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INSURANCE LAW BULLETIN

January 2021 – Samuel Kirwin (student at law)

COVID-19 – Striking the Jury Notice: Delay as a Ground to Strike *Louis v. Poitras*

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Introduction

On January 25, 2021 the Court of Appeal for Ontario released its judgment in the case of *Louis v Poitras*. This case is informative of the factors that motion judges must consider when faced with motions to strike jury notices.

This bulletin is an update to our *COVID-19 – Striking the Jury Notice: The “Wait and See” Approach* bulletin. In that bulletin, we reviewed the Superior Court judgment in *Pietsch et al v Lyons* where the court provided that “an allegation of delay alone has been held to be an insufficient basis on which to strike a jury”. Although COVID-19 has delayed the hearing of many civil jury trials, without more, that delay was not sufficient to warrant the striking of a jury notice. Parties awaiting a civil jury trial were able to “Wait and See” when their trial date would be, and there was little likelihood that the jury notice would be struck since delay was not sufficient to warrant the striking of the jury notice. This contributed to the civil trial backlog.

In the *Louis* decision, the Court of Appeal sought to prevent further backlog by making delay a sole ground upon which a motion judge can grant a motion to strike a jury notice. As the *Louis* case demonstrates, jury notices can be struck where the parties are waiting to see whether the courthouse will be able to hold a civil jury trial.

Facts

This case arises from a motor vehicle accident which occurred in Ottawa on May 9, 2013. It initially involved an action in tort and a separate action for accident benefits. The defendants filed jury notices in each proceeding. The actions were to be tried together in a ten-week proceeding commencing on April 20, 2020. When the April trial date was cancelled due to COVID-19, the plaintiff obtained an order striking the jury notices. When the motion was heard, only judge alone trials were being scheduled in Ottawa.

The decision granting the motion to strike the jury notice was appealed to the Divisional Court, which overturned the decision because it was based on insufficient evidence of delay. The

matter then proceeded to the Ontario Court of Appeal, which overturned the Divisional Court's judgment and restored the order to strike the jury notices.

Decision

The Court of Appeal overturned the Divisional Court's decision on the basis of the following errors:

1. The Divisional Court was wrong in stating that delay alone is not enough to strike a jury notice. In fact, delay by itself can justify striking out a jury notice. The court owes a duty to the parties and to the justice system to move cases forward and offer timely service.
2. The Divisional Court failed to follow the principle that the right to a jury trial is subject to the overriding interest of the administration of justice and issues of practicality, which was established by the Court of Appeal for Ontario in *Girao v Cunningham*. In determining that the jury notice should not have been struck, the Divisional Court ignored the pandemic reality faced by the Ottawa courthouses, namely that a backlog of civil trials was building up. The Court of Appeal stated that "local judges are best positioned to understand the...appropriate approach in the circumstances of a given case."
3. The Divisional Court erred in finding that the motion judge did not have evidence of delay applicable to the specific situation. In fact, the motion judge was justified in relying upon the judicial notice taken by a judge in a separate Ottawa case, specifically that was unclear when a civil jury trial could proceed in Ottawa. The judge also observed that only a limited number of courtrooms in Ottawa had plexiglass dividers, that only one jury trial could proceed in the courthouse at a time, and that no plan had been finalized to accommodate jury trials. The Court of Appeal described these items as evidence that supported the motion judge's "unassailable" finding that it was unknown when or how a jury trial might be heard in Ottawa.

The Court of Appeal instructed that appellate courts are to pay a high level of deference to motion judges in their decisions to strike jury notices. Delay is now a factor that is enough on its own to warrant the granting of a motion to strike. However, this does not mean that all jury notices will be struck. It is possible that some courts are equipped to proceed with civil jury trials and that there is no delay posed by allowing them to proceed. In this way, motions to strike jury notices can be denied, simply because there is no more delay than in non-jury civil trials.

Conclusion

The fate of civil jury trials will be determined by how well the respective courthouses are equipped to safely accommodate jury selection and the willingness of the judges to proceed. At the end of the day, if the civil jury trial would result in greater delay than a non-jury trial, it is likely that the motion to strike the jury notice will be granted.

We are pleased to advise that we have become *Shillington McCall LLP* effective January 1, 2021. Our physical address, phone number and fax number remain unchanged.