Court File No.: CV-09-431800

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

PREETI KAPOOR

Plaintiff

- and -

RADOJE KUZ MANOVSKI also known as RADOJA KUZ MANOVSKI, KRASIMIR PETROV, JASON AGUILAR, and UNIFUND ASSURANCE COMPANY

Defendants

- and -

THE ADVOCATES' SOCIETY and THE MINISTRY OF THE ATTORNEY GENERAL OF ONTARIO

Intervenors

FACTUM OF THE INTERVENOR THE ADVOCATES' SOCIETY

Date: November 30, 2017

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FACTUM OF THE INTERVENOR THE ADVOCATES' SOCIETY

PART I - INTRODUCTION AND OVERVIEW

A. Invitation to Intervene

1. The Advocates' Society intervenes on this motion at the invitation of the Court. Pursuant to the endorsement of Regional Senior Justice Daley, dated March 16, 2017, The Advocates' Society intervenes as a friend of the court for the purpose of rendering assistance to the court by way of argument on this motion in accordance with Rule 13.02.

B. The Advocates' Society

2. The Advocates' Society, established in 1963, represents over 5,700 advocates in all provinces and territories of Canada, practising in virtually all areas of law that

involve appearing before courts or tribunals, including constitutional, administrative and public law. As courtroom advocates, The Advocates' Society's members have a keen interest in the effective judicial resolution of legal disputes.

3. The Advocates' Society's mandate includes advocacy education, legal reform, the protection of the rights of litigants, the protection of the public's right to representation by an independent bar, and the promotion of access to, and improvement of, the administration of justice.

4. The Advocates' Society's mandate also includes intervening in court proceedings that involve issues affecting the legal profession and, in particular, affecting advocates and the rights of litigants in Canada's court systems. The Advocates' Society from time to time considers whether to intervene in a matter before the courts, as a result of: a) a request from a member of the judiciary or the bar; b) a request from others; or c) on its own initiative. The Advocates' Society is frequently called upon by the courts to provide assistance on issues relating to access to justice and the administration of justice across the country.

C. Overview of Position

5. The Advocates' Society submits that there are a number of guiding principles that are applicable to the matters in issue on this motion.

6. It is well established that the right to a jury trial in a civil action is and remains a substantive right not to be interfered with lightly. The right to a civil jury is entrenched in common law and statute in Ontario.

7. The jury system is founded on the two fundamental characteristics of impartiality and representativeness. Litigants are entitled to have their case tried by an unbiased

and impartial adjudicator. In Canada, there is a strong presumption of impartiality on the part of the jurors and there is a heavy burden on a party who seeks to rebut this presumption. Representativeness is a crucial characteristic of juries and enhances juries' impartiality.

8. As a general rule, there is no right to challenge a potential civil juror for cause in Ontario. There are existing mechanisms to protect jury fairness which are available to safeguard against the types of concerns raised by the plaintiff on this motion. These existing mechanisms and safeguards are sufficient to ensure that the parties receive a fair and impartial resolution of their dispute.

9. The Advocates' Society submits that this Honourable Court need not create additional jury screening or exclusion mechanisms, and that any necessary changes to the existing civil juries system are best and most appropriately left to the Legislature or the Civil Rules Committee to determine based on a thorough and measured consideration of these issues.

PART II - THE FACTS

A. Position on the Factual Record

10. The Advocates' Society accepts the factual record created by the parties and it will not take a position on the evidentiary issues raised by the parties, except to the extent necessary to advance its submissions on the legal issues before the court.

PART III - ISSUES AND THE LAW

A. General Principles – The Right to a Jury Trial in a Civil Action in Ontario

11. In Ontario, the right to a trial by a jury in civil matters is enshrined in both the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, and the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

12. The *Courts of Justice Act*, provides at s. 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.

13. Rule 47.01 of the *Rules of Civil Procedure* states:

> A party to an action may require that the issues of fact be tried or the damages be assessed, or both, by a jury, by delivering a jury notice at any time before the close of pleadings, unless section 108 of the *Courts of Justice Act* or another statute requires that the action be tried without a jury.

14. It is well established that the right to a civil jury is a substantive one, which ought not to be interfered with lightly or prematurely. In *Sloane v. Toronto Stock Exchange*, reversing a motion judge's decision to strike a jury notice due to complexities, the Court of Appeal for Ontario stated:

> As this court has frequently stated, the right to trial by a jury is an important substantive right: see *Isaacs v. MHG International Ltd.* (1984), 1984 CanLII 1862 (ON CA), 45 O.R. (2d) 693, 7 D.L.R. (4th) 570 (C.A.) and *Such v. Dominion Stores Ltd.*, 1961 CanLII 173 (ON CA), [1961] O.R. 190, 26 D.L.R. (2d) 696 (C.A.). That right should not be denied prematurely.[1]

15. Similarly, in *Cowles v. Balac*, O'Connor A.C.J.O. observed that the right to a trial by jury in a civil case is a substantive right and should not be interfered with without just

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[1] *Sloane v. Toronto Stock Exchange* (1991), 5 O.R. (3d) 412, 1991 CarswellOnt 439 (C.A.), The Advocates' Society Book of Authorities ("TAS BOA"), Tab 29.

cause or cogent reasons.[2] The Supreme Court of Canada recognized this more than 60 years ago when it held in *King v. Colonial Homes Ltd.*: "the right to trial by jury is a substantive right of great importance of which a party ought not to be deprived except for cogent reasons".[3]

16. Although a substantive right, the right to a jury in civil matters is not absolute and is not protected by the *Canadian Charter of Rights and Freedoms*.[4] Certain limitations are imposed by s. 108(2) of the *Courts of Justice Act*, which requires civil actions seeking specific forms of relief be tried by a judge alone.[5]

B. General Principles – Jury Impartiality and Representativeness

17. Canadian courts have long recognized that the value and importance of the jury system is founded on the two fundamental characteristics of impartiality and representativeness. As Justice L'Heureux-Dubé commented in *R. v. Sherratt*, "without the two characteristics of impartiality and representativeness, a jury would be unable to perform properly many of the functions that make its existence desirable in the first place."[6]

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[2] *Cowles v. Balac* (2006), 83 O.R. (3d) 660 (C.A.), leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 496, at para. 36, TAS BOA, Tab 5.
[3] *King v. Colonial Homes Ltd.*, [1956] S.C.R. 528, 1956 CarswellOnt 74, at para. 17, TAS BOA, Tab 11.
[4] See *Legroulx v. Pitre*, 2009 ONCA 760, at paras. 3 and 5, leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 34, TAS BOA, Tab 12; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2017 BCCA 324, at paras. 37-38, TAS BOA, Tab 31.
[5] These are: 1. Injunction or mandatory order; 2. Partition or sale of real property; 3. Relief in proceedings referred to in the Schedule to section 21.8; 4. Dissolution of a partnership or taking of partnership or other accounts; 5. Foreclosure or redemption of a mortgage; 6. Sale and distribution of the proceeds of property subject to any lien or charge; 7. Execution of a trust; 8. Rectification, setting aside or cancellation of a deed or other written instruction; 9. Specific performance of a contract; 10. Declaratory relief; 11. Other equitable relief; and 12. Relief against a municipality.
[6] *R. v. Sherratt*, [1991] 1 S.C.R. 509, 1991 CarswellMan 7, at para. 35, TAS BOA, Tab 26.

Jury Impartiality

18. It is a fundamental principle of the Canadian justice system that litigants will be heard and cases will be decided by an unbiased and impartial adjudicator. The Court of Appeal for Ontario has recently stated:

> jurors are entitled to the same "strong presumption of impartiality" as judges, and that there is "a heavy burden on a party who seeks to rebut this presumption" ... Similarly, this court noted in *R. v. Farinacci* ... that "[j]urors, like judges, are presumed to govern themselves by the oath they swore to try the accused on the evidence adduced in the courtroom."[7]

19. In *R. v. Dowholis* the Court of Appeal for Ontario recently considered the issue of juror partiality in depth.[8] Several of Benotto J.A.'s observations, though made in the criminal context, have general application regarding juror bias and partiality. Many of them bear repeating in full:

> [18] A juror is a judge. There is a strong presumption of judicial impartiality and a heavy burden on a party who seeks to rebut this presumption. Judicial impartiality has been called "the key to our judicial process": *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259, at para. 59. The presumption of impartiality anchors public confidence in the integrity of the administration of justice.
>
> [19] In order to rebut the presumption of impartiality, a stringent test has been developed by the Supreme Court of Canada. It was first articulated by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394, and has been repeatedly endorsed:
>
> > [T]he apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information.... [T]hat test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

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[7] *R. v. Zvolensky*, 2017 ONCA 273, at paras. 230-231 (citations omitted), TAS BOA, Tab 28.
[8] *R. v. Dowholis*, 2016 ONCA 801, 133 O.R. (3d) 1, TAS BOA, Tab 19.

...

> [21] In order to maintain public confidence in the administration of justice, the appearance of judicial impartiality is as important as the reality: *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex p. Pinochet Ugarte* (No. 2) (1999), [2000] 1 A.C. 119 (U.K. H.L.). ...
>
> [22] The Canadian system starts on the presumption that jurors are capable of setting aside their views and prejudices and acting impartially. There are safeguards in place to address potential sources of juror partiality. ...

20. Justice Benotto concluded juror impartiality may be undermined by actual bias, or by a reasonable apprehension of bias.[9]

21. Justice Doherty observed that there is a distinction between bias and partiality that merits consideration:[10]

> The distinction between bias and partiality is crucial. Jurors come from the community and reflect the views and values of the community. Inevitably, jurors will have biases for or against certain persons or certain groups. The jury system is predicated on the presumption that those biases can be overcome by the various protections built in to the jury trial process so that jurors, despite their biases, will decide the case on the evidence and the law as given to them by the judge.[11]

22. Doherty J.A. noted that to demonstrate a juror's partiality would (or did) undermine trial fairness, the concerned party must satisfy the court that a reasonable, informed observer, would conclude it was probable that: a) the juror had preconceived opinions, interests, or negative attitudes about a party or the subject matter (i.e. bias); **AND** b) the juror's preconceived opinions, interests, or negative attitudes towards caused or would cause that juror to discriminate against the party or decide the case in a particular way (i.e. partiality).[12]

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[9] *R. v. Dowholis*, at para. 44, TAS BOA, Tab 19.
[10] Justice Doherty dissented in the conclusion, though not on the general legal principles applicable. See also *R. v. Williams*, [1998] 1 S.C.R. 1128, TAS BOA, Tab 17.
[11] *R. v. Dowholis*, at para. 81, TAS BOA, Tab 19.
[12] *R. v. Dowholis*, at para. 79, TAS BOA, Tab 19.

23. In relation to the trial safeguards that protect biases from materializing as partiality, Doherty J.A. noted: "Jurors are not expected to leave their moral compass at home when they attend for jury duty. They cannot, however, allow any negative view they may form about an accused's lifestyle to prejudice them against the accused in their deliberations. Juries are routinely instructed to that effect."[13] The adequacy of those instructions might, as in *Dowholis*, form a ground of appeal, but in the normal course, the justice system places great faith in jurors to set aside their biases and decide cases impartially.

24. It is also necessary to note that some types of bias or partiality are more deeply held and likely to be acted upon than others. In *R. v. Dowholis,* Benotto J.A. held that "a reasonable observer would not be merely identifying bias, but rather a bias that would likely affect the juror's ability to decide fairly. In this regard, the type of bias is relevant. Some types of bias may be easier to set aside than others" (emphasis added).[14] Justice Doherty's discussion regarding types of bias in the context of a challenge for cause in *R. v. Parks* is also relevant here:

> In deciding whether the post-jury selection safeguards against partiality provide a reliable antidote to racial bias, the nature of that bias must be emphasized. For some people, anti-black biases rest on unstated and unchallenged assumptions learned over a lifetime. Those assumptions shape the daily behaviour of individuals, often without any conscious reference to them. In my opinion, attitudes which are engrained in an individual's subconscious, and reflected in both individual and institutional conduct within the community, will prove more resistant to judicial cleansing than will opinions based on yesterday's news and referable to a specific person or event. [Emphasis added.][15]

25. Similarly, in *R. v. Farinacci*, the appellants argued that even if there was no reasonable possibility that the extrinsic information affected the jury's verdict, the

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[13] *R. v. Dowholis*, at para. 96, TAS BOA, Tab 19.
[14] *R. v. Dowholis*, at para. 41, TAS BOA, Tab 19.
[15] *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.), at para. 59, TAS BOA, Tab 24.

appearance of unfairness resulting from excessive exposure of the jury to outside information requires a new trial.[16] Justice Pardu rejected that argument, stating:

> [39] Jurors do not live in a bubble but are drawn from the community where the trial takes place. ...
>
> [40] In some cases where there is extensive publicity, at least some, if not all the jurors will be inevitably exposed to some aspects of it. This does not mean that a juror will not abide by his or her oath. Judges, after all, sometimes decide cases in a sea of publicity.
>
> [41] Jurors, like judges, are presumed to govern themselves by the oath they swore to try the accused on the evidence adduced in the courtroom. As observed in *R. v. Spence*, [2005] 3 SCR 458 at para. 22:
>
> > Our collective experience is that when men and women are given a role in determining the outcome of a criminal prosecution, they take the responsibility seriously; they are impressed by the jurors' oath and the solemnity of the proceedings; they feel a responsibility to each other and to the court to do the best job they can; and they listen to the judge's instructions because they want to decide the case properly on the facts and the law. Over the years, people accused of serious crimes have generally chosen trial by jury in the expectation of a fair result. This confidence in the jury system on the part of those with the most at risk speaks to its strength. The confidence is reflected in the *Charter* guarantee of a trial by jury for crimes (other than military offences) that carry a penalty of five years or more (s. 11 (f)). [Emphasis added.][17]

26. In *R. v. Moffit*, the Court of Appeal for Ontario observed: "It is fundamental to jury trials that juries be trusted to follow the instructions given by trial judges".[18] Therefore, any suggestion of juror partiality must overcome the strong presumption of impartiality and the expectation that jurors would follow the instructions and cautions given by trial judges.

27. These principles should apply equally to members of the public who are given the role of trier of fact in a civil action. Indeed, because of the liberty at stake in criminal

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[16] *R. v. Farinacci*, 2015 ONCA 392, 328 C.C.C (3d) 101, at para. 38, TAS BOA, Tab 20.
[17] *R. v. Faranacci*, at paras. 39-41, TAS BOA, Tab 20.
[18] *R. v. Moffit*, 2015 ONCA 412, at para. 100 (citations omitted), TAS BOA, Tab 23.

proceedings and the constitutional assurances we give to accused persons to ensure that they receive a fair trial, arguably the presumption of impartiality in civil cases ought to be at least as stringent, if not more stringent than it is applied in criminal cases.

28. The plaintiff will face a heavy burden to rebut the strong presumption of juror impartiality. It is presumed that potential jurors in this action will come from a broad, representative community and bring with them their own views and values and even preconceived conscious or unconscious biases. However, it is also presumed that these jurors will fulfill the oath they will swear and, with the benefit of trial safeguards, any preconceived bias will not materialize as partiality.

Jury Representativeness

29. Regarding representativeness, in *R. v. Sherratt*, L'Heureux-Dubé J. held that the jury "due to its representative character, ... acts as the conscience of the community" and "was envisioned as a representative cross-section of society, honestly and fairly chosen". Justice L'Heureux-Dubé further commented: "The perceived importance of the jury ... is meaningless without some guarantee that it will perform its duties impartially and represent, as far as is possible and appropriate in the circumstances, the larger community."[19]

30. The following comments of Sharpe J.A. in *R. v. Gayle* reflect the important interplay between representativeness and impartiality:

> The importance of representativeness, along with impartiality, was discussed in *R. v. Sherratt*...: "[W]ithout the two characteristics of impartiality and representativeness, a jury would be unable to perform properly many of the functions that make its existence desirable in the first place." Representativeness was described ... as a "crucial characteristic of juries" to which "little if any objection can be made".

[19] *R. v. Sherratt*, at pp. 523-24, 526, paras. 30-31, 35, TAS BOA, Tab 26.

> Representativeness was also accepted as an important characteristic of the jury in *R. v. Bain* ... "[t]he well-informed observer certainly knows that a jury should be impartial, representative and competent." ... Securing a representative jury enhances impartiality and, as this Court stated in *R. v. Church of Scientology of Toronto* ... "[t]he representative character of the jury also furthers important societal or community interests by instilling confidence in the criminal justice system and acting as a check against oppression."
>
> ... As stated by McLachlin J. in *R. v. Biddle* ... representativeness is a means to ensuring impartiality, "[b]ut it should not be elevated to the status of an absolute requirement."[20]

31. In *Nishnawbe Aski Nation v. Eden*, Laskin J.A. observed: "A representative jury is one that corresponds, as much as possible, to a cross-section of the larger community. And a representative jury enhances the impartiality of a jury."[21]

32. In *R. v. Church of Scientology of Toronto*, Doherty J.A. stated:

> The essential quality that the representativeness requirement brings to the jury function is the possibility of different perspectives from a diverse group of persons. The representativeness requirement seeks to avoid the risk that persons with these different perspectives, and who are otherwise available, will be systematically excluded from the jury roll.[22]

33. The plaintiff seeks to disqualify all drivers and purchasers of insurance. This will likely result in the systematic exclusion of a significant percentage of the potential jury pool. It is questionable whether the remaining jury panel would be representative of the public and whether it would be in the interest of justice to allow such a blanket disqualification. Such a broad disqualification would have a precedent setting impact. A decision reached on this motion to systematically exclude drivers and insurance customers from the jury pool would inevitably create a similar situation in personal injury actions across Ontario.

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[20] *R. v. Gayle* (2001), 54 O.R. (3d) 36 (C.A.) at paras. 56-57 (citations omitted), TAS BOA, Tab 22.
[21] *Nishnawbe Aski Nation v. Eden,* 2011 ONCA 187, at para. 28, TAS BOA, Tab 16.
[22] *R. v. Church of Scientology of Toronto* (1997), 116 C.C.C. (3d) 1 (Ont. C.A.), at para. 158, TAS BOA, Tab 18.

34. The Advocates' Society submits that any concerns of juror partiality, if demonstrated, can be addressed through existing mechanisms, discussed below. To cast a blanket disqualification of all drivers and purchasers of insurance as requested by the plaintiff would, in effect, completely undermine the representativeness of the jury and detrimentally affect trial fairness. The resulting unfairness would be borne equally by plaintiff and defendants.

C. There is No Right in Ontario to Challenge a Civil Juror for Cause

35. In civil cases, there are only three types of challenges permitted under the *Juries Act*: statutory ineligibility (s. 32); peremptory challenges (s. 33); and municipality related challenges (s. 34).

36. In *Thomas-Robinson et al v. Song*, Jennings J. observed:

> There is no express statutory authority permitting a challenge for cause in Ontario in a civil case. This is not the case in other provinces of Canada; for example, in Alberta and British Columbia, where specific provisions are made in the controlling provincial legislation for challenges for cause.[23]

37. Justice Jennings went on to note: "by declining to provide for challenge for cause in the *Juries Act*, the legislature did not believe it necessary to extend that right to litigants in civil cases. It may well be that the issue should be reconsidered but that is for legislature and not for me."[24]

38. A number of other lower court decisions have held that in Ontario there is no right to challenge a juror for cause in a civil action.[25] The only appellate authority on the

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[23] *Thomas-Robinson v. Song* (1997) 34 O.R. (3d) 62, 1997 CarswellOnt 5627 (Ct. J. (Gen. Div.)), at para. 6, TAS BOA, Tab 30.
[24] *Thomas-Robinson v. Song*, at para. 12, TAS BOA, Tab 30.
[25] *Abou-Marie v. Baskey* (2001), 56 O.R. (3d) 360 (S.C.J.), at para. 8, TAS BOA, Tab 1; *Amana Imports Canada v. Guardian Insurance Co. of Canada* (2002), 57 O.R. (3d) 587, TAS BOA, Tab 3; *Al-Haddad v. London & Middlesex County Roman Catholic Separate School Board*, [1996] O.J. No. 4675, 1996

issue in Ontario is *Kayhan et al v. Greve*, wherein the Divisional Court allowed an appeal from a lower court decision to strike a defendant's Jury Notice based on fairness related to ethnicity of the plaintiff.[26] The Divisional Court acknowledged that there is no recognized procedure in Ontario to challenge a jury for cause in civil actions, but noted that it is not prohibited. The majority of the court acknowledged that some would suggest it may be for the Civil Rules Committee and the Legislature to consider the issue, but did not advance that suggestion.[27] In concurring reasons, though, Kiteley J. stated "it is clear that this is a matter which needs a legislative response."[28]

39. The majority in *Kayhan et al v. Greve* also commented on the ramifications of creating a challenge for cause in civil matters:

> there would be considerable delay and expense involved in many civil cases in large urban centres. Evidence would need to be brought to the attention of the trial judge on the issue of potential prejudice. We already have a civil system that is seriously overloaded, and to this extent, challenges for cause in civil cases would not do anything but to increase the current backlog.[29]

40. As much as the civil justice system was overloaded in 2008, these concerns are only more pronounced almost a decade later.

41. The Advocates' Society submits that the balance of authority in Ontario is against the availability of any challenge for cause outside of what is provided for in the *Juries Act* or the *Courts of Justice Act.* To the extent any substantive reform or changes are required to the civil jury system in Ontario to allow a general challenge for cause

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CarswellOnt 5047 (Gen. Div.), at para. 12, TAS BOA, Tab 2; *Desando v. Canadian Transit Co.*, 2017 CarswellOnt 1162 (S.C.J.), at para 18, TAS BOA, Tab 6.
While one case does appear to consider the possibility of a challenge for cause in civil proceedings as a matter of judicial discretion, Justice Mulligan dismissed the plaintiff's motion, noting that such challenges have only been conducted in the criminal context, and that a legislative response might be necessary and more appropriate: *MacNeil v. Parry*, 2013 ONSC 7273, TAS BOA, Tab 13.
[26] *Kayhan et al. v. Greve* (2008), 92 O.R. (3d) 139 (Div. Ct.), TAS BOA, Tab 9.
[27] *Kayhan et al. v. Greve*, at para. 38, TAS BOA, Tab 9.
[28] *Kayhan et al. v. Greve*, at para. 48, TAS BOA, Tab 9.
[29] *Kayhan et al. v. Greve*, at para. 42, TAS BOA, Tab 9.

procedure, this should be done through measured and carefully considered legislative amendments and/or changes to the *Rules of Civil Procedure*.

D. Existing Mechanisms to Ensure Jury Fairness

42. The majority of cases in Ontario which have addressed the issue of jury impartiality or bias have done so either in the context of a motion to strike the Jury Notice or in the context of a request to pre-screen potential jurors.

43. A party seeking to challenge a juror or potential juror on the basis of bias or impartiality has a number of potential remedies, in addition to the use of its four peremptory challenges pursuant to s. 33 of the *Juries Act*, namely:

i. Challenge regarding a juror's eligibility pursuant to s. 32 of the *Juries Act*;

ii. Section 108(7) of the *Courts of Justice Act* where a judge may discharge a juror on the ground of partiality during the course of the trial; and

iii. Striking the Jury Notice pursuant to rule 47.02(2).

44. In addition, the potential availability for judicial pre-screening may provide an additional mechanism to enhance jury fairness.

i. Challenge Based on Eligibility

45. A party may challenge a juror for want of eligibility pursuant to s. 32 of the *Juries Act*, which states:

> **Lack of eligibility**
> 32. If a person is drawn as a juror for the trial of an issue in any proceeding the want of eligibility is a good cause for challenge.

46. "Want of eligibility" refers to the eligibility requirements set out in ss. 2-4 of the *Juries Act* and such factors as residence, citizenship, age of majority and criminal record.

47. Section 3(3) of the *Juries Act* also makes every person who has an interest in the action ineligible. Section 3(3) provides:

> **Ineligibility to serve as juror**
> ...
> **Connection with court action at same sittings**
> Every person who has been summoned as a witness or is likely to be called as a witness in a civil or criminal proceeding or has an interest in an action is ineligible to serve as a juror at any sittings at which the proceeding or action might be tried. [Emphasis added.]

48. There does not appear to be any judicial interpretation of the phrase "an interest in an action" in s. 3(3) of the *Juries Act*. In criminal cases, a judge may order any jury panel member to be excused from jury service on the grounds that the panel member has "a personal interest in the matter to be tried".[30] Courts have held that "personal interest in the matter to be tried" reflects circumstances of "obvious partiality" or "manifest partiality".[31]

49. The plaintiff argues that all potential jurors who drive cars or who pay automobile insurance have "an interest in the action" giving rise to a conflict of interest and automatic disqualification. The *Juries Act* does not expressly state that impartiality is a ground to disqualify a juror for ineligibility. There is no authority on the question whether ineligibility on the grounds of having "an interest in the action" would include a conflict or partiality.

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[30] *Criminal Code*, R.S.C. 1985, c. C-46, s. 632.
[31] See *R. v. B. (A.)* (1997), 33 O.R. (3d) 321 (C.A.), at paras. 94-95, TAS BOA, Tab 17; *R. v. Pickton*, 2006 BCSC 1832, at para. 3, TAS BOA, Tab 24.

50. If the court holds that "interest in the action" includes partiality, it may find guidance in the criminal law jurisprudence to fashion a test for when it is appropriate to challenge a juror for "want of eligibility" on the basis of partiality and to develop an onus which must be met in order to exclude an individual potential juror who has been challenged.

51. The Advocates' Society suggests a two-stage test. At the first stage, the court would consider a threshold analysis of whether a challenge for want of eligibility should be permitted. At the second stage, if a challenge is permitted, the court would consider whether the challenging party has discharged its onus to satisfy the court that a prospective juror ought to be dismissed due to partiality.

52. In *R. v. Find*, the Supreme Court of Canada outlined a two-part test on the threshold analysis of whether to permit a challenge for cause. The party seeking to challenge potential jurors must establish a "realistic potential" for juror partiality by satisfying the court:

1) that a widespread bias exists in the community; and

2) that some jurors may be incapable of setting aside this bias, despite trial safeguards, to render an impartial decision.

The two parts of the test are guidelines to determine whether "a realistic possibility exists that some jurors may decide the case on the basis of preconceived attitudes or beliefs, rather than the evidence placed before them."[32]

53. The two key concepts identified by the Supreme Court of Canada underlying potential partiality are "bias" and "widespread". The Court provided guidance to understand these concepts:

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[32] *R. v. Find*, 2001 SCC 32, at paras. 30-33, TAS BOA, Tab 21.

Bias

-In the context of a challenge for cause, bias refers to an attitude that could cause a juror to discharge his/her function in the case at hand in a prejudicial and unfair manner.

- It is not determined at large but in the context of the specific case before the court.

- "What must be shown is a bias that could, as a matter of logic and experience, incline a juror to a certain party or conclusion in a manner that is unfair. This is determined without regard to the cleansing effect of trial safeguards and the direction of the trial judge, which become relevant only at the second stage consideration of the behavioural effect of bias."

Widespread

- This concept relates to prevalence of the bias in question.

- Generally, it must be established that the alleged bias is "sufficiently pervasive in the community to raise the possibility that it may be harboured by one or more members of a representative jury pool (although, in exceptional circumstances, a less prevalent bias may suffice, provided it raises a realistic potential of juror partiality ...)."[33]

54. If widespread bias is shown, the next component of the test asks whether a juror or jurors may be unable to set aside their bias despite the "cleansing effect" of the trial judge's instruction and the trial process. The Supreme Court of Canada outlined the various procedural safeguards to counter biases, including the juror's oath, the trial judge's and lawyers' opening addresses and the judge's instructions. It is noted that the law presumes that jurors' views and biases will be cleansed by the trial process and thus does not allow a party to challenge a juror because of the existence of widespread bias alone.[34]

55. If this court determines that a challenge for want of eligibility under s. 32 of the *Juries Act* may be based on partiality due to having an interest in the action, the party

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[33] *R. v. Find*, at paras. 34-39, TAS BOA, Tab 21.
[34] *R. v. Find*, at paras. 40-41, TAS BOA, Tab 21.

seeking to challenge the eligibility of potential jurors would need to establish a "realistic potential" for juror partiality by satisfying the court:

1) that a widespread interest in the action or its subject matter exists in the community; and

2) that some jurors may be incapable of setting aside this pre-existing interest, despite trial safeguards, to render an impartial decision.

Again, the fundamental question at this first, threshold stage is whether "a realistic possibility exists that some jurors may decide the case on the basis of preconceived attitudes or beliefs, rather than the evidence placed before them."

56. Turning to the second stage, as mentioned above, in the criminal context, having "a personal interest in the matter to be tried" has been interpreted to require circumstances of "obvious" or "manifest" partiality in order to warrant the discharge of a potential juror. Should this court accept that ss. 32 and 3(3) of the *Juries Act* combine to permit a party to seek to challenge potential jurors for want of eligibility based on having an interest in the action, and such a challenge is allowed, the "manifest partiality" standard may be appropriate in the civil context as well.

57. Whether a potential juror is manifestly partial should be a multi-factor analysis given the circumstances of each case and having regard to: the strong presumption of juror impartiality; the various procedural safeguards to counter biases, including the juror's oath; and the trial judge's instructions. As the word "manifest" suggests, for a potential juror to be dismissed, his or her partiality should be "clear and obvious to the eye or mind".

58. For greater certainty, The Advocates' Society is not suggesting that a broad, general challenge for cause mechanism such as that used in criminal proceedings be read into the *Juries Act*. Rather, The Advocates' Society's submission is limited to

shaping a test for the very narrow circumstances of a challenge for want of eligibility based on having an interest in an action. Indeed, this hesitation against broadly expanding the juror challenges available in civil cases was recently expressed in *Nemchin v. Green*,[35] wherein Justice Corthorn made the following comments:

> [53] In my view, the decisions in *Thomas-Robinson* and *Kayhan*, individually and collectively, serve to emphasize that the presumption of impartiality (a) remains a significant feature of the jury selection process and (b) is a difficult presumption to rebut in an effort to cause a trial judge in a civil action to exercise his or her discretion, pursuant to section 108(7) of the *Courts of Justice Act*, to address impartiality in any way other than as strictly prescribed by the *Juries Act*.
>
> ...
>
> [55] I agree with the conclusion reached by Jennings J. in *Thomas-Robinson*, that (a) in a civil action the only "good cause[s] for challenge" are those specified within the *Juries Act* and (b) the wording of the statute does not give the trial judge discretion to expand the scope of the pre-screening process to include "other unspecified good causes for challenge."
>
> [56] The Supreme Court of Canada made it clear in *R. v. Sherratt* that "there is absolutely no room for a trial judge to increase further his/her powers and take over the challenge process by deciding controversial questions of partiality." This statement was made in a criminal law case and emphasized the importance of the trial judge adhering to the challenge for cause process prescribed by the *Code*. In my view, it is equally as important that trial judges in civil cases adhere to the jury selection process prescribed by the *Juries Act*.
>
> [57] It is clear from the decision of the Supreme Court in *Sherratt* that the "threshold question" to be met for a challenge for cause to proceed in a criminal case is:
>
> > [N]ot whether the ground of alleged partiality will create such partiality in a juror, but rather whether it could create that partiality which would prevent a juror from being indifferent as to the result. In the end, there must exist a realistic potential for the existence of partiality, on a ground sufficiently articulated in the application, before the challenger should be allowed to proceed.

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[35] *Nemchin v. Green*, 2017 ONSC 2126, TAS BOA, Tab 15.

ii. Discharge of a Juror for Partiality

59. While there is no express right to challenge a potential juror for cause, once a juror is selected and sworn the trial judge can address any concerns with respect to partiality by discharging the juror where appropriate.

60. Section 108(7) of the *Courts of Justice Act* provides: "The judge presiding at a trial may discharge a juror on the ground of illness, hardship, partiality or other sufficient cause." Subsection (8) speaks to the continuation of a jury trial with five jurors where a juror dies or is discharged. Read together, the courts have held that ss. 108(7) and (8) suggest the trial judge in a civil trial is seized of the issue of impartiality and may discharge a juror on the ground of partiality during the course of a trial.[36] Neither the *Courts of Justice Act* nor the *Juries Act* define "partiality" nor have these section received much judicial interpretation.

61. Although the plaintiff does not seek to discharge a particular juror, in considering the relief sought by the plaintiff it is important to note that this tool is available to the trial judge to address juror partiality in the course of a trial should the need arise.

iii. Striking Jury Notice – *Rules of Civil Procedure*, rule 47.02(2)

62. Rule 47.02(2) of the *Rules of Civil Procedure* provides that a party may move before a judge to strike out a Jury Notice on the grounds that a jury trial is inappropriate. Rule 47.02(2) provides:

> **Where Jury Trial Inappropriate**
> A motion to strike out a jury notice on the ground that an action ought to be tried without a jury shall be made to a judge.

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[36] *Thomas-Robinson v. Song*, at para. 7, TAS BOA, Tab 30; *Elbakhiet v. Palmer*, 2014 ONCA 544, at paras. 18-19, TAS BOA, Tab 7.

63. A party can also bring a motion to strike a jury notice under section 108(3) of the *Courts of Justice Act*. Section 108(3) states:

> On motion, the court may order that issues of fact be tried or damages assessed, or both, without a jury.

64. Judges have a great deal of discretion in deciding whether an action would be more appropriately tried without a jury. The leading case on the test for striking a jury in Ontario is *Cowles v. Balac*, which sets out the following considerations:

> (a) If a litigant is entitled to trial by jury, that right is a substantive one, and a trial judge should not interfere with it without cogent reasons;
>
> (b) A party moving to strike a jury notice bears the onus of showing that there are features in the legal or factual issues, in the evidence, or in the conduct of the trial which merit the discharge of the jury;
>
> (c) The test to strike a jury notice is whether the moving party has shown that justice to the parties will be better served by the discharge of the jury.[37]

65. The Court of Appeal in *Cowles v. Balac* elaborated as follows with respect to the broad discretion of the judge in deciding whether or not to dispense the jury:

> While that test confers a rather broad discretion on a court confronted with such a motion, it is nonetheless a sensible test. After all, the object of a civil trial is to provide justice between the parties, nothing more. It makes sense that neither party should have an unfettered right to determine the mode of trial. Rather, the court, which plays the role of impartial arbiter, should, when a disagreement arises, have the power to determine whether justice to the parties will be better served by trying a case with or without a jury.[38]

66. The party moving to strike the jury bears the onus of "showing that there are features in the legal or factual issues to be resolved, in the evidence, conduct or in the trial which merit the discharge of the jury."[39]

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[37] *Cowles v. Balac*, at paras. 27, 36-37, TAS BOA, Tab 5; *Kempf v. Nguyen*, 2015 ONCA 114, at para. 43, TAS BOA, Tab 10.
[38] *Cowles v. Balac*, at para. 38, TAS BOA, Tab 5.
[39] *Cowles v. Balac*, at para. 37, TAS BOA, Tab 5.

67. Regarding the onus question, the decision of the Court of Appeal for Ontario in *Hunt v. Sutton Group*, overturning a trial judge's decision to strike a jury notice is instructive. The Court of Appeal focused primarily on the idea that the trial judge struck the jury prematurely, before the alleged complications and bias had a chance to manifest. The Court of Appeal noted "it bears repeating that the right to trial by jury is a substantial right and one which is not to be taken away lightly. The onus is upon a party moving to discharge a jury and that onus must also be substantial."[40] The Court of Appeal concluded:

> Assuming, without deciding, that the disposition of the motion respecting publicity adds to the weight of the argument in favour of discharging the jury, in the absence of any evidence that any member of the jury had seen or heard of any of the publicity in question, the trial judge erred in giving any weight whatever to this consideration. Had there been any concern whatever, the jurors could and should have been asked whether any of them had seen or heard of the material in question.[41]

68. Should this Honourable Court determine on the evidentiary record that there is a real risk that a fair and impartial jury cannot be empanelled in Brampton in the circumstances of this case, the court may exercise its discretion to find that justice to the parties would be better served by the discharge of the jury. It is open to the court, in those circumstances to strike the Jury Notice.[42]

E. Judicial Pre-Screening

69. It has become common practice in Ontario for judges to make preliminary remarks to the jury panel raising potential areas of concern, including whether any panel member is related to or closely associated with anyone involved in the case, or whether any panel member has any personal knowledge of the circumstances of the

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[40] *Hunt (Litigation Guardian of) v. Sutton Group Incentive Realty Inc.* (2002), 60 O.R. (3d) 665 (C.A.), at para. 73, TAS BOA, Tab 8.
[41] *Hunt (Litigation Guardian of) v. Sutton Group Incentive Realty Inc.*, at para. 82, TAS BOA, Tab 8.
[42] *Cowles v. Balac*, at para. 37, TAS BOA, Tab 5; *Kempf v. Nguyen*, at para. 96, TAS BOA, Tab 10.

case. Judges will typically review juror eligibility requirements as well, inviting any ineligible juror to come forward if they believe they are not eligible.[43]

70. Chief Justice McLachlin described this judicial pre-screening process in *R. v. Find* as follows:

> [T]he trial judge enjoys a limited preliminary power to excuse prospective jurors. This is referred to as "judicial pre-screening" of the jury array. At common law, the trial judge was empowered to ask general questions of the panel to uncover manifest bias or personal hardship, and to excuse a prospective juror on either ground. Today in Canada, the judge typically raises these issues in his remarks to the panel, at which point those in the pool who may have difficulties are invited to identify themselves. If satisfied that a member of the jury pool should not serve either for reasons of manifest bias or hardship, the trial judge may excuse that person from jury service.[44]

71. Chief Justice McLachlin also explained that the consent of both parties to the judicial pre-screening was presumed, provided the reason for the discharge of a potential juror was "manifest" or obvious.[45]

72. In *Al-Haddad v. London & Middlesex County Roman Catholic Separate School Board*, Browne J. considered the ability of a trial judge in a civil proceeding to ask prospective jurors pre-screening questions to address the issue of partiality on the basis of a party's ethnicity. Justice Browne held:

> In my view the trial judge in a civil case may ask prospective jurors pre-screening questions. Such pre-screening questions might well be with the consent of counsel and/or agreement as to the particulars of pre-screening questions. But absent such a consent, in my view the presiding justice at a civil trial can pre-screen upon racial bias...
>
> the statutory requirements taking the issue of partiality out of the trial judge's hands in criminal matters results in the trial judge being seized of

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[43] Paul M. Perell and John W. Morden, *The Law of Civil Procedure in Ontario*, 2d ed (Markham: LexisNexis Canada Inc., 2014), at pp. 737-740, TAS BOA, Secondary Sources, Tab 1; Michelle Fuerst and Mary Anne Sanderson, *Ontario Courtroom Procedure*, 3d ed (Markham: LexisNexis Canada Inc., 2012), at p. 683, TAS BOA, Secondary Sources, Tab 2.
[44] *R. v. Find*, at para. 22, TAS BOA, Tab 21.
[45] *R. v. Find*, at para. 23, TAS BOA, Tab 21.

> such issues in a civil case. In the result, subject to the discretion of the trial judge, my opinion is that the issue of partiality can be adequately addressed by pre-screening in the jury selection process.[46]

73. In *Nemchin v. Green*, Justice Corthorn considered a request by the plaintiff to conduct judicial pre-screening on the basis not of racial bias, but of any connection to one of the insurers involved in the case. Justice Corthorn observed that *Al-Haddad* was restricted in scope to pre-screening questions posed on consent or with the agreement of the parties, or on the basis of racial bias.[47] Justice Corthorn noted that she was not provided with any case authority in which a trial judge expanded the pre-screening process to identify potential partiality other than racial bias.[48] Her Honour concluded that "the decision in *Al-Haddad* does not serve as authority for the expansion of the pre-screening process as broadly as was requested by the plaintiff in the matter before me."[49]

74. While neither *Al-Haddad* nor *Nemchin* are determinative of the issue as to whether pre-screening jurors in civil actions on a basis other than racial bias (without the consent or agreement of the parties) is an option, limited judicial pre-screening, as described by Chief Justice McLachlin in *R. v. Find* may be available in appropriate cases.

F. Criticisms of the Civil Jury System

75. The civil jury system has faced significant criticism in recent years, especially in the context of personal injury actions arising out of motor vehicle accidents, regarding the perceived unfairness of the civil juries system to plaintiffs.

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[46] *Al-Haddad v. London & Middlesex County Roman Catholic Separate School Board*, at paras. 12-13, TAS BOA, Tab 2.
[47] *Nemchin v. Green*, at para. 43, TAS BOA, Tab 15.
[48] *Nemchin v. Green*, at para. 45, TAS BOA, Tab 15.
[49] *Nemchin v. Green*, at para. 44, TAS BOA, Tab 15.

76. Even some members of the judiciary have expressed criticism of the civil juries system. In *Mandel v. Fakhim*, Justice F.L. Myers, commented: "While jury trials in civil cases seem to exist in Ontario solely to keep damages awards low in the interest of insurance companies, rather than to facilitate injured parties being judged by their peers, the fact is that the jury system is still the law of the land."[50]

77. Regardless of the validity of these concerns, the question on this motion is not whether civil juries as a whole are unfair to plaintiffs. Rather, the issues for determination on this motion are: (i) whether the governing principles regarding civil juries permit the relief the plaintiff seeks, or: (ii) whether existing mechanisms in place to ensure jury fairness are sufficient to prevent the potential mischief the plaintiff alleges will occur if this action is tried by a jury.

G. Issues Raised by the Plaintiff

i. Conflict of Interest

78. The plaintiff argues that there is an inherent conflict of interest with respect to citizens of Brampton who operate vehicles, pay for automobile insurance, or who have such premiums paid on their behalf, serving as jurors in a motor vehicle personal injury trial.[51] The result, the plaintiff suggests, should be automatic exclusion of such individuals from the jury selection pool.[52]

79. The Advocates' Society respectfully disagrees. Members of the public who drive automobiles and who pay for automobile insurance have been sitting as jurors in motor vehicle accident cases for many decades. They are no more in a position of conflict

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[50] *Mandel v. Fakhim*, 2016 ONSC 6538, at para. 9, TAS BOA, Tab 14. It should be noted that Justice Myers' decision has been appealed to the Divisional Court (Divisional Court File No. 533/16).
[51] Factum of the Plaintiff, dated February 23, 2017, at para. 21.
[52] Factum of the Plaintiff, at paras. 9, 20, 24.

than a taxpayer sitting on a jury in an action against publicly funded hospital or a newspaper subscriber in a defamation action against the newspaper. Any suggestion of a conflict is at best secondary and remote.

80. As acknowledged by the plaintiff, if this argument is accepted, the same result – the automatic exclusion of potential jurors who drive automobiles or pay insurance premiums – would necessarily follow in other personal injury cases and in all jurisdictions across Ontario.[53]

81. The inevitable consequence of giving effect to the plaintiff's argument will be to undermine the civil jury system as a whole.

ii. Analogy to Municipal Ratepayers

82. The plaintiff submits that challenges to jurors found in s. 34 of the *Juries Act* is analogous to the circumstances of this case.[54] The Advocates' Society disagrees.

83. Section 34 of the *Juries Act* provides:

> In a proceeding to which a municipal corporation, other than a county, is a party, every ratepayer, and every officer or servant of the corporation is, for that reason, liable to challenge as a juror.

84. The maxim *expressio unius est exclusio alterius* (to express one thing is to exclude another) applies to the interpretation of this provision of the *Juries Act*, leading to a result contrary to the plaintiff's position. This "implied exclusion" maxim, as described by *Sullivan on the Construction of Statutes*, "is widespread and important in interpretation" which arises whenever "there is reason to believe that if the legislature

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[53] Factum of the Plaintiff, at para. 24.
[54] Factum of the Plaintiff, at para. 26.

had meant to include a particular thing within its legislation, it would have referred to that thing expressly."[55]

85. Sullivan notes: "when a provision specifically mentions one or more items but is silent with respect to other items that are comparable, it is presumed that the silence is deliberate and reflects an intention to exclude the items that are not mentioned."[56] In *Canada (Canadian Private Copying Collective) v. Canadian Storage Media Alliance*, Noel J.A. (as he then was, now Chief Justice) explained: "if a statute specifies one exception (or more) to a general rule, other exceptions are not to be read in. The rationale is that the legislator has turned its mind to the issue and provided for the exemptions which were intended."[57]

86. Sections 32-34 provide that "want of eligibility" is a good cause for challenge, each side has four peremptory challenges, and ratepayers, officers and servants of a municipality are liable to challenge when the municipality is a party. The legislature specifically turned its mind to challenges and included a general challenge for want of eligibility provision, and a specific challenge in cases concerning municipalities, remaining silent regarding anything related to insurance. To paraphrase Sullivan: the silence is telling.[58]

87. Additionally, section 108(2) of the *Courts of Justice Act* lists 12 express exceptions to the general rule that parties to civil proceedings have a right to trial by jury. Claims for relief against a municipality is one of the express exemptions the legislature has provided for to that general right. Claims against persons insured

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[55] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis Canada Inc., 2008), at pp. 243-44, TAS BOA, Secondary Sources, Tab 3.
[56] *Construction of Statutes*, at p. 244, TAS BOA, Secondary Sources, Tab 3.
[57] *Canada (Canadian Private Copying Collective) v. Canadian Storage Media Alliance*, 2004 FCA 424, at para. 96, TAS BOA, Tab 4.
[58] *Construction of Statutes*, at p. 244, TAS BOA, Secondary Sources, Tab 3.

pursuant to automobile insurance policies are not. Other exceptions ought not to be read in.

88. It was (and remains) open to the Legislature to include a specific challenge provision relating to insurance cases, but the Legislature has not done so. The implied exclusion rule suggests that courts ought not to read in comparable items. To paraphrase the rule, if the Legislature had intended to include considerations regarding jurors in cases involving insurance, it would have mentioned them expressly or used a general term sufficiently broad to encompass them; it would not have mentioned municipalities while saying nothing of insurance companies.[59]

iii. Public Policy

89. As a public policy argument, the plaintiff asks the Court to consider the availability of jury trials and challenge for cause procedures in other jurisdictions.

90. The fact that legislation in other provinces and in the United Kingdom restricts the right to a civil jury trial or permit challenges for cause reinforces The Advocates' Society submission that these issues are best addressed by the Legislature and/or the Civil Rules Committee.

H. Submissions Regarding Venue and Juror Hardship

91. Due to courtroom constraints at the Brampton Courthouse, this action may be tried in Kitchener, requiring the daily transportation of jurors between the two cities. The Advocates' Society has significant concerns regarding the hardship to individual jurors involved and the administration of justice generally.

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[59] *Construction of Statutes*, at p. 244, TAS BOA, Secondary Sources, Tab 3.

92. The Advocates' Society is concerned about the hardship to any jurors required to be transported from one county to another and back every day during the course of a trial. Jurors play an important role in the administration of justice and their interests should be protected by the court. Jurors are asked to give their time and energy to serve as jurors with minimal, if any, compensation. Many jurors will suffer personal financial loss while serving as a juror.

93. Given the directive of the Supreme Court of Canada in the *R. v. Jordan* decision and the legislative limitations on judicial resources, court resources are strained. This is particularly palpable for civil cases. The unfortunate side-effect of insufficient resources at one judicial centre resulting in the transportation of jurors to another judicial centre for the duration of a trial is to accentuate the hardship faced by jurors. When civil trials are delayed or civil juries are caused to endure additional hardships involved in transportation, jurors may be more likely to harbour grievances against the court and the parties which might tend to bring the administration of justice into disrepute.

94. Pursuant to the *Courts of Justice Act* and the *Rules of Civil Procedure*, the judiciary maintains jurisdiction in relation to court administration and the conduct of a trial. Sections 75 and 76 of the *Courts of Justice Act* provide authority to the judiciary to direct and supervise the sittings and assignment of courtrooms and judicial duties, as well as the direction of court staff.

95. Rule 13.1.02 of the *Rules of Civil Procedure* provides multiple mechanisms for the transfer of proceedings from the place of commencement to a different region or a different county within the same region. Rule 13.1.02(2) allows a party to make a motion and the court to make an order to transfer the proceeding to a county other than the one where it was commenced, if certain conditions are satisfied. The plaintiff has selected

Brampton as the place of trial and that choice should not be interfered with lightly, and unless the requirements of ss. 13.1.02(2)(a) or 13.1.02(2)(b) are met.

96. Further, rule 13.1.02(4) provides that the regional senior judge in a region, on his or her own initiative has jurisdiction to make an order transferring the proceeding to another county in the same region as it was commenced. Subrule (6) directs the regional senior judge to consider whether a transfer is in the interest of justice, having regard to the factors listed in subclauses (2)(b)(i) to (ix), which include: the convenience of the parties, witnesses, and the court; whether judges and court facilities are available at the other county; and any other relevant matter. The Advocates' Society submits that juror hardship is a relevant consideration.

97. While the interest of jurors should be reasonably protected, the need to move a trial to another judicial centre should not, by itself, be grounds to strike the Jury Notice and/or abrogate a party's right to a jury trial. The serious concerns raised with respect to the hardship and inconvenience placed on jurors if the trial is held in Kitchener is more properly addressed through other mechanisms.

98. This Honourable Court, and in particular the Regional Senior Justice, has the power pursuant to ss. 75-76 of the *Courts of Justice Act* and rule 13.1.02 to direct that the trial of this action take place in Brampton, if required by the interests of justice due to either prejudice to a party or hardship to the jurors.

PART IV - ORDER REQUESTED

99. As an intervener, The Advocates' Society takes no position on what order should be made.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of November, 2017.

Peter W. Kryworuk
Jacob R.W. Damstra
Lerners LLP

Lawyers for the Intervenor
The Advocates' Society

CERTIFICATE

I, Peter W. Kryworuk, counsel to the Intervenor, The Advocates' Society, certify that the oral argument will take approximately 40 minutes.

Peter W. Kryworuk
Lerners LLP

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Abou-Marie v. Baskey* (2001), 56 O.R. (3d) 360 (S.C.J.)
2. *Al-Haddad v. London & Middlesex County Roman Catholic Separate School Board*, 1996 CarswellOnt 5047 (Ct. J. (Gen. Div.))
3. *Amana Imports Canada v. Guardian Insurance Co. of Canada* (2002), 57 O.R. (3d) 587 (S.C.J.)
4. *Canada (Canadian Private Copying Collective) v. Canadian Storage Media Alliance*, 2004 FCA 424
5. *Cowles v. Balac* (2006), 83 O.R. (3d) 660 (C.A.)
6. *Desando v. Canadian Transit Co.*, 2017 CarswellOnt 1162 (S.C.J.)
7. *Elbakhiet v. Palmer*, 2014 ONCA 544
8. *Hunt (Litigation Guardian of) v. Sutton Group Incentive Realty Inc.* (2002), 60 O.R. (3d) 665 (C.A.)
9. *Kayhan et al. v. Greve* (2008), 92 O.R. (3d) 139 (Div. Ct.)
10. *Kempf v. Nguyen*, 2015 ONCA 114
11. *King v. Colonial Homes Ltd.*, [1956] S.C.R. 528, 1956 CarswellOnt 74
12. *Legroulx v. Pitre*, 2009 ONCA 760
13. *MacNeil v. Parry*, 2013 ONSC 7273
14. *Mandel v. Fakhim*, 2016 ONSC 6538
15. *Nemchin v. Green*, 2017 ONSC 2126
16. *Nishnawbe Aski Nation v. Eden*, 2011 ONCA 187
17. *R. v. B. (A.)* (1997), 33 O.R. (3d) 321 (C.A.)
18. *R. v. Church of Scientology of Toronto* (1997), 116 C.C.C. (3d) 1 (Ont. C.A.)
19. *R. v. Dowholis*, 2016 ONCA 801
20. *R. v. Farinacci*, 2015 ONCA 392
21. *R. v. Find*, 2001 SCC 32
22. *R. v. Gayle* (2001), 54 O.R. (3d) 36 (C.A.)
23. *R. v. Moffit*, 2015 ONCA 412

24. *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.)

25. *R. v. Pickton*, 2006 BCSC 1832

26. *R. v. Sherratt*, [1991] 1 S.C.R. 509

27. *R. v. Williams*, [1998] 1 S.C.R. 1128

28. *R. v. Zvolensky*, 2017 ONCA 273

29. *Sloane v. Toronto Stock Exchange* (1991), 5 O.R. (3d) 412 (C.A.)

30. *Thomas-Robinson v. Song* (1997) 34 O.R. (3d) 62 (Ct. J. (Gen. Div.))

31. *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2017 BCCA 324

Secondary Sources

1. Paul M. Perell and John W. Morden, *The Law of Civil Procedure in Ontario*, 2d ed (Markham: LexisNexis Canada Inc., 2014)

2. Michelle Fuerst and Mary Anne Sanderson, *Ontario Courtroom Procedure*, 3d ed (Markham: LexisNexis Canada Inc., 2012)

3. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham: LexisNexis Canada Inc., 2008)

SCHEDULE "B"
RELEVANT STATUTES

***Courts of Justice Act*, R.S.O. 1990, c. C. 43**

Jury trials
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.

Trials without jury
(2) The issues of fact and the assessment of damages in an action shall be tried without a jury in respect of a claim for any of the following kinds of relief:

1. Injunction or mandatory order.
2. Partition or sale of real property.
3. Relief in proceedings referred to in the Schedule to section 21.8.
4. Dissolution of a partnership or taking of partnership or other accounts.
5. Foreclosure or redemption of a mortgage.
6. Sale and distribution of the proceeds of property subject to any lien or charge.
7. Execution of a trust.
8. Rectification, setting aside or cancellation of a deed or other written instrument.
9. Specific performance of a contract.
10. Declaratory relief.
11. Other equitable relief.
12. Relief against a municipality.

Same
(3) On motion, the court may order that issues of fact be tried or damages assessed, or both, without a jury.

Composition of jury
(4) Where a proceeding is tried with a jury, the jury shall be composed of six persons selected in accordance with the *Juries Act*.

...

Discharge of juror at trial
(7) The judge presiding at a trial may discharge a juror on the ground of illness, hardship, partiality or other sufficient cause.

Continuation with five jurors
(8) Where a juror dies or is discharged, the judge may direct that the trial proceed with five jurors, in which case the verdict or answers to questions must be unanimous.

***Juries Act*, R.S.O. 1990, c. J.3**

ELIGIBILITY

Eligible jurors

2. Subject to sections 3 and 4, every person who,

(a) resides in Ontario;

(b) is a Canadian citizen; and

(c) in the year preceding the year for which the jury is selected had attained the age of eighteen years or more,

is eligible and liable to serve as a juror on juries in the Superior Court of Justice in the county in which he or she resides.

Ineligibility to serve as juror
Ineligible occupations

3. (1) The following persons are ineligible to serve as jurors:

1. Every member of the Privy Council of Canada or the Executive Council of Ontario.

2. Every member of the Senate, the House of Commons of Canada or the Assembly.

3. Every judge and every justice of the peace.

4. Every barrister and solicitor and every student-at-law.

5. Every legally qualified medical practitioner and veterinary surgeon who is actively engaged in practice and every coroner.

6. Every person engaged in the enforcement of law including, without restricting the generality of the foregoing, sheriffs, wardens of any penitentiary, superintendents, jailers or keepers of prisons, correctional institutions or lockups, sheriff's officers, police officers, firefighters who are regularly employed by a fire department for the purposes of subsection 41 (1) of the Fire Protection and Prevention Act, 1997, and officers of a court of justice.

Connection with court action at same sittings

(3) Every person who has been summoned as a witness or is likely to be called as a witness in a civil or criminal proceeding or has an interest in an action is ineligible to serve as a juror at any sittings at which the proceeding or action might be tried.

Previous service

(4) Every person who, at any time within three years preceding the year for which the jury roll is prepared, has attended court for jury service in response to a summons after selection from the roll prepared under this Act or any predecessor thereof is ineligible to serve as a juror in that year.

Ineligibility for personal reasons

4. A person is ineligible to serve as a juror who,

(a) has a physical or mental disability that would seriously impair his or her ability to discharge the duties of a juror; or

(b) has been convicted of an offence that may be prosecuted by indictment, unless the person has subsequently been granted a pardon.

CHALLENGES

Lack of eligibility
32. If a person not eligible is drawn as a juror for the trial of an issue in any proceeding, the want of eligibility is a good cause for challenge.

Peremptory challenges in civil cases
33. In any civil proceeding, the plaintiff or plaintiffs, on one side, and the defendant or defendants, on the other, may challenge peremptorily any four of the jurors drawn to serve on the trial, and such right of challenge extends to the Crown when a party.

Ratepayers, officers, etc., of municipality may be challenged
34. In a proceeding to which a municipal corporation, other than a county, is a party, every ratepayer, and every officer or servant of the corporation is, for that reason, liable to challenge as a juror.

GENERAL

Omissions to observe this Act not to vitiate the verdict
44. (1) The omission to observe any of the provisions of this Act respecting the eligibility, selection, balloting and distribution of jurors, the preparation of the jury roll or the drafting of panels from the jury roll is not a ground for impeaching or quashing a verdict or judgment in any action.

Panel deemed properly selected
(2) Subject to sections 32 and 34, a jury panel returned by the sheriff for the purposes of this Act shall be deemed to be properly selected for the purposes of the service of the jurors in any matter or proceeding.

***Criminal Code*, R.S.C. 1985, c. C-46**

Excusing jurors

632 The judge may, at any time before the commencement of a trial, order that any juror be excused from jury service, whether or not the juror has been called pursuant to subsection 631(3) or (3.1) or any challenge has been made in relation to the juror, for reasons of

(a) personal interest in the matter to be tried;

(b) relationship with the judge presiding over the jury selection process, the judge before whom the accused is to be tried, the prosecutor, the accused, the counsel for the accused or a prospective witness; or

(c) personal hardship or any other reasonable cause that, in the opinion of the judge, warrants that the juror be excused.

***Rules of Civil Procedure*, R.R.O. 1990, Reg. 194**

RULE 47 JURY NOTICE

ACTIONS TO BE TRIED WITH A JURY

47.01 A party to an action may require that the issues of fact be tried or the damages be assessed, or both, by a jury, by delivering a jury notice (Form 47A) at any time before the close of pleadings, unless section 108 of the Courts of Justice Act or another statute requires that the action be tried without a jury.

STRIKING OUT JURY NOTICE

Where Jury Notice not in Accordance with Statute or Rules

47.02 (1) A motion may be made to the court to strike out a jury notice on the ground that,

(a) a statute requires a trial without a jury; or

(b) the jury notice was not delivered in accordance with rule 47.01.

Where Jury Trial Inappropriate

(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.

Discretion of Trial Judge

(3) Where an order striking out a jury notice is refused, the refusal does not affect the discretion of the trial judge, in a proper case, to try the action without a jury.