



June 15, 2020

The Honourable Douglas Downey  
McMurtry-Scott Building  
720 Bay Street  
11<sup>th</sup> Floor  
Toronto, ON M7A 2S9

**Dear Mr. Downey:**

**Re: Submissions on Civil Jury Trials**

We are one of the largest private practice boutique firms devoted exclusively to insurance defence in Ontario. We are a team of 45 lawyers, many of whom have been recognized as being top experts in our field by organizations such as Lexpert, Best Lawyers, and Martindale and Hubbell. Our firm is featured as one of the Top 10 insurance defence firms in the country by *Canadian Lawyer* magazine. Our lawyers have appeared frequently at all levels of court including the Supreme Court of Canada. We have expertise in advocating in all forms of tribunals and courts in this province, including before juries.

The function of civil juries cannot be undermined. Preceding even the *Magna Carta*, the importance of due process, community participation in active justice, and collective efforts to safeguard against the abuse of power have formed the fundamental building blocks of a fair and democratic society. The current civil rights movement across North America against racism and police brutality demonstrates the critical role citizens play in legal reform and justice. And yet, the civil jury trial has remained under constant scrutiny.

The arguments compelling the elimination of civil jury trials run contrary to empirical studies and data. In fact, the 1996 Ontario Law Reform Commission Report delivered to Premier Mike Harris concluded, "After conducting extensive consultations with members of the bench, the bar, and the public, as well as a detailed time and cost study ... the civil jury does not increase the cost of a trial unduly". The 2007 Civil Justice Reform Project headed by Justice Coulter Osborne reported that between 2005 and 2006, 6839 civil trials were heard in Ontario, only 23% of which were tried by a jury. It was Justice Osborne's recommendation that civil juries remain available for claims involving defamation, malicious prosecution, and false imprisonment. To address the issue of negligence cases, the recommendation was to remove

the smaller claims fitting within the Simplified Rules, from a jury's consideration. At that time, the figure was \$50,000.

It is undisputed that the judicial system as it operates in Ontario today remains underfunded, causing litigants significant delays. To expect the judicial system to respond to the unprecedented challenges of a worldwide pandemic without intentionally and creatively embracing change is simply untenable. Further, as must be remembered, our Supreme Court of Canada said in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, “[32] This culture shift requires judges to actively manage the legal process in line with the principle of proportionality. ...”

The consultation efforts undertaken by The Honourable Doug Downey mark a proactive and responsible approach by the Office of the Attorney General to prioritize access to justice. It is within the spirit of Mr. Downey's request for input in these challenging times that we make the following recommendations.

1. The ongoing debate surrounding civil jury trials cannot be permanently resolved in the midst of a global health and economic crisis, without adequate data to support the conclusion that eliminating civil juries will serve to streamline the judicial system. **Any amendments to civil jury trials must be temporary until a more measured and informed approach can be undertaken.**
2. In October 2016, the Civil Rules Committee was tasked with addressing the chronic court backlog. The Committee's exhaustive consultations and dedicated work resulted in substantial changes to the Simplified Procedure effective January 1, 2020. The fundamental change was that actions in which damages were claimed in an amount between \$35,000.00 and \$200,000.00 would proceed under Rule 76, without a jury. This development was consistent with the views of Justice Osborne's Civil Justice Reform Project from a few years earlier. Only a few months passed between the amendments to Rule 76 and the suspension of limitation periods effective March 16, 2020. There is simply no benchmark for measuring the impact of the new Rule 76. As a means of relieving pressure on the existing backlog of cases, **we recommend permitting any existing statement of claim issued in Ontario to be amended, without the need for leave or consent, for the sole purpose of bringing the claim within the monetary jurisdiction of Rule 76. This window of opportunity should be available only for the remainder of 2020.** Moving some existing claims into the Simplified Procedure within



the \$200,000 monetary threshold without any cost consequences will relieve significant pressure from the court system. Trials can be mandated to be conducted within 5 days before a judge alone, and presumably with even greater flexibility with the use of virtual hearings. The balance of pending cases that are not amenable to the use of Simplified Procedure could still proceed before a jury.

3. As part of the responsibility to actively manage cases mindful of the principle of proportionality as per the SCC in *Hyrniak*, **we recommend that Judges be reminded to use their existing powers more extensively and effectively.** Rule 50.07 (pre-trial judges' broad powers to make orders to facilitate the just, most expeditious and least expensive disposition of proceedings) and Rule 20.05(2) (the power to set time limits for the oral examination of a witness at trial) are two examples of existing rules that can be used more extensively and effectively by judges.
4. Further, Judges should try to push cases into the Simplified Procedure during a pre-trial conference if they believe it to be in the interests of proportionality. If they do not yet have that power, **we recommend that the Rules committee amend the Rules to vest judges with the power to move cases into the Simplified Procedure at their own discretion at any time in a proceeding and to have greater trial management powers during a pre-trial conference** granting Judges the power to decide that cases have a known value at the pre-trial of between \$200,001 and \$1,000,000. The trial would then be conducted in a maximum of two weeks. The pre-trial judge would determine who gets to call how many witnesses and for how long. All of this should already be within the power of the pre-trial judge as set out above. If a case has a value of greater than \$1,000,000, then a three week trial could be conducted. With this enhanced usage of judiciary power, there will be far fewer cases in backlog to be decided by a jury and, any that are left, can be decided more efficiently with a jury than they presently take.
5. COVID-19 has forced the world to work virtually. We have seen the use of e-filing and e-trials heralded as models of modernity and efficiency in improving access to justice. The technology for virtual proceedings has existed for years and, since March 2020, has become the norm within the legal community in Ontario. **Our final recommendation is therefore that the courthouse be set up for virtual civil jury trials where members of the jury can either participate from the courthouse utilizing social distancing measures**



**or from their homes, through video conferencing and electronic documents.** There are many current and some retired members of the judiciary and an increasingly large segment of the province's trial counsel who are both willing and able to use technology to enhance the delivery of evidence to triers of fact, both in terms of efficiency, and timeliness, but also by way of effectiveness to the recipient of said evidence.

Eliminating jury trials in most if not all civil actions may appear to be an expeditious quick fix in the bench's never ending effort to clear the trial list. However, the historic importance of civilian participation in shaping the law has never been more relevant than today. Before disposing of one of the most fundamental pillars of the legal system, the questions, "Will it even help?", and "At what price?", should be fully explored and answered.

We thank you for the opportunity to provide our submissions on this area of critical importance to the delivery of justice to the citizenry of the province of Ontario. We are available to respond to any questions or follow up you may have for us.

Yours very truly,



David Zarek, Eric Grossman, and Shanti Barclay

