CANADIAN DEFENCE LAWYERS

June 15, 2020

Ministry of the Attorney General
McMurtry-Scott Building
720 Bay Street, 11th Floor
Toronto ON M7A 2S9

To The Honourable Attorney General,

**Re: Proposed Amendments to the *Courts of Justice Act* regarding juries**

**Submissions from Canadian Defence Lawyers**

***Pre-amble***

Your correspondence of June 5, 2020 dealing with the abolishment of civil juries or greatly restricting their availability has reached our organization. We were unaware such a monumental proposal was going to be tabled so closely following the January 2020 abolition for matters commenced under the "simplified" *Rules*. We have concerns that we hope you will give measured consideration.

The query you propose is addressed to "stakeholders". We wonder who "stakeholders" are and who has been consulted? No list has been provided. What was the selection process? What is the reason for the apparent lack of seeking public involvement? Have lobbyists been involved, and if so, for which parties, groups and interests? We do believe the public has the right to know what is influencing what we would characterize as precipitous action by the Ministry of the Attorney General. The process has not been transparent.

We have composed the following submission as best able on notice so short that it is essentially obstructive of due process, setting a dangerous precedent for future governments.

We hope you will give this submission careful consideration and recoil from what some fear appears to be a *fait accompli*. At a minimum, considered discussion and debate of this topic ought to be engaged before a long recognized substantive right of citizens of Ontario is rendered defunct.

***Juries are Desirable in a Parliamentary Democracy***

Canada's Department of Justice identified the roles its citizens can play in the justice system: sitting on a jury and testifying in court. Indeed, sitting on a jury is considered one of the two hallmarks of a parliamentary democracy (the other being the right to vote).

The Supreme Court of Canada, in *Sherratt*, has said, "Importantly, the development of the institution known as the jury and the process through which it came to be selected was neither fortuitous nor arbitrary but proceeded upon the strength of a certain vision of the role that body should play." It added that most early rationales for the use of a jury remain as relevant today as centuries ago, and adopted rationale set forth by the Law Reform Commission of Canada (1980) for the past and continued reverence for the jury:

- The jury through collective decision making is an "excellent" fact finder;
- Due to its representative character it acts as the conscience of the community;
- The jury can act as a final bulwark against oppressive laws;
- The public can increase its knowledge of the justice system by means of the jury; and
- By involving the public a societal trust in the justice system is developed..

This remains current. Removing or limiting the role of juries represents a fundamental shift from the core values of our parliamentary democracy. Should such a decision be made, Ontarians must be afforded an opportunity to exercise their democratic right in a properly constituted process

***Juries are diverse and inclusive***

We know that the civil jury system has been challenged since 1850 when jury packing was finally abolished. For nearly 200 years, there has been no end to various waves of voices seeking to remove or narrow it claiming its inefficiency and cost to the civil administration of justice. Yet, no definitive empirical study has been conducted over nearly two centuries to support these vacuous cries that the delays to the administration of justice are arising due to the reliance or election of a civil jury at trial.

To the contrary, the civil jury has asserted itself as a great service to our civil society in determining civil rights and liabilities in an area of law that requires a balancing act: what constitutes the "reasonable person", a "reasonable standard" or a "reasonable amount of time". These are questions that often need flexibility and that justice comes from jurors who are taken from all walks of life as they are more likely than a sitting judge to reflect the social climate in which we live our lives.

More to the point, the expansion of the jury pool to better reflect today's society has been a welcome change. As you are well aware, last year, the Ford government's budget bill changed the primary source list for creating juries from property assessment rolls to the province's health card database. That jury list will now more accurately reflect our reality: one where the majority of people are not white, older and homeowners. This important step taken to address this inequity will result in a more representative jury. To consider the removal of a civil jury or its narrowing one year after this important change should be of significant concern to all "stakeholders" including, most importantly, the public.

By broadening eligibility, this government fulfilled a mandate to put the administration of justice into the hands of the community at large, where possible. Indeed, juries are now the only

truly inclusive mechanism of adjudication in our justice system. Now removing or restricting the use of juries is dog whistle that signals a reversal of this government's stated policy.

You state in your June 5th letter that the intention for your Ask is to build a justice system for the 21st century that is more accessible, responsive and resilient to Ontarians. Our answer is that the ”how” starts with supporting the development of a more inclusive jury process that will stand a better chance of building confidence and respect for our administration of justice as it will reflect more accurately a community’s concept of fairness.

***So why the Attack on Juries?***

Despite the lack of objective evidence to support any restriction or abolition of juries, there continues to be concerted backlash against trials by jury in Ontario. It appears restricted to civil juries. The genesis of the campaign is difficult to pinpoint in time. It has had an ebb and flow to it over time. What we do know is the campaign against civil juries has been championed by certain special interests, including insurance companies at select moments and the Plaintiffs’ personal injury bar at others.

The attacks have been described such as follows:

> “The civil jury is under attack in Ontario. Bruised and battered by repeated onslaughts upon its integrity, the jury system is gradually falling into disrepute. The charges levelled against juries are varied: because they are easily influenced by emotional appeals, they tend to find for the Plaintiff; because they are Plaintiff-minded they tend to award damages that are too high; because they are laymen, inexperienced in the law, the pace of litigation is slowed down. There are other criticisms as well, in the realm of values, upon which men may understandably differ, but the main thrust of the attacks have been factual in nature. In spite of this, these accusations have not been supported by any empirical data.”

The above excerpt was authored in 1968 by Professor Linden as a postscript to the *Osgood Hall Study on Compensation for Victims of Automobile Accidents*. It can be fairly said that the campaign against juries in 1968 was not promulgated by the Plaintiff personal injury bar of the day, but the insurance industry. It can also be fairly said that the new onslaught is from interests other than the insurance industry.

After considered study and debate on the topic the jury survived in 1968 and through numerous governments since.

While there are nuances to the current onslaught, the reasons are strikingly similar to the charges levelled fifty years ago. The current justification for the affront to the longstanding substantive right to a trial by jury has been framed in the jury’s inability to “handle the truth”, its lack of medical expertise, its inability to unravel complexities, the widespread availability of information via modern technology and the added cost of trial by jury.

The Plaintiffs’ bar is not alone in questioning the ongoing role of the civil jury. A Superior Court Judge, in *Mandel*, has chimed in, offering:

> "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. This jury has spoken and did so loud and clear."

There was no evidence led at trial that jury awards are kept low at the behest of insurance companies. Jurors are not polled or questioned on how they arrive at a verdict. If they were it would be shocking to learn that a juror aligns with insurance companies as opposed to the citizenry. Our experience is that jurors appear to be unwilling to find for a particular citizen who presents a case that would require a suspension of disbelief, is a poor historian, or loose with the truth. Jurors seem less likely to align with citizens of that ilk than insurers.

Piling on the disrespect is commentary from the previous Liberal government's Ministry of the Attorney General's office in Ontario, which publicly stated that it is an "unfortunate reality that insurers in most negligence actions require their counsel to deliver a jury notice", reasoning that "the strategy is to increase the risk to which the plaintiff is exposed." How can electing a longstanding mode of the plenary trial by which to proceed be unfortunate? How is that statement reconciled with the Government of Canada's position on the "Role of the Public" in the justice system? Even before the advent of modern democracy, trial by a jury of ordinary people reflected a seismic shift from the top-down justice administered by a Crown or state appointee. Today, testifying in court as a witness or sitting as a juror are specifically identified as the role of the citizen.

The attack on civil juries is not limited to Ontario. There has long been a move afoot in the U.S. to restrict civil jury trials. The perception of many, or at least some, is that charge is being led south of the border by, "Corporations and other powerholders who are held accountable by the civil jury are striving to weaken, limit and override the province of juries pursuant to a wholesale jettisoning of civil juries in large categories of cases. Some of their companies, led by insurers, have used expensive and focused media to persuade public opinion that civil juries are too costly to tolerate in their present state of access."

What of the current attack on juries? There are those that are at least partially motivated by the notion that jurors tend to find for the Defendant and/or damages awards are too low – the converse of the attack of a half century past. As was the case in 1968, there is no empirical data supporting the attack. If the Ministry has access to such empirical data it should be shared with "stakeholders" and discussed and dissected before a centuries old tradition is jettisoned.

As mentioned earlier, we are uncertain who the "stakeholders" are. We would be pleased to learn who was considered a "stakeholder" and consulted regarding this proposition. Our group considers itself a stakeholder but learned of the proposal quite by accident.

***Juries Are As Well Suited To Deliver Justice As A Judge***

Can jurors handle the truth? Absolutely. It is important to only allow relevant truths to be put to a jury for consideration. It is the Judge who is the gatekeeper of what "truths" a juror can consider in arriving at a verdict.

It has been suggested by some that juries are not qualified to assess damages in an injury case because jurors have no medical training. This ignores a glaring reality: no trier of fact (neither Judge nor jury) necessarily possesses any specific expertise in medicine. We are unaware of any medical doctor who has moved on to sit on our Superior Court of Justice. Even if the trier of fact has a medical background (far more likely with a juror than a judge), does that make him or her

better able to assess damages? The assessment of damages is a fact-based undertaking which must be completely grounded in the trial evidence, not on the trier of fact's prior experience or outside education. Damages are what the community says they are. A Judge does not have a monopoly on the pulse of the community and ought not have a monopoly on damages awards. A jury drawn from the community is in fact the representative of the community. In particular, assessments of damages are best suited to the local community as such findings will always be a better reflection of actual value in that community. To suggest otherwise is elitist and paternalistic, reminiscent of a colonial attitude.

**There I*s No Evidence Juries "Cost" The Justice System Anything***

There is no evidence of what, if any, costs are burdened on the civil justice system by having juries available. A study in the United States by Dean Joiner proffers that a jury trial is no more time consuming than Judge alone trial. It is proposed that this is because the Trial Judge must enforce the rules of evidence more strictly, shortening the trial in some ways and promoting a firm grasp of the law of evidence by counsel at the same time. Requests for adjournments or indulgences are less likely granted. The gatekeeping function of restricting expert testimony is exercised with greater vigilance. A decision is not delayed for days, weeks or months. An appeal is less likely.

Even if an added cost was quantifiable, it must be measured in light of what the jury trial that settled saved the justice system from what appears to be a cost that cannot be measured. The Ontario Ministry of the Attorney General reported that in 2005 and 2006 there were 6,839 civil trials, 1,598 (23%) of which were decided by jury. Does that mean that more actions to be tried by judge alone are brought to judgment, with jury actions much more likely to settle? Maybe. Maybe not.

There were even fewer civil jury trials proceeding under the simplified rules, 30 in a recent year, 22 of which were injury cases. Now there will be none, and there has been inadequate time pass to see what impact the increased monetary amount under the simplified rules has on jury sittings province wide.

A further consideration on "costs" has to be the time a Judge alone trial takes, *plus* the time to reserve and write reasons. If reasons take a week or two to write, then that is time that takes a Judge away from other matters in the administration of justice. It is the experience of many counsel that Judge's take some considerable time to write and release reasons. Access to justice includes being provided a verdict or judgment. The months a litigant might have to wait for a decision in a Judge alone trial are a delay that is not experienced in a jury trial.

Although it is likely that the Attorney General's office has information about trial lengths, this data is not shared with the bar or the public. How many cases actually seek trial by jury and how many proceed to a trial by jury, as compared to the others? Any discussion about the elimination of juries, including the discussion around the January 2020 changes to Rule 76, appears to revolve around anecdotal evidence entirely, at least as far as the public knows. Anecdotal evidence that some jury cases seem to take longer than Judge alone cases is inadequate to form a basis for the abrogation of parties' long-standing rights to trial by jury.

There is no evidence we are aware of that access to justice is improved with Judge alone trials.

***Why Is This An Issue***?

Given the paucity of civil jury trials in Ontario, it is a wonder that the topic has spurred the debate it has. We are told by one member that in Northeastern Ontario, for example, there was *one* civil jury trial in 2019 (that is Sudbury, Sault Ste. Marie, Timmins, Cochrane, North Bay and Haileybury *combined*).

Absent any hard evidence of the added costs of jury trials and setting aside the smug and elitist assertion that jurors are incapable of, or far less capable of, justly deciding a case, the debate should end. Perceived imperfections or deficiencies are insufficient to justify the abolition of an institution of justice by one's peers that has stood the test of time over centuries of adjudication.

***The Pandemic and Changes to the Courts***

The Courts have wrestled with modernization and the pandemic has hurried that into existence. That is not necessarily a bad thing, and many changes may well be welcome. That said the pandemic may have required a fundamental shift in practice, but ought not be part of any conversation regarding the continued use of juries. Measures are in place to adjourn trials that cannot proceed. If a matter requires immediate hearing and health concerns do not permit hearing by jury, parties can consent to striking the jury or bring a motion to have the jury struck in those particular circumstances.

***"Stakeholders" On This Issue Are Numerous And The Discussion Should Be Open And Broad***

While the hope is that this submission and others will cause you to cast aside any notion to eradicate civil jury trials, we believe it is imperative that "stakeholders" be identified, that the net be cast widely and that discussion should be broad and robust before any final decision is made.

We hope you carefully consider these thoughts and do not make your government an historic one by virtue of eliminating one of the few roles citizens have in a democracy and our justice system. Moreover, with regard to your well-known career as a leader of the Ontario Bar and supporter of the English Common Law tradition, we ask you not to be the Attorney General who rings the death knell for civil juries in Ontario.

This is all respectfully submitted on behalf of the Canadian Defence Lawyers and its membership.

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President, Canadian Defence Lawyers