Toronto Law Journal

Updates to Ontario's Franchise Regulations

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In Ontario, franchise disclosure is governed by the *Arthur Wishart Act (Franchise Disclosure), 2000* (the "*Wishart Act*") and its associated regulations. On September 1, 2020, several amendments (the "Amendments") to the *Wishart Act* and its corresponding General Regulation, O. Reg 581/00, (the "General Regulation") came into effect. The Amendments, which have been detailed below, have been adopted from recommendations made by Ontario's Business Law Modernization and Burden Reduction Council.

Confidentiality and Location Agreements

Under the previous s. 5 of the *Wishart Act*, franchisors were required to provide potential franchisees with a disclosure document at least 14 days before asking the franchisee to pay, or sign any agreement relating to the franchise, including confidentiality and non-disclosure agreements.

The amended s. 5(1.1) of the *Wishart Act* has carved out exceptions to the disclosure requirement. Pursuant to the Amendments, franchisors and potential franchisees can enter into legally-binding preliminary agreements relating to the franchise before providing a disclosure document, as long as the preliminary agreement only contains terms that:

i. Requires the potential franchisee to maintain confidentiality regarding the information provided to them by the franchisor;
ii. Restricts the potential franchisee from using any information that was provided to it by the franchisor; or
iii. Reserves a location, site or territory for the potential franchisee.

It is noteworthy that the above exception will not apply if the franchisor:

i. Seeks to protect confidentiality of information that was publically-available, disclosed without any contravention of the preliminary agreement, or disclosed with the franchisor's consent; or
ii. Restricts disclosure of information to an organization of franchisees, other franchisees in the same franchise system, or their professional advisors.

Deposits

The previous s. 5(1)(b) of the *Wishart Act* prohibited the franchisor from receiving any consideration from the potential franchisee related to the franchise in the 14-day period immediately following the delivery of a disclosure document.

The amended s.5(1)(b) of the *Wishart Act* now permits franchisors to accept a deposit, as long as:

i. The deposit does not exceed the prescribed amount, which is stated to be the lower of 20% of the franchise fee or $100,000 (s. 7.1(1) of the General Regulation);
ii. The deposit is fully refundable; and
iii. The deposit does not oblige the potential franchisee to enter into a franchise agreement.

Statements of Material Change

The previous *Wishart Act* did not prescribe any requirements for the contents of a Statement of Material Change.

Section 5(5.1) of the amended *Wishart Act* states that a Statement of Material Change must contain certain prescribed information. The Amended ss. 7.1(2) and (3) of the General Regulation clarify that Statements of Material Change must include a certificate of disclosure, signed by the franchisor or its director or officer, certifying that the statement of Material Change does not contain any untrue information, representation or statement, and includes every material change.

Disclosure Exemption – Directors and Officers

The previous s. 5(7)(b) of the *Wishart Act* exempted a franchisor from the obligation to provide a disclosure document to a potential franchisee, if the potential franchisee was a director or officer of the franchisor or a franchisor's associate.

The amended s. 5(7)(b) of the *Wishart Act* exempts a franchisor from providing a disclosure document to a potential franchisee, if the potential franchisee is an individual or a corporation controlled by an individual who:

i. Is currently a director or officer of the franchisor or a franchisor's associate and has been in the role for at least six months; or
ii. Was a director or officer of the franchisor or a franchisor's associate for at least six months until no longer than four months ago.

Disclosure Exemption – Fractional Franchisee

The previous s. 5(7)(e) of the *Wishart Act* exempted a franchisor from the obligation to provide a disclosure document to a potential franchisee, if it involved the grant of a franchise to a person with an interest in a pre-existing business, where the anticipated sales from the franchise would constitute less than 20% of the pre-existing business' revenues.

The amended s. 5(7)(e) of the *Wishart Act* clarifies that the disclosure exemption applies when the anticipated sales from the franchise would constitute less than 20% of the pre-existing business' revenues during the first year of the franchise's operation.

Disclosure Exemption – Investment size

The previous s. 5(7)(g)(i) of the *Wishart Act,* in conjunction with the previous s. 9 of the General Regulation, exempted a franchisor from the obligation to provide a disclosure document to a potential franchisee if the franchisee invested less than $5,000 for the acquisition and operation of the franchise. Additionally, the previous s. 5(7)(h) of the *Wishart Act,* in conjunction with the previous s. 10 of the General Regulation, exempted a franchisor from the obligation to provide a disclosure document to a potential franchisee if the franchisee invested greater than $5,000,000 in one year for the acquisition and operation of the franchise.

The amended s. 5(7)(g)(i) of the *Wishart Act*, in conjunction with the amended s. 9(2) of the General Regulation, exempts the franchisor from the obligation to provide a disclosure document to a potential franchisee if the total initial investment is less than $15,000. Additionally, the amended s. 5(7)(h) of the *Wishart Act*, in conjunction with the amended s. 9(3) of the General Regulation, exempts the franchisor from the obligation to provide a disclosure document to a potential franchisee if the total initial investment is greater than $3,000,000.

Furthermore, the amended s. 9(1) of the General Regulation clarifies that the amounts to be included in calculating the total initial investment for the purposes of the above exemptions are:

i. Deposits and franchise fees;
ii. Estimated cost of inventory, leasehold improvements, equipment, leases, rentals, and other property costs; and
iii. Any other costs associated with the establishment of the franchise.

Financial Statements

The previous ss. 3(1)(a), (b) and ss. 11(2)(a), (b) of the General Regulation required franchisors to include the franchisor's financial statements prepared on an audit or review engagement according to Canadian standards in their disclosure documents.

The amended ss. 3(1)(a), (b) and ss. 11(2)(a), (b) of the General Regulation permit the franchisor's financial statements to be prepared in a manner consistent with:

i. The CPA Canada handbook;
ii. The Financial Accounting Standards Board of the United States; or
iii. The International Accountant Standards Board.

Conclusion

The Amendments were implemented with the objectives of reducing the cost of compliance with franchise disclosure requirements and providing clarity to certain sections of the *Wishart Act* and the General Regulation.

While the Amendments do provide clarity and resolve certain ambiguities, the regulatory burden of complying with the requirements might not change drastically for franchisors,

depending on the franchisor's aims. If an international franchisor wishes to grant franchises across Canada, the franchisor will be required to comply with franchise disclosure obligations across all regulated provinces, and may still be required to generate new financial statements. Moreover, the updated disclosure exemption based on investment size will likely not apply to most franchise systems. However, the new ability for franchisors to collect deposits and enter into non-disclosure agreements will provide franchisors with greater flexibility when engaging in negotiations with potential franchisees.

Toronto Law Journal

Chandos: Supreme Court affirms anti-deprivation rule and confirms rule is triggered by effects of contractual provisions, not purpose

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In *Chandos Construction Ltd v. Deloitte Restructuring Inc*, 2020 SCC 25, the Supreme Court addressed the anti-deprivation rule, a common law principle invalidating contracts that affect the distribution of proceeds in bankruptcy. A unanimous Court held that the rule is a long-standing part of Canadian law that has not been displaced by the courts or legislation. A majority of the Court also confirmed that the anti-deprivation rule is effects-based. As such, it invalidates any contract provision triggered by a party's insolvency that removes value from a bankrupt's estate, even if the provision reflects a *bona fide* commercial purpose.

Background

This case arose in the bankruptcy proceedings of Capital Steel Inc. Before its bankruptcy, Capital Steel entered a fixed-price construction subcontract with Chandos Construction Ltd. Clause VII Q(d) of the subcontract said that if Capital Steel committed any act of bankruptcy before completing its work then it would forfeit 10% of the subcontract price to Chandos.

Capital Steel assigned itself into bankruptcy before completing the subcontract. At the time, Chandos owed Capital Steel $149,618.39. Chandos invoked clause VII Q(d) and asserted that Capital Steel owed it a debt of $137,330.05 (10 percent of the subcontract price of $1,373,300.47). Chandos purported to set off that and certain other debts against the amounts owed to Capital Steel.

Lower Court Decisions

Capital Steel's trustee in bankruptcy applied to the Alberta Court of Queen's Bench. It argued that clause VII Q(d) was invalid because it violated the anti-deprivation rule and was a penalty clause.

The application judge found that clause VII Q(d) was valid. In his view, the anti-deprivation rule only applied to provisions that attempted to avoid bankruptcy laws and clause VII Q(d) was not such a clause. He also found that the provision was a valid liquidated damages clause and not an invalid penalty clause.

On appeal, a majority of the Court of Appeal of Alberta held that clause VII Q(d) was invalid because it infringed the anti-deprivation rule. Justice Rowbotham, for the majority, held that the anti-deprivation rule is a part of Canadian common law and it invalidates contractual

provisions triggered by an insolvency that have the effect of removing value from an insolvent estate. She found that clause VII Q(d) met that test and was therefore invalid.

Justice Wakeling wrote a lengthy dissent. In his view, the anti-deprivation rule was never part of Canadian common law and, even if it was, it was displaced by 2009 amendments to the *Bankruptcy and Insolvency Act* (the "*BIA*") and the *Companies' Creditors Arrangement Act* that addressed contractual provisions and rights triggered by an insolvency. In the alternative, Wakeling J.A. would have adopted the approach of the U.K. Supreme Court in *Belmont Park Investments Pty Ltd v. BNY Corporate Trustee Services Ltd*, [2011] UKSC 38, which held that the anti-deprivation rule did not invalidate contractual provisions that had a *bona fide* commercial purpose. Justice Wakeling also held that clause VII Q(d) was not a penalty clause and would have upheld the application judge's decision.

Supreme Court Decision

Chandos appealed to the Supreme Court. Among other things, it argued that Rowbotham J.A. had erred by finding that the anti-deprivation rule is a part of Canadian common law or by declining to adopt the purpose-based test from *Belmont*.

Justice Rowe, for an eight-member majority, agreed with Rowbotham J.A. and dismissed the appeal. Justice Côté, dissenting by herself, would have allowed the appeal.

Majority Reasons

Justice Rowe first addressed the existence of the anti-deprivation rule. He held that the rule is part of Canadian common law and has not been eliminated by the Supreme Court or Parliament. In particular, he explained that the 2009 amendments cited by Wakeling J.A. and Chandos did not evidence any intention to displace all related common law. According to Rowe J., the most relevant legislation was s. 71 of the *BIA*, which provides that all property of a bankrupt vests in the trustee. This provision reflects a policy of maximizing the assets available for the trustee to pass to creditors and the anti-deprivation rule voids contractual provisions which would frustrate that statutory objective.

Justice Rowe then addressed the content of the anti-deprivation rule. He held that the rule was an effects-based test and declined to follow *Belmont* in adopting a purpose-based test. In Rowe J.'s view, an effects-based test respected Parliament's policy choice in s. 71 of the *BIA* that all of a bankrupt's property should vest in a trustee. It also avoided commercial uncertainty and the risk that parties may undermine the *BIA*'s statutory scheme by asserting plausible *bona fide* intentions. Justice Rowe added that his approach was consistent with the effects-based test for the related *pari passu* rule (which prohibits contractual provisions that give creditors more than their statutorily-prescribed share) and provisions in the *BIA* prohibiting the exercise of certain contractual rights and remedies. Finally, Rowe J. also rejected Chandos' invocation of general principles of contractual freedom, its argument that a purpose-based test was acceptable because unsecured creditors tended to receive little in most bankruptcies, and its

argument that the anti-deprivation rule was inconsistent with the *BIA* preserving the law of set-off in bankruptcy proceedings.

Dissenting Reasons

Justice Côté agreed with Rowe J. that the anti-deprivation rule is part of Canadian law and has not been eliminated by the Supreme Court or legislation. However, she did not agree with the effects-based test. Instead, she said that the anti-deprivation rule should not prohibit contractual provisions which serve a *bona fide* commercial purpose for three reasons.

First, unlike Rowe J., Côté J. found that case law from the U.K., the Supreme Court, and other Canadian courts showed that courts applying the anti-deprivation rule had not just relied on the effects of offending clauses and had generally inquired into the presence or absence of a *bona fide* commercial purpose for any deprivation.

Second, Côté J. said there was a basis for distinguishing the anti-deprivation rule from other effects-based prohibitions like the *pari passu* rule. According to Côté J., those other prohibitions were implied statutory prohibitions whereas the anti-deprivation rule originated in the common law public policy against agreements entered into for the unlawful purpose of defrauding or otherwise injuring third parties. Thus, Côté J. said that the anti-deprivation rule could be interpreted to accommodate parties' *bona fide* commercial purposes.

Third, Côté J. believed that the considerations supporting an effects-based rule could not override the strong countervailing public interest in the enforcement of contracts and the freedom to contract. And as Parliament had occupied much of the ground formerly covered by the common law and added statutory protections in the *BIA* to safeguard the interests of creditors, there was less need to expand the anti-deprivation rule by adopting an effects-based test.

Like Wakeling J.A. and the U.K. Supreme Court in *Belmont*, Côté J. would have found that the anti-deprivation rule does not apply to contractual provisions with a *bona fide* commercial purpose. She would have upheld the application judge's finding that clause VII Q(d) had a *bona fide* purpose and allowed the appeal.

Conclusion

There are two main takeaways in *Chandos*.

First, the anti-deprivation rule is part of Canadian law. While most authorities already reached that conclusion, some like Wakeling J.A.'s dissent had created doubt. However, the Supreme Court unanimously confirmed that the rule is a long-standing principle of Canadian common law that has not been displaced.

Second, the anti-deprivation rule is purely an effects-based test. A strong majority declined to follow the purpose-based approach from *Belmont* and confirmed that the anti-deprivation rule

will invalidate contractual provisions triggered by insolvency that have the effect of removing value from a bankrupt's estate even if the provision is animated by a *bona fide* commercial purpose.

Toronto Law Journal

Matthews v Ocean Nutrition: Supreme Court of Canada confirms fundamental employment obligations

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On October 9, 2020, the Supreme Court of Canada (the "Court") released its decision in *Matthews v Ocean Nutrition.*[2]

David Matthews had been constructively dismissed after what the Court held was a "campaign" against him by a senior executive at Ocean Nutrition ("Ocean"). But for the dismissal, thirteen months later Matthews would have been entitled to a Long Term Incentive Plan ("LTIP") payout of more than $1 million.

At trial, Matthews was awarded fifteen months notice (which had no value, as Matthews had immediately mitigated) and damages for the LTIP.

The majority of the Nova Scotia Court of Appeal upheld the notice period but allowed Ocean's appeal with regards to the LTIP.

On appeal by Matthews to the Supreme Court of Canada, *Ocean Nutrition* was argued on two main issues: whether Matthews was entitled to damages for the loss of the LTIP as part of his common law notice entitlement, and alternatively, if damages should arise for what Matthew argued was a breach of the *Bhasin v. Hrynew*[3] requirement to perform contracts honestly and in good faith.

The Court held there was no need to address *Bhasin.*[4] Instead, Matthews was entitled to damages for the loss of the LTIP based on existing doctrines of notice.

Ocean Nutrition has several important takeaways for the employment bar:

1. It resolves an inconsistency between the provincial appellate courts about what type of language is sufficient to restrict an employee's common law entitlements.

2. The Court adopts a clear two-step test to determine notice entitlement which opens the door to claims for bonuses and incentives during the notice period.

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[2] 2020 SCC 26 [*Ocean Nutrition*].

[3] 2014 SCC 71 [*Bhasin*].

[4] *Ocean Nutrition, supra* note 1 at para. 38.

3. The Court leaves open the possibility that *Bhasin* duties may apply throughout the duration of the employment contract.

Background

Matthews had spent twenty years with Ocean when a change in management led to a new Chief Operating Officer who had significant friction with Matthews; the Court found the COO engaged in dishonesty and sought to marginalize Matthews.[5]

The LTIP was a key reason Matthews remained.[6] Potential realization events for the LTIP included the sale of Ocean and, in 2010, Matthews became aware that there was a sale in progress.[7]

By 2011 Matthews was in negotiations with Ocean for a termination package.[8] These negotiations never crystallized, as Matthews took a position with a new employer in June 2011.[9]

Thirteen months later, Ocean was sold for $540 million.[10] Ocean advised that since Matthews was not "actively employed" as of that date, he was not entitled to any LTIP payment.[11]

The lower courts all agreed that Matthews had been constructively dismissed, and that the appropriate notice period was 15 months.[12]

The trial judge held Matthews' mistreatment by Ocean "was not motivated by a desire to deprive him of his LTIP entitlement"[13] but nevertheless awarded Matthews $1,086,893.36 for the LTIP.[14] However, the majority of the Court of Appeal held that no such damages should be ordered as the language of the LTIP was unambiguous and excluded any such entitlement.[15]

The Legal Context Prior to *Ocean Nutrition*

Prior to *Ocean Nutrition,* there had been inconsistency among the provincial appellate courts regarding treatment of LTIPs and bonuses during the notice period:

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[5] *Ocean Nutrition, supra* note 1 at paras. 10-14.
[6] *Ocean Nutrition, supra* note 1 at paras. 15-18.
[7] *Ocean Nutrition, supra* note 1 at paras. 15-18.
[8] *Ocean Nutrition, supra* note 1 at para. 18.
[9] *Ocean Nutrition, supra* note 1 at para. 17.
[10] *Ocean Nutrition, supra* note 1 at para. 18.
[11] *Ocean Nutrition, supra* note 1 at para. 18.
[12] *Matthews v. Ocean Nutrition,* 2017 NSSC 16 at para. 368 [*Ocean Nutrition Trial*]; *Matthews v. Ocean Nutrition,* 2018 NSCA 44 at paras. 3, 45-54, 153 [*Ocean Nutrition COA*]; *Ocean Nutrition, supra* note 1 at para. 49.
[13] *Ocean Nutrition Trial, supra* note 12 at para. 325; *Ocean Nutrition, supra* note 1 at para. 18.
[14] *Ocean Nutrition Trial, supra* note 12 at para. 427.
[15] *Ocean Nutrition, supra* note 1 at para. 29.

- The British Columbia Court of Appeal in *Iacobucci v. WIC Radio Ltd.*[16] held that a wrongfully dismissed employee is not suing for the actual benefit.[17] This means exclusionary language might exclude entitlement to the benefit itself, but not damages for the failure to provide a working notice period (which includes damages for the lost opportunity to gain the benefit).

- The Court of Appeal for Ontario in *Paquette v. TeraGo Networks Inc.*[18] and *Lin v Ontario Teachers Pension Plan*[19] held that with clear language, parties could contract out of entitlement during the notice period —with the caveat that "active employment" language was *not* sufficient.

- In contrast, the Court of Appeal of Alberta in *Styles v. Alberta Investment Management Corporation*[20] held that "active employment" language *was* sufficient to deny Styles an incentive bonus.

The reconciliation of these decisions was one of the two main issues in *Ocean Nutrition*. The second issue was the application of bad faith: how did *Bhasin* apply in a case like *Ocean Nutrition*, and was there a remedy if Ocean had failed to perform the contract in good faith?

The Holding from the Supreme Court of Canada

The Court decided the case could be determined without resort to *Bhasin*; because the law should develop in an incremental fashion, the Court "would decline to decide whether a broader duty exists during the life of the employment contract..."[21].

However, this did not stop the Court from making certain points about good faith. Namely:

1. "Bad faith in manner of dismissal" allows the court to consider conduct that is beyond just the exact moment of termination,[22] and

2. A reciprocal duty of good faith throughout the duration of the employment contract may one day exist:

   > [85] … It might be that… a duty of good faith will one day bind the employer based on a mutual obligation of loyalty in a non-fiduciary sense during the life of the employment contract, owed reciprocally by both the employer and employee. I recognize, however, that whether the law should recognize this is a matter of fair debate.[23]

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[16] 1999 BCCA 753 [*WIC Radio*].
[17] *Ibid.* at paras. 19, 24.
[18] 2016 ONCA 618 at paras. 28, 29, 35, 48 [*Paquette*].
[19] 2016 ONCA 619 at paras. 86, 89 [*Lin*].
[20] 2017 ABCA 1 [*Styles*].
[21] *Ocean Nutrition, supra* note 1 at para. 86.
[22] *Ocean Nutrition, supra* note 1 at paras. 40, 81.
[23] *Ocean Nutrition, supra* note 1 at para. 85.

Ocean Nutrition was ultimately decided, however, on principles of notice.

The Court held the test to be applied to benefits and bonuses in the notice period is as follows:

> [55] Courts should accordingly ask two questions when determining whether the appropriate quantum of damages for breach of the implied term to provide reasonable notice includes bonus payments and certain other benefits. Would the employee have been entitled to the bonus or benefit as part of their compensation during the reasonable notice period? If so, do the terms of the employment contract or bonus plan unambiguously take away or limit that common law right?

The Court held that Matthews did not have to prove that the LTIP was "integral" to his compensation to meet the first criteria: the realization event occurred during the notice period, and but for his dismissal, he would have received the LTIP payout.[24]

As for the language of the LTIP in question, the Court considered the two main clauses:

> 2.03 CONDITIONS PRECEDENT:
>
> [Ocean Nutrition] shall have no obligation under this Agreement to the Employee unless on the date of a Realization Event the Employee is a full-time employee of [Ocean Nutrition]. For greater certainty, this Agreement shall be of no force and effect if the employee ceases to be an employee of [Ocean Nutrition], regardless of whether the Employee resigns or is terminated, with or without cause.
>
> 2.05 GENERAL:
>
> The Long Term Value Creation Bonus Plan does not have any current or future value other than on the date of a Realization Event and shall not be calculated as part of the Employee's compensation for any purpose, including in connection with the Employee's resignation or in any severance calculation.

The Court held that contrary to *Styles* and similar cases, active employment language is insufficient to remove an employee's right to damages: if the employee had been given proper notice, they would have been "actively employed" or "full-time" throughout the notice period.[25] Clause 2.03 did not unambiguously limit Matthews' common law rights, such that he was entitled to damages equal to the LTIP.[26]

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[24] *Ocean Nutrition, supra* note 1 at paras. 58-59.
[25] *Ocean Nutrition, supra* note 1 at para. 65.
[26] *Ocean Nutrition, supra* note 1 at paras. 67-70.

Concluding Thoughts and Impact

The decision in *Ocean Nutrition* is unequivocal: anything less than a clear exclusionary clause will fail to limit an employee's damages upon termination. Contrary to *Styles,* active employment language is now insufficient across Canada.

Second, counsel on both sides of the bar will want to pay close attention to what breach and remedies have been pled, as the Court held that "damages arising out of the same dismissal are calculated differently depending on the breach invoked"[27].

Third, bad faith "in the manner of dismissal" per *Wallace*[28] and *Keays*[29] is not confined to only the exact instant of termination.[30] A pattern of behaviour prior to dismissal may now fall under that umbrella. It is also possible that good faith in the performance of employment contracts may be a live issue in the years to come.

To learn more and/or for assistance contact Sherrard Kuzz LLP.

[27] *Ocean Nutrition, supra* note 1 at para. 45.
[28] *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC).
[29] *Honda Canada Inc. v. Keays,* 2008 SCC 39 at paras. 57-59.
[30] *Ocean Nutrition, supra* note 1 at para. 81.

Toronto Law Journal

Pandemic Prejudice: Striking Civil Jury Notices During COVID-19

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As a result of COVID-19, effective March 17, 2020, the Superior Court of Justice suspended in-person court operations. As of that date, civil jury selection and jury trials were suspended until September 2020. Only urgent criminal, family and civil matters continued to be heard. On June 25, 2020, Chief Justice Morawetz issued a Notice to the Profession announcing a phased return to in-person hearings.

Despite this phased return, the current and extraordinary circumstances present unique challenges to court operations and the exercise of judicial discretion in the application of the relevant case law.[1] This is particularly true with respect to motions to strike jury notices.

This article contemplates the effects of COVID-19 on civil jury trials and summarizes the court's reasons on leave motions for same. What is clear is that no two courthouses are the same. While some jurisdictions have been quick to strike jury notices, others such as Toronto have avoided doing so.

***Belton v. Spencer* (Hamilton Action)**

In *Belton v. Spencer*,[2] the plaintiff commenced an action seeking damages arising from injuries he sustained in 2010 when he was kicked by a horse owned by the defendant. The claim was issued in May of 2012 and the defendant delivered a defence and jury notice in July of 2013.

In September of 2020, the plaintiff moved to strike the jury, arguing that justice would be better served. In contrast, the defendant argued that:

- The court should not assume that a judge alone trial could be reached sooner than a trial before a judge and jury;
- The caselaw recognizes the need to follow a "wait and see" approach and that it should be left to the trial judge to decide whether to strike the jury notice;
- The British Columbia Supreme Court's decision in *Vacchiano v. Chen*[3] was distinguishable from the case at bar because the decision to strike the jury notice, in that case, was based on delay and fading memories of key liability witnesses; and

[1] *Louis v. Poitras*, 2020 ONSC 5301 at para. 2 [*Louis*].
[2] 2020 ONSC 5327 [*Belton*].
[3] 2020 BCSC 1035.

- It would be unfair for the plaintiff, who the defendant alleged was responsible for five years of delay, to now point to the possible delay caused by the pandemic as a reason to remove the defendant's substantive right to trial by jury.[4]

In addressing this novel COVID-19 issue, Justice Sheard of the Ontario Superior Court first looked to legislation for guidance. Sections 108(1) and (3) of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, provide:

> **108 (1)** In an action in the Superior Court of Justice that is not in the Small Claims Court, a party may require that the issues of fact be tried or the damages assessed, or both, by a jury, unless otherwise provided.
>
> **108 (3)** On motion, the court may order that issues of fact be tried or damages assessed, or both, without a jury.

In addition, the court cited Rule 47.02(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which states:

> **47.02 (2)** A motion to strike out a jury notice on the ground that the action ought to be tried without a jury shall be made to a judge.

Justice Sheard then referred to the Superior Courts decision in *Rolley v. MacDonell*,[5] wherein Justice Corthorn delineated the test for a motion to strike the jury:

> A decision frequently cited with respect to the test on a motion of this kind is the Ontario Court of Appeal decision in *Cowles v. Balac (2006)*, 2006 CanLII 34916 (ON CA), 83 O.R. (3d) 660, 216 O.A.C. 268. The principle or test to be taken from paragraph 37 of that decision is:
>
> a) The factors to be considered include the legal and/or factual issues to be resolved, the evidence at trial, and the conduct of the trial; and
>
> b) The overriding test is whether the moving party has shown that justice to the parties will be better served by the discharge of the jury.
>
> The plaintiffs acknowledge that they bear the onus of demonstrating that they satisfy the test to be met on the motion.
>
> In deciding whether to make an order that the jury notice be struck, the trial judge has "considerable discretion" (*Kempf v. Nguyen*, 2015 ONCA 114, 124 O.R. (3d) 241, at para. 44). In a number of its recent decisions, the Ontario Court of Appeal addressed the manner in which a trial judge is to exercise his or her discretion on a motion to strike the jury notice:

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[4] *Belton*, above, at paras. 28-31.
[5] 2018 ONSC 508.

- This discretion must not be exercised arbitrarily or on the basis of improper principles (*Kempf*, at para. 44); and
- The right to a jury trial is not to be taken away lightly (*Hunt (Litigation guardian of) v. Sutton Group Incentive Realty Inc. (2002)*, 2002 CanLII 45019 (ON CA), 60 O.R. (3d) 665, 162 O.A.C. 186, at para. 73).[6]

The court further cited *MacLeod v. Canadian Road Management Company*.[7] In that case, Justice Myers described the principles from *Cowles* as follows:

(a) The court must decide whether the moving party has shown that justice to the parties will be better served by the discharge of the jury;

(b) The object of a civil trial is to provide justice between the parties, nothing more; and

(c) A judge may strike a notice even before the trial has begun if the judge considers that there is no advantage to beginning the trial with the jury because the situation makes it apparent that the case should not be tried with a jury.[8]

In *MacLeod,* Justice Meyers looked to the Supreme Court of Canada's decision in *Hryniak v. Mauldin*[9] for the proposition that, "to be just, a civil resolution of a dispute must not either take too long or be too expensive."[10] Further still, Justice Meyers opined:

- Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised;
- Undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes; and
- Prompt judicial resolution of legal disputes allows individuals to get on with their lives. But, when court costs and delays become too great, people look for alternatives or simply give up on justice.[11]

Returning to the *Belton* decision, Justice Sheard adopted the Court of Appeal's wording in *Girao v. Cunningham,*[12] which affirmed the principles governing the discharge of a jury per *Kempf v. Nguyen*.[13] Namely, the court confirmed that "the question for the trial judge is simply this: will justice to the parties be better served by dismissing or retaining the jury?"[14] Perhaps more importantly, the court in *Girao* further opined: "While I recognize that the right to a jury trial

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[6] *Rolley v. MacDonell*, 2018 ONSC 508 at paras. 15-17 [*Rolley*]; *Belton*, above, para. 15.
[7] 2018 ONSC 2186.
[8] *Ibid.* at paras. 23-24 [*MacLeod*]; *Belton*, above, at para. 16.
[9] 2014 SCC 7.
[10] *MacLeod*, above, at para. 30; *Belton*, above, at para 17.
[11] *MacLeod*, above, at para. 30; *Belton*, above, at para 18.
[12] 2020 ONCA 260.
[13] 2015 ONCA 114.
[14] *Girao v. Cunningham*, 2020 ONCA 206 at para. 162 [*Girao*]; *Kempf v. Nguyen*, 2015 ONCA 114 at para. 119.

in a civil action has been recognized as fundamental, it is not absolute and must sometimes yield to practicality."[15]

Following a review of the caselaw and the parties' submissions, the court struck the jury notice, concluding that, in doing so, justice would be better served.

Justice Sheard acknowledged the defendant's position that the law recognizes the need to follow a "wait and see" approach and that the matter would best be left to the trial judge. Despite this, the court reasoned:

> Firstly, the defendant suggests that the generally accepted and preferred procedural route is a "wait and see" approach. By that, I understand the defendant to suggest that it should be up to the trial judge to decide whether to strike the jury notice. The difficulty with that position is that the trial judge will not be appointed until the Friday afternoon prior to the Monday commencement of the long trial. Therefore, if a "wait and see" approach is taken, the delay in the scheduling of the trial that the plaintiff seeks to avoid, will have already occurred. For that reason, I find that the "wait and see" approach to be [sic] unsuitable.[16]

Justice Sheard did not accept the defendant's submission that the plaintiff had delayed the trial by waiting so long to set the matter down and also did not accept the defendant's argument that a non-jury trial would result in equal delays in comparison to jury trials.[17] The court also acknowledged that the risk of fading memories was reduced given witness statements, recent discoveries and expert reports. Notwithstanding this, Justice Sheard concluded that "Justice to the parties would be better served if this matter is brought to trial sooner, rather than later."[18]

On appeal, the Ontario Court of Appeal held that the three components of the test in *RJR-MacDonald v. Canada (Attorney General)*[19] favoured refusing to grant a stay of the judgment. That test considers the following questions: (1) is there a serious question to be tried (*i.e.*, to be determined on the appeal); (2) will the moving party suffer irreparable harm if the stay is not granted; and (3) does the balance of convenience favour granting the stay?[20]

Ultimately, the court concluded that by not granting the motion, the parties, who were otherwise ready for trial, would likely be required to wait over one year to have the matter returned before a civil jury. This, the court stated, "would be an unconscionable wait."[21] Justice Brown, writing for the Court of Appeal, explained:

> This action is long overdue for trial, concerning as it does events that took place 10 years ago. The parties are ready for trial and have been for some time. COVID-

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[15] *Girao*, above, at para. 171.
[16] *Belton*, above, at para. 38.
[17] *Ibid.* at paras. 40, 43.
[18] *Ibid.* at para. 44.
[19] 1994 SCC 117.
[20] *Belton v. Spencer*, 2020 ONCA 623 at para. 20.
[21] *Ibid.* at para. 78.

> 19 came out of left-field and upset the trial court's scheduling apple cart. But the Central South Region can make a judge available this coming Monday to try this personal injury case. If not tried then, the record shows that it will likely be over a year before the matter can return before a civil jury. That would be an unconscionable wait. The qualified right to a civil jury trial cannot dictate such a result, as it would be completely contrary to the interests of justice. Consequently, I dismiss the appellant's motion for a stay of the Order.[22]

***Louis v. Poitras* (Ottawa Action)**

Louis v. Poitras[23] involved claims for injuries sustained as a result of a motor vehicle accident which occurred in May of 2013. Following issuance of the Statement of Claim in May of 2015, the defendant, Jacques Poitras, delivered a defence and jury notice in August of that year. It was subsequently ordered in 2018 that this action and the related accident benefits carrier action be tried together. The plaintiff's OPCF 44R carrier was also added as a defendant to the action. But for COVID-19, the trial would have been heard in April of 2020; however, as a result of the pandemic, the plaintiffs moved to strike the defendant's jury notice.

Counsel for the plaintiffs argued that they had already waited seven years for the trial and should not have to bear the weight of the uncertainty; any further delay could be substantial. Second, additional delays would have consequences with respect to recovery for past income loss. As is common knowledge, the *Insurance Act*, R.S.O. 1990, c. I-8 limits past income loss to 70%. Third, the plaintiffs argued that the defendants in the tort had failed to show that they would suffer any prejudice if the jury was struck. Last, it was submitted that the defendants in the accident benefits action, as insurers, owed a duty of good faith to the plaintiff.[24]

The tort defendants submitted that:

- The motion was premature;
- The plaintiffs had not established that a ten-week trial before a judge alone could take place and/or be completed any sooner than could a ten-week trial before a judge and jury;
- The plaintiff has failed to show that she would suffer any income loss because she continues to receive long-term disability and CPP disability benefits;
- The court ought not to be making policy decisions about the right to a jury trial on a case-by-case basis; and
- The plaintiffs have not met the heavy onus on them with respect to an order discharging a jury notice.[25]

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[22] *Ibid*.
[23] 2020 ONSC 5301.
[24] *Ibid*. at paras. 23-28.
[25] *Ibid*. at paras. 30-32.

The accident benefits carrier argued that the motion was premature, that the plaintiff had not met the onus on her to deny the defendants of their right to trial by jury and that the court should adopt a "wait and see" approach.[26]

Justice Beaudoin of the Ontario Superior Court began his analysis by describing the two tests for leave to hear the motion. His Honour explained:

> As these actions have been set down for trial, the Plaintiffs require leave to bring these motions. There are two tests for granting leave. The more established test requires the moving party to show a substantial or unexpected change of circumstances subsequent to the filing of the trial record. The second, more flexible test, provides that leave may be granted if it is in the interests of justice to do so. In the context of the ongoing COVID-19 pandemic, the more flexible test has been preferred. On either test, I am satisfied that the Plaintiffs should be granted leave to bring these motions.[27]

As was the case in *Belton*, the court referenced *Cowles v. Balacas* the seminal case where the Court of Appeal confirmed: "the right to trial by jury in a civil case is a substantive right that should not be interfered with without just cause or cogent reasons."[28]

Amongst other cases, the court also cited the above-discussed decisions of *Rolley* and *MacLeod*. Concerning the latter, Justice Beaudoin adopted the following reasons of Justice Meyers:

> … Proportionality is a vital component of the civil justice system. It is enshrined in Rule 1.04 (1.1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194 as an omnipresent consideration in the assessment and balancing of all procedural issues. Mr. Rachlin argues, with much logical force, that in addition to complexity alone, if it can be shown that a jury trial will take much longer or cost much more than a non-jury trial; or if, because of its added length or <u>just because it is a jury trial, systemically, it will not be held until a much later date, then the use of a jury trial may fail to meet the interests of justice</u>. I agree.
>
> … <u>The court must react to the realities facing civil litigants and the civil justice system</u>. It is not news to anyone that delays, and the high cost of civil proceedings impair access to justice. The Supreme Court has declared that "[e]nsuring access to justice is the greatest challenge to the rule of law in Canada today."[3] 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. <u>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</u>

[26] *Ibid.* at para. 33.
[27] *Ibid.* at para. 22.
[28] *Cowles v. Balac* (2006), [2006] O.J. No. 4177, 151 A.C.W.S. (3d) 1044 at para 154 [*Cowles*]; *Louis*, above, at para. 40.

> 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.[29]

Following a fulsome review of relevant jurisprudence, the court ordered that the jury notice be struck because justice would be better served. It was found that "real and substantial prejudice arises simply by reason of delay."[30]

The decision also acts to confirm the court's decision in *Belton*. In this regard Justice Beaudoin commented:

> Justice Sheard identified several very practical concerns in empanelling and continuing with a jury during the pandemic which would be exacerbated in a long trial. She reviewed the relevant caselaw. Justice Sheard observed that COVID-19 has created additional challenges to ensuring access to justice. She concluded that the defendant' [sic] right to a jury trial was outweighed by the need to provide the plaintiff with a more timely access to justice.[31]

The court rejected the "wait and see" approach and concluded:

> In the matters before me, the Plaintiffs have waited seven years for the trials of the actions. All parties are ready. Any delay will likely require costly updated expert reports. It is unknown when or how a new jury trial may be heard. When I questioned counsel as to how a jury trial could proceed without a physical return to the courtroom, they conceded that they had not turned their minds to the logistics.
>
> …
>
> None of the parties to these actions has an unfettered right to a jury trial. These parties should not be required to wait for a policy decision from the legislature. I decline to take a "wait and see" approach nor am I prepared to revisit the issue. I am satisfied that these are appropriate cases in which to exercise the discretion currently conferred upon me to strike a jury notice. I find that justice to the parties will be better served by these actions proceeding to trial, in a timely manner, before a judge alone.[32]

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[29] *MacLeod*, above, at paras. 31-32; *Louis*, above, at para. 50.
[30] *Louis*, above, at para. 46.
[31] *Ibid*. at para. 56.
[32] *Ibid*. at paras. 58, 62.

***Higashi v. Chariot* (Ottawa Action)**

In *Higashi v. Chariot*,[33] the plaintiff moved to strike the jury following the indefinite adjournment of the trial, which had originally been scheduled for March of 2020.

After hearing the parties' submissions, Justice Roger of the Ontario Superior Court held that the applicable test was that contained in the decision of *Cowles v. Balac*. Justice Rogers referred to the oft-cited proposition in that case, that "the right to a jury trial in Ontario is a substantive right that should not be lightly interfered with unless there is just cause or cogent reasons to do so".[34]

Justice Rogers also relied upon the court's comments in *Gervais v. Kapasi*.[35] In that case, Justice Bockenshire stated:

> In my view there comes a time when matters in dispute have to be resolved. There comes a time when the cost of litigation outweighs what can be hoped for as a result. I think in this case the time has come. I have considered the grounds put forth. I feel they are novel. I feel they are practical. I feel they meet the needs of present litigation and the needs of parties to be served by the judicial system. I do not think it would be doing justice to the positions of either the plaintiffs or the defendants to again put this off to another day. They have come here prepared and ready to go and ready to present their respective cases to a tribunal for decision. I am prepared to allow them to proceed forthwith. The jury is struck.[36]

The court ultimately struck the jury. Justice Rogers rejected the defendants' argument that prejudice could not truly be measured without knowing when a jury trial might be heard. To do so would create added uncertainty which would not be in the interests of justice and would add to the parties' expenses. The following reasons were cited:

- At the time of the decision, it was not known when a civil jury trial might be heard in Ottawa.
- A four-week judge alone trial could be heard in Ottawa in the very near future.
- The parties were ready for trial and neither party disputed its readiness to proceed to trial.
- Expert reports had been prepared and it would be much more costly to update these reports at a later date.
- The plaintiff would statutorily lose 30% of any pre-trial loss of income she may have had prior to trial.

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[33] 2020 ONSC 5523.
[34] *Cowles*, above, at para. 154; *Higashi v. Chariot*, 2020 ONCA 5523 at para. 34 [*Higashi*].
[35] [1995] O.J. No. 3128, 58 A.C.W.S. (3d) 572.
[36] *Gervais v. Kapasi*, [1995] O.J. No. 3128, 58 A.C.W.S. (3d) 572 at para 26 (Ont. Gen. Div.).

- It seemed more probable that civil jury trials would be delayed for quite some time considering the resulting backlogs.
- The state of uncertainty resulting from COVID-19 was very much unknown. At this point in time, the state of not knowing favoured a trial by judge alone. Balancing the risks and the rights of the parties seemed to favour striking the jury notice, considering this existing state of uncertainty.
- Uncertainty or added uncertainty would result if the motion were to be adjourned for an unknown period of time to allow for a "wait and see" approach. This unknown or this uncertainty, or level of uncertainty, was not in the interest of justice as it would probably delay the trial and would result in increased expense to both parties.
- As indicated by the Supreme Court of Canada in *Hryniak v. Mauldin*, a fair trial requires a process that is proportionate, timely and affordable, and the high level of uncertainty about when a jury trial might proceed in the future would make the probability of achieving these goals much more unlikely.
- The unknown delay *vis-à-vis* the availability of a civil jury trial in Ottawa could be substantial. A "wait and see" approach could not be employed and the matter ought to move forward given the circumstances of the case.[37]

Of interest, the court provided a glimmer of hope for the defendants. In the event that the timeframe for the return of jury trials was not as long as anticipated, Justice Rogers would allow the parties, in the circumstances of this case, the possibility of returning before the court to review if the interests of justice then balance differently. Justice Rogers continued: "If it's timely then the opportunity is available to the parties. If it's untimely, it's not."[38] That said, his honour levelled the defendants' expectations by remarking that civil jury trials were uncertain and would probably not be available in a timely way.

Jiang v. Toronto Transit Commission (Toronto Action)

Despite the trend in the above decisions, there is a separate line of authority which might arguably apply to all Toronto civil jury trials. In *Jiang v. Toronto Transit Commission*,[39] the court considered the plaintiff's motion to strike the jury.

The plaintiff argued that COVID-19-related court backlogs would cause substantial delay. Further, the plaintiff would be prejudiced because jurors who take Toronto transit may blame the plaintiff for their having to attend. Last, the plaintiff submitted that the action in itself was complex and therefore not suitable for trial by jury.[40]

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[37] *Higashi*, above, at para. 42.
[38] *Ibid*.
[39] 2020 ONSC 5727.
[40] *Jiang v. Toronto Transit Commission*, 2020 ONSC 5727 at paras. 2, 4.

Defence counsel argued that the case was not a complex one and that the defendant has a fundamental right to have her matter adjudicated by jury. This right ought not to be taken away without compelling reasons.[41]

Justice Wilson of the Superior Court distinguished this case from others and explained that Toronto is offering civil jury trials. As such, the court rejected the plaintiff's submissions about time delays and explained:

> I am well aware that we are in unprecedented times. The Court must be flexible and adaptable to accommodate the needs of the parties and to ensure that cases proceed in a fair and equitable fashion. In Toronto, we are very fortunate that we have courtrooms that have been retrofitted to accommodate the social distancing that is required to conduct jury trials. We also are able to conduct jury selection at an off-site premise which has been created to allow for social distancing; it has been approved by the appropriate authorities to ensure it is safe for choosing juries. Further, counsel can decide what witnesses can give their evidence virtually and what evidence can be filed electronically and what evidence may be necessary to have heard in the courtroom.
>
> I am aware that in other jurisdictions that cannot at the present time offer civil jury trials, my colleagues have granted motions striking juries: see *Higashi v. Chiarot*, 2020 ONSC 5523 (Ont. S.C.J.), *Louis v. Poitras*, 2020 ONSC 5301 (Ont. S.C.J.) and *Belton v. Spencer*, 2020 ONSC 5327 (Ont. S.C.J.). In all these decisions, the prejudice to the Plaintiff as a result of an undetermined delay had to be weighed against the right of the Defendant to have the action tried by a jury. In the case at hand, I do not have to consider these issues as there is no prejudice to the Plaintiff and no access to justice issue to be balanced since civil jury trials are available in Toronto.[42]

Justice Wilson also rejected counsel's argument that the jury would be biased against the plaintiff. While jurors may or may not have to take public transportation, there was no evidence doing so would result in bias to the plaintiff.[43]

The court was seemingly unpersuaded that the complexity of the action warranted a judge alone trial. There is a high onus when seeking leave to strike a jury due to complexity; however, this was said to be an issue best left to the trial judge after some evidence has been heard.[44]

Justice Wilson concluded the brief decision with the following remarks:

> In conclusion, there is no urgency to this motion nor is there merit to the suggestion that a jury trial will somehow prejudice the Plaintiff. There may be other reasons why counsel prefer to have a case decided by a judge alone as

[41] *Ibid*. at para. 5.
[42] *Ibid*. at paras. 6-7.
[43] *Ibid*. at para. 9.
[44] *Ibid*. at paras. 10-11.

> opposed to a jury; if that is the case, the reasons must be clearly and cogently set out for the judge to consider. Mere speculation is not sufficient to justify depriving a party of its right to a trial by jury.
>
> I decline to order this motion heard on an urgent basis or prior to the trial. If the solicitor for the Plaintiff wishes to bring a motion to strike the jury on the basis that the case is too complex for a jury to understand, he is to do so to the trial judge.

Closing Remarks

It is apparent that various court jurisdictions are hesitant to delay proceedings that are otherwise ready for judge alone trials. While the majority of cases suggest that a plaintiff will succeed on a motion to strike, the ever-changing circumstances and uncertainty that arise from COVID-19 militate in favour of continuing to oppose such motions for certain jurisdictions.

As we have seen, various courthouses including Toronto are now prepared to hear civil jury trials. Other jurisdictions such as Barrie have also followed suit.

It may be that those court jurisdictions that are currently striking jury notices will be prepared for civil jury trials sooner than anticipated. In such circumstances, the court's perspective on motions to strike a jury notice may also change.

For the time being, we will all have to wait and see.