



## Novel Coronavirus (COVID-19)

### Litigation

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## Litigation in the Time of COVID

By Marco P. Falco

In 2014, the Supreme Court of Canada issued a judicial call-to-arms in *Hryniak v. Mauldin*, 2014 SCC 7. The Court called for no less than a litigation “culture shift”, requiring the judiciary and lawyers to apply more efficient modes of resolving parties’ disputes.

Nearly seven years on, and the culture shift is still arguably in its inception. The pandemic has exacerbated problems identified in *Hryniak*: the scarcity of judicial resources has increased; Courts are severely pressed; and now more than ever, the need for “fast justice” has become acute.

A recent decision of the Ontario Court of Appeal, *Louis v. Poitras*, 2021 ONCA 49, addresses the culture shift head-on. *Louis* concludes that, in the context of a pandemic, appeal Courts should defer to case-management solutions employed by the lower Courts in the interests of administrative efficiency. The *Louis* approach may very well come at the cost of legalistic purity - but it may also amount to a necessity in the time of COVID-19.

### Think Locally

*Louis* involved a motion to strike a jury notice.

In two motor vehicle accident actions to be tried together, the defendants filed separate jury notices. The trials were to be heard in April, 2020, until the pandemic struck.

The plaintiff moved to strike the jury notices in the Summer of 2020. At that time in Ottawa, no Court was scheduling civil jury trials. However, judge-alone trials of three weeks or less were available.

The motion judge granted the plaintiff’s requested relief.

After engaging in a detailed analysis about the status of civil jury trials in Ottawa, the Court ordered that the two trials proceed before a judge alone, in three-week tranches. The motion judge observed that formal notice had already been given to the profession that civil jury trials would not proceed in Ottawa

until January, 2021. Only a small number of Courtrooms in Ottawa, for example, were renovated to include the necessary plexiglass to prevent the spread of COVID-19.

On appeal, the Divisional Court reversed.

It held that the motion judge's solution to strike the jury notice was arbitrary. In the Divisional Court's view, the decision lacked an evidentiary basis. It was based solely on the motion judge's concerns about the delayed trial and there was insufficient evidence of "actual prejudice to the parties".

On further appeal, the Court of Appeal reversed. It held that the Divisional Court ought to have deferred to the motion judge's discretionary decision to impose a pragmatic, efficient solution to move the case along in the Ottawa Court system.

### **An "Unprecedented Crisis"**

The *Louis* decision constitutes a clarion call for the Ontario civil justice system.

The Court began its analysis by discussing why *Hryniak* ushered in an era of civil justice reform. At that time, in 2014, the system was being "overwhelmed" and access to justice was imperiled. In the pandemic, these concerns are heightened.

The first few sentences of *Louis* illustrate the toll COVID-19 has taken on the civil justice system:

....the COVID-19 pandemic has significantly reduced the availability of courtrooms. Trial courts have necessarily had to prioritize criminal and family law cases to the detriment to civil cases' timely resolution...Procedural reforms have been implemented to respond to the challenge, including increasing the use of electronic filing and electronic hearings...more fundamental changes in the operation of the civil justice system are being contemplated, such as the potential elimination of civil jury trials...Judges of the Superior Court work tirelessly to keep the civil justice system afloat.

Recognizing that the justice system is in an "unprecedented crisis", the Court held that intermediary appellate Courts should accordingly defer to local and creative solutions for efficient trial management.

This means that only in "rare situations" should an appeal court "overrule discretionary case management decisions". Unnecessary interference in the lower Courts' practical application of the law to its local circumstances ought to be discouraged.

The right to a jury trial was always subject to the motion judge's discretion. The motion judge has the power to address concerns about the proper administration of justice in making her decision.

In *Louis*, at the time the motion to strike the jury notice was heard, it was unclear when a civil jury trial would be held in Ottawa. Judicial resources had to be allocated elsewhere at the outset of the pandemic.

Accordingly, in the Court of Appeal's opinion, the Divisional Court's decision to uphold the jury notice was at odds with the reality of litigation in Ottawa and, accordingly, with the *Hryniak* "culture shift":

This case neatly captures the competing approaches to the crisis faced by the civil justice system. The motion judge approached this case practically, cognizant of his responsibility to the parties and the system to move cases forward and offer timely service...the Divisional Court took the wrong approach to the new reality of the civil justice system...[it engaged in the] type of complacency that has led to the civil justice system's systemic delay and was subject to criticism by the Supreme Court of Canada in *Hryniak*.

In the Court of Appeal's view, local judges, and not appeal Courts, "are best positioned to understand the availability of resources and the appropriate approach in the circumstances of a given case".

In other words, context matters. Appeal Courts that interfere with discretionary case-management decisions purportedly impede, and do not promote, access to justice.

### **What the Culture Shift Means for Case Management**

The message in *Louis* is clear: the litigation culture shift, particularly in a pandemic, requires lawyers and Courts to adopt and show deference to pragmatic case management solutions.

While “fast justice” may come at the expense of non-compliance with legal tests and may promote a measure of arbitrariness, the Court of Appeal is willing to take its chances.

Local, creative solutions to trial management are to be given primacy. The proper functioning of the Court system depends upon an idiosyncratic understanding of civil operations at the lower-Court level.

Parties who seek to challenge this understanding on appeal should be prepared for an uphill battle. Only in the rarest of circumstances will discretionary case management decisions be overturned.

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