



The Advocates' Society La Société des plaideurs

June 15, 2020

VIA EMAIL: attorneygeneral@ontario.ca

The Honourable Doug Downey, M.P.P.
Attorney General of Ontario
Ministry of the Attorney General
720 Bay St., 11th Floor
Toronto, ON M7A 2S9

Dear Attorney General:

RE: Elimination of Civil Jury Trials in Ontario

The Advocates' Society, established in 1963, is a not-for-profit association of more than 6,000 members throughout Canada, including approximately 5,000 in Ontario. The Society's mandate includes, among other things, making submissions to governments and others on matters that affect access to justice, the administration of justice, and the practice of law by advocates. The Society's membership includes advocates who regularly represent clients in cases tried by civil jury, and advocates whose trial practice focuses on judge-alone trials.

We are in receipt of your letter dated June 5, 2020, which sought the Society's input by June 15, 2020, as to whether civil juries should be eliminated in Ontario, and if so, whether certain types of actions should be exempt. The Society struck a Task Force to consider these important questions.

First, the Society must strenuously object to the extremely short timeframe in which the government has asked for input on this vital issue. The Society shares the government's desire to build a justice system that is more accessible and responsive to Ontarians. However, we believe that decisions regarding permanent changes to longstanding elements of our justice system ought to be the product of careful research, analysis, consultation, and deliberation. As you are aware, jury trials are currently suspended in Ontario due to the COVID-19 pandemic and the Superior Court of Justice has indicated that it "[w]ill not recommence criminal or civil jury selection or jury trials until September, 2020, at the earliest."¹ We suggest that there is therefore time to engage in careful consideration of whether to maintain or eliminate civil jury trials in Ontario, or whether there are other paths, such as reforming aspects of the civil jury system, that should be explored.

Specifically, the Society believes that more time is required to permit (1) robust stakeholder consultation on the advantages and disadvantages of civil jury trials and (2) the collection and publication of data about civil jury trials in Ontario.

¹ Ontario Superior Court of Justice, *Consolidated Notice to the Profession, Litigants, Accused Persons, Public and the Media Re: Expanded Operations of Ontario Superior Court of Justice, effective May 19, 2020*, online: Superior Court of Justice < <https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/consolidated-notice/> > .

The question of whether to eliminate a long-held, substantive right held by parties to civil litigation merits broad consultation with justice system stakeholders. In particular, comprehensive consultation with the bar is necessary because there is no apparent consensus among members of the bar regarding whether civil juries ought to be maintained, reformed, or eliminated (with or without exceptions).

In response to a 2016 consultation by the Civil Rules Committee about whether jury trials should be eliminated under the Simplified Procedure, the Society observed that juries have historically been considered a hallmark of a free and democratic society where ordinary citizens consider it their right to participate in the legal system. That said, there are some who believe that the time for civil juries has passed and that there are other means, such as trial by judge alone, which better achieve access to justice. Before such an important substantive right is taken away, however, there needs to be appropriate consultation, fact gathering, and analysis. Consideration should also be given to potential reform of the current jury system short of complete elimination of a civil jury trial. Such a robust process would also permit consideration whether certain types of actions should be exempt if civil juries are to be eliminated. The Society's December 8, 2016 letter to the Civil Rules Committee is attached for your reference.

The members of the Society's Task Force were unanimous that any decision about whether to eliminate civil juries in Ontario ought to be made in part on the basis of data regarding the frequency of civil jury trials and their cost and resource implications for our justice system. The government's response to COVID-19 has been informed by evidence; a fundamental change to our legal system should similarly be based on relevant, reliable data. In our 2016 letter to the Civil Rules Committee, the Society outlined the types of statistics that could assist in deciding whether to change the regime prevailing at that time. As we noted in our 2016 letter, "Without these statistics, the Society is left with only anecdotal evidence and is not in a position to evaluate the true impact that the elimination of jury trials under the Simplified Procedure would have on the efficient use of court resources." We believe this statement remains applicable to deciding the way forward in regular actions now.

The Society reiterates its grave concern with the government altering the administration of justice in Ontario without the benefit of relevant data and fulsome stakeholder input. The Society strongly urges the government to gather and publish data about civil juries in Ontario, and to engage in a significantly more extended consultation with the bar and other justice system stakeholders. Given more time, the Society would be pleased to review data provided by the government regarding civil juries, canvass the diverse views of its membership more comprehensively, and develop helpful input for the government's consideration.

Thank you for considering these submissions. We would be pleased to answer any questions you may have.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Guy Pratte", is written over a light blue circular stamp.

Guy Pratte
President

Attachments:

1. The Advocates' Society Letter to Derek McKay, Member of the Civil Rules Committee Secretariat, dated December 8, 2016

CC: Amanda Iarusso, Director of Policy and Legal Affairs to the Attorney General of Ontario
Vicki White, Chief Executive Officer, The Advocates' Society

Members of The Advocates' Society's Task Force:

Christopher Horkins, *Cassels Brock & Blackwell LLP*, Toronto

Peter W. Kryworuk, *Lerners LLP*, London

Sabrina A. Lucenti, *Dooley Lucenti LLP*, Barrie

Tara Sweeney, *Soloway Wright LLP*, Ottawa

Stephen G. Ross, *Rogers Partners LLP*, Toronto

Maureen Whelton, *Stevenson Whelton LLP*, Toronto

December 8, 2016

VIA EMAIL: dm@royoconnor.ca

Derek McKay
Member of the Civil Rules Committee Secretariat
c/o Roy O'Connor LLP
23rd Floor, 200 Front Street West
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Toronto, ON
M5V 3K2

Dear Mr. McKay:

RE: Consultation on Simplified Procedure and Jury Trials

The Advocates' Society (the "Society"), founded in 1963, is a not-for-profit association of over 5,500 lawyers throughout Ontario and the rest of Canada. The mandate of the Society includes, amongst other things, making submissions to governments and other entities on matters that affect access to justice, the administration of justice and the practice of law by advocates. As courtroom advocates, the Society's members have a keen interest in the effective resolution of legal disputes.

The Society has reviewed with interest the consultation document circulated by the Civil Rules Committee on whether to recommend legislative changes to limit the availability of jury trials in actions under the Simplified Procedure of Rule 76 of the *Rules of Civil Procedure* (the "Consultation Document"). The Society assembled a Task Force whose members have closely considered the issue and consulted with other members of the Society in order to draft these submissions.

The members of the Task Force held strongly opposed viewpoints, which we believe would be reflected within the Society's membership as a whole, and ultimately were unable to reach a consensus position on the question of whether jury trials should be eliminated under the Simplified Procedure.

Juries are considered a hallmark of a free and democratic society where ordinary citizens consider it their right to participate in the legal system. In an article entitled "Jury Systems Around the World",¹ Valerie P. Hans states: "Two-thirds of the opinion leaders, including judges, prosecutors, lawyers, religious leaders, business executives, and members of the national assembly, agreed that the judicial system would become more democratic and transparent if

¹ (2008) *Cornell Law Library Publications*, Paper 305, Scholarship@Cornell Law: A Digital Repository, online: <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1378&context=facpub> ("Hans").

laypersons were included as legal decision makers.”² In fostering participation by members of the public in the justice system, jury trials enhance public understanding of the role of judges, lawyers and the justice system generally. It is a substantive right of a party to have the facts of his or her case determined by his or her peers and juries can make basic determinations of credibility and fact as effectively as judges can.

Jury trials also encourage settlement more than non-jury trials. As noted in the Civil Justice Reform Project report by The Hon. Coulter A. Osborne, Q.C.,³ both insurers (in tissue cases) and plaintiffs (in catastrophic and fatality cases) have endorsed the use of jury notices as an effective means of encouraging settlements. If the threat of a jury trial encourages settlement then the elimination of the availability of jury trials under the Simplified Procedure could have the adverse effect of increasing the number of Simplified Procedure matters that actually proceed to trial, which in turn will require additional court and judicial resources.

To some, the elimination of jury trials may seem counterintuitive to upholding these important principles. Some are also concerned that the elimination of jury trials under the Simplified Procedure could begin a slippery slope to the eventual elimination of jury trials for all civil actions in all jurisdictions.

That said, some remain concerned that the costs and court resources that are channeled into jury trials under the Simplified Procedure may be best diverted to other avenues within the justice system to ensure better access to justice. As the Consultation Document notes, some Canadian jurisdictions have restricted the use of civil jury trials in different situations (e.g. Quebec, Alberta and British Columbia). In Ontario, jury trials are already not permitted for certain types of proceedings (family law matters, either in the Superior Court of Justice or Ontario Court of Justice, including for very serious child protection cases; claims for injunctive relief, the partition of real property, foreclosure of a mortgage, specific performance, and declaratory judgment; and claims against municipalities or other government bodies, including personal injury claims).

The policy behind the Simplified Procedure is to attempt to reduce the cost of litigating claims of modest amounts by reducing the amount of procedure available, consistent with the principle of proportionality articulated by the Supreme Court of Canada in *Hryniak v. Mauldin*⁴ and *Canada (Attorney General) v. Confédération des syndicats nationaux*.⁵ The court resources, including physical space, court staff, juror selection processes, and time,⁶ and the additional cost to litigants, including extra disbursements associated with copies of exhibits, demonstrative aids, audio-visual equipment and oral expert testimony, should be proportional to the amount at stake in the proceeding and the nature of the issue.

These observations are made, however, without the benefit of robust statistical information. The Consultation Document states that:

² Hans at p. 283.

³ November 2007, Ontario Ministry of the Attorney General, online: <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/> (“Osborne Report”).

⁴ [2014] 1 SCR 87, 2014 SCC 7.

⁵ [2014] 2 SCR 477, 2014 SCC 49.

⁶ Both the Osborne Report and the report of Prof. John McCamus on civil justice reform from 1996 support a finding that civil jury trials are slower than bench trials.

In Ontario, over the last five years, an average of 943 jury notices have been filed each year under Rule 76, of which an average of only 30 cases per year actually proceeded to a jury trial. More than 75% of these cases involved either motor vehicle accident claims or other, non-vehicle related personal injury claims.

While these statistics tell part of the story, the Society believes that they are insufficient to inform any decision with regard to the potential curtailment, or elimination, of the right to a jury trial under the Simplified Procedure. More robust statistics on jury trials under the Simplified Procedure and under the regular stream must be analyzed. In particular, the Society believes that the following statistics would be essential to making any decision regarding a change to the current regime:

- In Ontario, over the past five years, how many jury notices have been filed each year in the regular stream, and how many of those cases actually proceeded to a jury trial?
- What is the average number of days taken by judge-only trials vs. jury trials over the past five years?
- What is the allocation of other court resources to jury trials under the Simplified Procedure?
- What is the average quantum of costs awards in jury trials under the Simplified Procedure?
- What is the breakdown of the monetary thresholds of the jury trials that have taken place before the Superior Court of Justice (e.g. \$25,000-\$50,000; \$50,000-\$75,000; \$75,000-\$100,000) over the past five years?

While there are certainly concerns regarding the timely hearing of proceedings before the Superior Court of Justice in various parts of the Province and on backlogs of cases in the system, there are several factors that contribute to these delays. The statistics referred to above could assist with assessing the financial and resource impacts at various stages of the jury trial process, including the pre-trial stage. Without these statistics, the Society is left with only anecdotal evidence and is not in a position to evaluate the true impact that the elimination of jury trials under the Simplified Procedure would have on the efficient use of court resources.

The Society stresses that any changes to the *Rules of Civil Procedure* must be made with a careful focus on statistical evidence in addition to qualitative factors. Having said that, the Society remains very concerned about the delays in the civil justice system and in particular with respect to securing trial dates. The Civil Rules Committee's search for a solution to this urgent problem is welcome.

Thank you for providing the Society with the opportunity to make these submissions. I would be pleased to discuss these submissions with you at your convenience.

Yours very truly,



Bradley E. Berg
President

Task Force Members:

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