote prospect of civil jury trials resuming in any form for the foreseeable future. In order to ensure access to justice, it is therefore necessary to strike jury notices.

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