

December 8, 2016

VIA EMAIL: dm@royoconnor.ca

Derek McKay
Member of the Civil Rules Committee Secretariat
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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

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