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May 29, 2020

The Honourable Doug Downey, M.L.A.
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The Honourable Rod Phillips, M.L.A.
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SENT VIA EMAIL: rod.phillips@pc.ola.org

Dear Minister:

Re: Changes to legislation to Abolish Civil Juries

I am the past President of the Ontario Trial Lawyers Association, past Chair of the Ontario Bar Association - Insurance Section, past Chair of the Ontario Safety League, and I have been practicing civil litigation as a trial lawyer (jury and non-jury) for over 25 years. I have been an active participant in relation to previous changes to the Ontario Auto Insurance System and I have presented before the Ministry of Finance as well as several committees at Queens Park. I am one of the select few lawyers in the province that have been selected by their peers into BestLawyers Canada, Most Frequently Recommended LExpert Canada, granted Martindale Hubbell Pre-eminent Rating and Certified as a

Specialist in Civil Litigation by the Law Society. I am also the owner of a firm that employs 60 staff and rents a floor of commercial space in Toronto.

We have been fortunate enough to invest over 20 years in technology that has allowed us to ensure our lawyers and employees can work remotely and remain employed. We continue to operate in this capacity and continue to do so, however I am frightened that this may not be sustainable.

Firstly, I would like to commend you and your government for your strong and decisive leadership during these very difficult and trying times. For this, thank you.

I also sincerely thank the MAG and the Judiciary for taking prudent and timely steps toward dealing with the difficulties the bar faces. These steps and prospective steps will help keep our cases moving forward, these have included wide and new steps to conduct matters virtually. I can assure you that we have completed multiple virtual discoveries, conferences, mediations, and pre trials and they have been effective. This of course has allowed us to keep our staff and lawyers busy. But one real and serious concern is the cancelling and delay associated with trials and trial dates. Things are at a standstill. The longer they remain in this state, the less likely files will move. Not only does this have a disastrous impact on the litigant, it means no revenue will stream into law firms so as to be able to maintain operations and employees.

I am therefore writing to request that you sincerely consider moving forward (in an expedited manner) to abolish jury trials in civil matters. All trials ought to proceed by a judge alone.

This of course may meet resistance from certain lawyers and litigants on both sides of civil disputes. However, to continue to allow a civil jury trial in the vast majority of disputes is simply no longer sustainable.

A few points that I suspect you have already considered:

- All civil jury trials have been suspended. It is likely they will be the last forums to open for obvious reasons due to social distancing.

- There will be a reluctance on any opening (post-pandemic) for jurors to attend these hearings.

- Civil jury trials are almost twice the costs to run than judge alone.

- The general public, who are subject to jury duty, simply cannot financially afford to

sit on juries that last for weeks, if not months, in civil cases, especially after this economic downturn. Judges are paid a decent wage to try cases, juries are not.

- Judge alone trials (pre and post-pandemic) are able to proceed virtually if necessary.

- Judge alone trials are able to adapt in the event that the calling of virtual evidence is not practical.

- Judicial Pre Trial Conferences will reduce the number cases going to trial since the opinion of the judge will be given due attention (as opposed to leaving the case open to the speculative nature of six potential jurors).

- The inordinate delay and shut down will continue to result in a clear denial to access justice. Justice delayed, is justice denied.

The justification for abolishing the civil trial is also founded on other grounds that have been presented regularly and supported by judicial commentary. I share these in the addendum only to indicate that taking this measure is not extraordinary by any means and is simply moving our judicial system into a new modern era.

I sincerely appreciate you reading and considering this in light of all that is coming at you. I am also confident that you will be given support for this from many, and I am certainly committed to using resources to have other groups support you in this change.

Yours sincerely,

McLEISH ORLANDO LLP

J. Patrick Brown

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JPB:jpb

ADDENDUM

Civil Jury Trials regardless of the present delay

The right to a jury is a substantive right but not an absolute one. Many jurisdictions have abolished civil jury trials in personal injury actions all together. In the United Kingdom, Western Australia, Tasmania and Queensland, juries are only available for civil actions in very limited circumstances, and not at all for personal injury actions. In South Australia, civil jury trials have been abolished completely. Canadian provinces have already abolished jury trials for many types of cases.

Firstly, a jury trial takes double the time and double the expense. The court room is full of clerks marching jurors back and forth to the jury room, processing the jury rolls, directing and instructing jurors, busing them when needed, taking oaths, etc. Anyone who practices in this area will attest not only is the court room filled with extra staff, the trial takes twice as long. That increases the expense of the added clerks, the judge, counsel, and of course each juror being away from their own jobs.

Some argue that the jury is a cornerstone to fair and impartial trial and they add a common sense perspective. However, part of the difficulty is that it is far too costly to ensure jurors are impartial and not accessing information outside the courtroom.

The law of evidence is a cornerstone of English common law and a fair trial. With the technical revolution, jurors have the ability to look at any information they like. A few hits on the keyboard and they have an instant view of the crash site (albeit years later with the new stop sign). A quick Google search can reveal virtually anything. Unfortunately it does not filter out bogus opinions and misinformation.

Controlling what jurors consider outside the courtroom has always been an issue. But the ability to do arm chair investigations has never been more accessible than it is now. Marshalling jurors to and from a jury room and bringing in lunch isn't going to do it. To sequester jurors for the entire trial duration [and take away their phones] is not a financially feasible option. Although it was in relation to publication bans, Lamer C.J. framed the problem in this way in *Dagenais v. Canadian Broadcasting Corp*.[1]:

> *It should also be noted that recent technological advances have brought*

[1] *Dagenais v Canadian Broadcasting Corp.* [1994] 3 SCR 835 at para 93, 120 DLR (4th) 12.

> *with them considerable difficulties for those who seek to enforce bans. The efficacy of bans has been reduced by the growth of interprovincial and international television and radio broadcasts available through cable television, satellite dishes, and shortwave radios. It has also been reduced by the advent of information exchanges available through computer networks. In this global electronic age, meaningfully restricting the flow of information is becoming increasingly difficult. Therefore, the actual effect of bans on **jury** impartiality is substantially diminishing.*

Without any real means of stopping collateral information from seeping into our courtrooms, there is a real risk that a cornerstone of the jury system (evidence based adjudication) will be eroded.

The only real restraint in place is the direction the trial judge gives at the beginning of the case and the oath that each juror takes. Unfortunately an oath is only as good as the moral compass of the individual taking it.

Even if one believes arm chair research does not happen due to an oath, the jury system is under attack on another front. Over the last 25 years the world has changed. Technology has impacted on both the ideas and values we hold. We no longer live in small communities but rather a global village. Ideas, thoughts and beliefs are exchanged instantly between individuals far beyond our borders. Information online can both enlighten and mislead. What is real and what is fake news is becoming more and more difficult to ascertain. With this all going on, one must ask, does each juror really reflect the views and values of the community? I suspect this question was asked after the advent of the printing press but print media is not social media. People from all corners of the world now congregate in groups, chat, and share dialogue, all within seconds. A person may spend more time conversing with an international group on Facebook than any person in the condo down the hall. Affiliations span the world and there are no filters that screen bias and prejudicial beliefs. I am not sure if this means society is becoming worse or better but the real scary part of this equation is that we do not even know what is filtering into our jury rooms. The risk of runaway juries is real.

Unlike judges who must write decisions with reasons, we simply have no idea what a jury has done. I understand the rational of protecting jurors from public scrutiny, but some confidential transparent process should take place to see what is actually happening. We are so cloaked in secrecy that we make it a criminal offence for any juror to tell anyone

what went on in the jury room[2]. Yes an oath is a powerful tool, but there still must be institutional checks and balances in place in the event the oath is not respected.

What happens at the end of a jury case would not matter so much if we ensured that jurors were screened for bias at the beginning. Unfortunately in Ontario and other Canadian jurisdictions we have no real mechanism to do that. In Ontario, the *Juries Act*[3] allows challenges based on eligibility [citizenship, criminal record, age] or a personal interest in the action. But as to whether a juror is "impartial or bias" there is no mechanism to weed them out. Under section 108 of the *Courts of Justice Act,* the judge may discharge a juror on grounds of "illness, hardship, partiality" but partiality is not defined nor is a process in place to determine such.[4] Unlike our neighbors to the south, we do not have the ability to conduct a voir dire and ask questions to potential jurors.

So why are there no checks and balances for juries? We have them for Judges. Judicial appointments are thoroughly screened well before they take the bench. Each and every decision is written and reviewable. Bias and impartiality is screened and scrutinized by our appeal courts and bodies that oversea the conduct of judges. Not only is real bias reviewed, but so is the apprehension of bias. The courts themselves have commented on the lack of ability to conduct challenges in civil cases.

In *Thomas-Robinson et al v. Song*, Jennings J. observed: " …*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."*[5]

The only appellate authority reciting the lack of ability to challenge for cause is the Ontario Divisional Court in *Kayhan et al v. Greve.*[6] Justice Kiteley J. stated "*it is clear that this is a matter which needs a legislative response*." The majority also stated that even if there was change, from a practical standpoint "*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."*[7]

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[2] *Criminal Code*, RSC 1985, c C-46, s 649.
[3] *Juries Act*, RSO 1990, c J3.

[4] *Courts of Justice Act*, RSO 1990, C 43, s 108.
[5] *Thomas – Robinson v Song* (1997), 34 OR (3d) 62 at para 12, 1997 CarswellOnt 5627 (Ont Ct J (Gen Div)).
[6] *Kayhan v Greve* (2008), 295 (DLR (4th) 756 at para 48, 92 OR (3d) 139 (Div Ct).
[7] *Ibid* at para 42.

Meanwhile, things are getting worse as courts accelerate criminal trials after the Supreme Court of Canada's 2016 decision on unreasonable delay in *R. v. Jordan* 2016 SCC 27.[8] The drunk driver who kills is given an expedited trial, while the spouse of the victim waits years for their day in court.

Unfortunately there seems to be too many costly hurdles in this day and age to ensure timely, impartial, evidence based jury trials. It is time that we join other jurisdictions in the commonwealth, save money and end the civil jury in personal injury matters here in Ontario. When we do, the substantial costs savings within our system will hopefully be able to flow to the ultimate consumers and taxpayers.

[8] *R v Jordan*, 2016 SCC 27, 1 SCR 631.