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Att: Doug Downey

June 9, 2020

RE Reference No.: M-2020-6430 Re Proposed Amendments to the Availability of Civil Juries in Ontario

Dear Hon. Attorney General Downey,

Thank you for engaging the County of Carleton Law Association (CCLA) in consultations regarding proposed reforms to Ontario's civil jury system. This submission is made on behalf of the 1800 lawyers and 53 licensed paralegals of the CCLA.

As the second largest law association in Ontario, our members see the breadth of COVID-19's impact on the lives of Ontarians. COVID-19 has brought trials to a halt in Ontario. Justice delayed can result in justice denied for many vulnerable Ontarians. Further, it can have a permanent negative impact on businesses which rely on the timely adjudication of disputes. We therefore applaud this Government's efforts to re-open the courts as soon as possible under the direction of public health experts and by using innovative technology. Please communicate our deep-felt gratitude to your staff, the Ministry of the Attorney General, and our justice partners.

Juries and their role within Ontario's civil justice system are hotly contested areas of debate. Views are polarized within the legal community. Interestingly, opinions do not

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organize themselves along plaintiff and defendant counsel bars. At times, the plaintiff bar has predominantly filed Jury Notices. As of late, the pendulum has swung the other way with Jury Notices being filed by many insurers regardless of the nature of the claim. Among our own membership, consensus is largely limited to the following areas:

1. The backlog in the civil justice system can no longer be supported as it is resulting in a profound denial of access to justice for Ontarians. If civil juries are contributing to this problem, system reform is necessary. Such reform must be informed and must provide the public with an opportunity to consult prior to permanent reforms.

2. Juries should continue to be used in defamation matters given the distinct policy considerations.

3. Juries should continue to be used in Corone'rs Inquests given their importance in ensuring public confidence in the justice system.

Given the disparate views on the jury trial within our own membership, the CCLA presents the following executive summary of its submissions.

EXECUTIVE SUMMARY

Part I – Importance and Need for Consultations

- Permanent reforms following the short consultation period given by the Attorney General's Office will likely result in strong criticism from the legal community and civil justice groups.

- Little public notice has been given and civil juries are an institution that Ontarians identify with strongly as the public's opportunity to participate in the civil justice system.

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- As such, it is strongly recommended that any proposed amendments be on an interim basis in response to COVID-19.

- This will allow for a more complete policy discussion and provide statistical evidence on the impact of civil jury reform on trial delays.

Part II – Review of Arguments for and Against Civil Jury Trials

- We present a brief overview of the range of policy views from the CCLA Bar.

- The following arguments are addressed:

A. Arguments in favour of juries

  - Safeguard against abuse of power
  - Confidence in fair treatment argument
  - The Participation Argument
  - Community standards, law reform, defamation arguments
  - Catalyst for Settlement Argument

B. Arguments against civil juries

  - Lack of representation and juror comprehension
  - Lack of consistent jury verdicts
  - Cost-Benefit Argument
  - Tactical device argument

Part III – CCLA Interim Proposal

Given the significant backlog created by COVID-19, the CCLA proposes the following interim measures regarding civil juries:

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1. With the exception of Jury Notices in defamation and Coroner's Inquests, the interim proposal sees all current and future Jury Notices suspended with retroactive effect for a period of 24 months;

2. The suspension is to be re-assessed thereafter;

3. During the suspension period, all trials on the jury list will be converted to judge alone trials. They will maintain their position on the trial list vis-à-vis all others so as not to "loose their dates";

4. A working group ("**Working Group**") composed of members of the judiciary, legal community, Ministry of the Attorney General, and Government of Ontario should be struck to study the impact of the interim suspension of civil jury trials on trial delays, the consistency of damage awards, and the rates of appeal;

5. Court administrators and judicial partners are to gather empirical evidence in major centers on trial delays, rates of appeal, number of re-trials awarded on appeal, quantum of damages awarded by judges, cost savings and public feedback so that the Government and the Working Group may better assess whether permanent reforms are in the public interest; and

6. Lastly, the Government of Ontario will ensure that adequate resources are available for trials to proceed. This includes infrastructure for virtual hearings, the training of court staff on virtual hearings and the requisite equipment to support them. It also means making it a priority to open actual court rooms for those matters that cannot readily be done in a virtual setting. Of the 24 court rooms in Ottawa, we need as many as possible open and

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operating where virtual trails are not possible to service child protection, criminal and civil matters.

Part IV - Conclusion

- There is no doubt that immediate reform is required in the civil jury trial process to reduce trial backlogs in the face of COVID -19.

- However, open and transparent governance requires empirical evidence-based decision-making when reforms fundamentally change the expectations of the public and their participation in the justice system.

- The legitimacy of policy reform depends not only on the substance of the policy change, but also on how it is developed.

- The CCLA hopes that its submissions and interim proposal can assist the Government in grappling with the challenge of how to address the backlog in Ontario's civil trial system.

All of which is respectfully submitted by C. Katie Black, Chair of the CCLA External Relations Committee, on behalf of the CCLA in consultation with:

Peter Cronyn – Partner at Nelligan LLP
Benoit M. Duchesne – Gowling WLG (Canada) LLP
Andrew Ferguson – Secretary of the CCLA
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Should you have questions or concerns, please do not hesitate to contact the undersigned at katie@black-law.ca or by phone at (613) 851-8884.

Best Regards,

C. Katie Black

CCLA Chair of the External Relations Committee

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PART I: THEN IMPORTANCE OF PUBLIC DEBATE

Interim Response

While not *Charter* protected, the right to a civil jury has been found by the Supreme Court of Canada to be a substantive right.[1] Courts have often held that this substantive right can only be set aside for compelling reasons.[2]

You state in your letter that as Attorney General, you "*are considering an amendment to the Courts of Justice Act to eliminate some or all civil jury trials".* It was unclear as to whether this reform is limited to the COVID-19 period or whether your Office is considering a more permanent change to Ontario's civil jury trial system.

For the purposes of the CCLA's submissions and given the short period for comment, we have assumed that the Government of Ontario's current exploration of civil jury trial reform is on an interim basis due to COVID - 19. Indeed, it is our understanding that precepts must be sent out by July if juries are to resume in September. If this is the case, while the CCLA would have benefited from more time to provide a fulsome analysis, we recognize the need for input and we are supportive of immediate and retroactive action to ensure that Ontario's courts remain open to litigants.

Simply put, jury trials are near impossible in the face of COVID-19. Not only do they present incredible challenges for court administrators to ensure their safe occurrence, their disproportionate use of courtroom resources given COVID-19 will have a necessary impact on access to the courts for non-jury trials.

[1] *Haaretz.com v. Goldhar*, 2018 SCC 28 (CanLII), [2018] 2 SCR 3.
[2] *Chandra v CBC*, 2015 ONSC 2980 (CanLII).

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It is our understanding that court administrators are contemplating having to use three (3) court rooms to accommodate juries given social distancing requirements. A jury empaneling necessarily places many people in close proximity to one another. Potential jurors, lawyers, judges, court staff and parties are must come together during this process thereby creating a risk of COVID- 19 transmission. Whereas a member of the public can choose to travel, go to the store, or otherwise be in proximity with others, a juror cannot. Their participation is mandatory.

Available statistics to the CCLA indicate that "there has been a noticeable dip in the number of civil jury notices filed province-wide between 2012 and 2016…". Certain judicial centers, such as the East and Central West Regions, are notable exceptions to this downtrend. Just over 21,000 Jury Notices were filed in 2016 and approximately 1700 cases were disposed of.[3]

To date, the Superior Court in Ottawa has had to adjourn 29 civil jury trials because of COVID-19. There are 30 more civil jury trials scheduled between September and December. The looming jury trial date is a material factor in encouraging settlement. Indeed, Justice Giovanna Toscano Roccamo's June 2018 report titled, "*Report to the Canadian Judicial Counsel on Jury Selection in Ontario*" found that over 80 percent of civil jury trials in Ottawa and Bellville concluded within one day.[4] The reality is that cases will not settle unless trial dates are set and the matter will proceed. Many of the jury trials that have been postponed or will be postponed have already waited years to be scheduled.

[3] Justice Giovanna Toscano Roccamo in her June 2018 report titled, "*Report to the Canadian Judicial Counsel on Jury Selection in Ontario*", p. 8.
[4] *Ibid.*

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Many of these litigants have been waiting upwards of seven (7) years to have their matter tried. Many are plaintiffs in personal injury claims. During this time, they face extreme financial hardship due to the need to pay for medical and caregiver bills compounded by the inability to work. Delays in access to justice fail everyone and undermine public confidence in the justice system. Justice delayed is justice denied for many. An interim solution must be found given the unprecedented times in which we live.

As set out in detail below, the CCLA commends this Government's action if its intention is to impose an interim suspension of all jury notices. To address the current backlog, this measure must apply to all jury notices retroactively during the suspension period. This will allow trials that would otherwise have required a jury to proceed.

Permanent Reforms

If the Government of Ontario is contemplating permanent changes to the civil jury trial, public consultations must be done. The Government of Ontario's continued commitment to non-partisan, merit-based law reform policy is a crucial determinant of the rule of law. To date, this Government's consultations in this area have been robust. They are critical as it relates to juries because, along with voting, jury participation lies at the heart of civic participation in democracy.

Indeed, many Ontarians believe that "*jury trials protect litigants from corruption, systemic bias, and abuses of executive, legislative or judicial power"*.[5] This demographic of Ontario's population is vocal. While a number of statutes preclude juries in actions against federal, provincial and municipal governments thereby undermining this belief's practical

[5] 1996, Ontario Law Reform Commission, "*Report on the Use of Jury Trials in Civil Cases"*, pp. 19-22 (enclosed).

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application, many hold to the conviction that juries represents the pulse of the people; a community's way to participate in the justice system. Juries impose contemporary community standards and expectations on the law. This is seen most acutely in defamation and Coroner's Inquests where the community imposes its standards of proper conduct and adequate remedies.

The Ontario Law Reform Commission's 1996 civil jury report surveyed juror's experiences, conditions and satisfaction. The survey engaged 757 jurors: *"While the Commission's study shows that the citizens of Ontario are generally favourably disposed towards the jury, actual service on the jury seems to increase their approval".* Ontarians support civil juries and participation actually increases public appreciation and confidence in our justice system.[6] This is despite the inconvenience, loss of income, and time spent waiting that is experienced by the juror.[7]

Indeed, members of the CCLA advised that, anecdotally, jurors have always provided feedback that they were honoured and amazed at the experience. They stated that prior to the experience they had no idea of the amount of authority a jury is given in the decision-making process. This is the very reason for the need to consult the public; it is their justice system. The public is the primary stakeholder here. It is imperative that policy development in this space benefit from public input.

Simply put civil juries are an instrument of democracy. Our legal system's precept that justice must not only be done, but must be seen to be done garners broad public support for juries. The removal or limitation of the right to civil juries in the absence of public

[6] In a ratio of approximately 3-1, those who were otherwise ambivalent became more supportive of the meaning and importance of civil juries after service. See 1996, Ontario Law Reform Commission, "*Report on the Use of Jury Trials in Civil Cases"*, pp. 69-70 (enclosed).
[7] *Ibid.*, pp. 63 – 66, and 70. See note 37 at p. 164 of the 1996 Civil Jury Report and note 52 at page 285. See also p. 75.

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consultation and democratic debate risks attracting sever criticism from legal groups and members of the public from both sides of the political spectrum. Accordingly, the CCLA strongly recommends that any proposed amendments be on an interim basis in response to COVID-19. This will allow for a more complete policy discussion and will provide an opportunity for the collection and analysis of statistical evidence on the impact of civil jury reform on trial delays.

PART II: RANGE OF POLICY VIEWS

Given the short time period for comment, the CCLA has not had an opportunity to conduct a full survey of its members or provide a detailed policy review of arguments for and against civil juries. We therefore present a brief review of arguments for and against civil jury trials from an *ad hoc* committee our members made up of both plaintiff and defence-side practitioners. The purpose of this analysis is to simply arm you and your policy team with the general policy and practical considerations that should, in our view, be taken into account.

a. Arguments for the Retention of Civil Juries

Safeguard against abuse of power

This argument, explained in detail above in Part I (b), was raised as it relates to a belief held by the public. Some members of the public view their jury participation as a means of scrutinizing the conduct of public authorities, judges, and fellow citizens. As such, civil juries represent a tool of democratic participation.

While this issue was not raised by a member of the CCLA, the 1996 Law Reform Commission Report highlighted another aspect of this same justification:

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> *A related view is that there might be cases in which a jury is sought because a particular judge is perceived to be biased or to abuse his or her power. However, there is little evidence to suggest that litigants generally request juries as a result of a concern about judicial impartiality or incompetence. The research and consultation conducted in connection with this report does suggest that some parties request juries as a result of a concern about the anticipated views or predispositions of particular judges. A number of lawyers advised the Commission that they request juries as a means of avoiding judges who, they feel, for one reason or another, would not give them a good hearing. While this might not be an instance of institutional "abuse of power", it indicates nevertheless that some parties select juries out of a concern about how some judges might decide cases or conduct hearings.*[8]

This issue may no longer be current given improvements to the judicial appointment processes. Alternatively, it may not arise in the context of large urban centers where individuals have not known one another throughout their lives. However, the concern is worth stating to the extent that it still exists.

Confidence in fair treatment argument

Similar to the safeguards against the abuse of power argument, supporters of civil jury trials indicate that judgment by one's peers is more tolerable that judgment by an individual (judge) in a position of power. Some Ontarians have greater confidence in the fairness of their peers than they do in the fairness of judges.

The corollary argument is equally applicable, however. Disappointed litigants may take greater comfort in the decision of a judge because it is supported by detailed reasons. Reasons have the ability to clearly communicate that the litigant was heard and tried on the merits. As such, the judgment is less arbitrary and has the added protection of our appeal review system.

[8] *Ibid.*, p. 20.

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The Participation argument

Many Ontarians view juries as their opportunity to participate in our democracy through the administration of justice. In this way, jury duty is seen as a means through which society can encourage civil responsibility. This, in turn, is said to have a beneficial effect.

Supporters of the jury trial argue that juries maintain the integrity of the administration of justice by allowing for public participation. In this way, the law is forced to respond to current community standards and public opinion. It allows members of the public to judge the conduct of their peers and provide for adequate remedies.[9]

The Ontario Law Reform Commission notes that there is a complete absence of studies to prove the participation argument.[10] While superficially romantic, this justification for civil juries would need to be studied.

Community standards, law reform, defamation arguments

Theoretically, the jury is supposed to provide the Court with a cross-section of society. While the accuracy of this assumption is questioned in Section B(i) below, for the purposes of this section we assume accurate representation. Juries are comprised of lay people selected from the community who are not required to justify their decision. In other words, they are able to reach a decision unburdened by the limitations placed on a judge to give reasons on the basis of binding authority, the implications of the decision on the future development of the law, and the knowledge that his, her, or their decision will be scrutinized by a Court of Appeal.

[9] *Ibid.*, p. 20.
[10] *Ibid.,* p. 25.

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A product of group consensus-building, the jury verdict is arguably less reflective of individual standards and more reflective of community values. The Ontario Law Reform Commission cited conflicting studies on whether groups perform certain intellectual tasks, link finding credibility and assessing damages, better than individuals.[11] That being said, juries are described as the litmus test of reasonable conduct and a reasonable remedy. The most ardent supporters of juries in the CCLA community state that the jury has a crucial role in defamation actions.

The law of defamation addresses injury to one's reputation in the community. Jury trials are important in defamation actions as they center on the values, attitudes, and priorities of the community. For example, where the defamatory meaning is in issue, the test for establishing defamatory meaning is based on community standards. Thus, the jury, composed of peers from the same community, plays a pivotal role in making these findings. The Supreme Court of Canada in *Haaretz v. Goldhar*, 2018 SCC 28 emphasized the geographic relevance of harm to one's reputation at paras. 74 and 212:

> *[74] The right to a jury trial is a substantive right of particular importance in defamation cases. As any party in Ontario may deliver a jury notice before the close of pleadings (rule 47.01 of the Rules), this was a juridical advantage still available to Goldhar at the time of the stay motion.*
>
> *[…]*
>
> *[212] This Court has repeatedly emphasized the importance of plaintiffs being allowed to sue for defamation in the locality where they enjoy their reputation, recognizing the value of the plaintiff's subjective conception of his or her reputation (Banro, at para. 58; Black, at para. 36). As the majority of this Court recently stated, "[t]he right to the protection of reputation, which is the basis for an action in defamation, is an individual right that is intrinsically attached to the person" [citation omitted]. In Banro, this Court approved the decision of the Ontario High Court*

[11] *Ibid.*, p. 23-24.

> *in Jenner v. Sun Oil Co., [citation omitted, wherein the judge "found that the plaintiff would not be able to satisfactorily 'clear his good name of the imputation made against him' other than by suing for defamation in the locality where he enjoyed his reputation — that is, where he lived and had his place of business and vocation in life" [citation omitted].*

The local community's standard of what constitutes harm to one's reputation underscores the importance of judgment by one's peers. Section 14 of the *Libel and Slander Act*, R.S.O. 1990, c. L.12 contemplates juries and provides that they may give either a general or special verdict.

This Government recognized the importance of judgment by one's peers in the area of defamation in the recent Simplified Procedure reforms. The Simplified Procedure Rule reforms exempted defamation actions when it removed jury trials as of right. In so doing, this Government recognized that these types of cases (as well as malicious prosecution and false imprisonment) are distinct from other types of cases like personal injury or commercial actions.[12] The Attorney General's decision followed recommendations made by the Advocates' Society highlighting the importance of juries when the issue at stake was a person's reputation and the issues involved the values of our community.[13]

Catalyst for settlement argument

Many members of the CCLA agree that the impending eve of a civil jury trial is a greater catalyst for settlement than a judge alone trial. The Ontario Law Reform Commission studied whether this belief is in fact true. It "*undertook a detailed comparative study of jury and non-jury trials,*

[12] Ministry of the Attorney General, "Civil Justice Reform Project", https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/090_civil.php [accessed on June 10, 2020].
[13] See Advocates Society Submissions, https://www.advocates.ca/Upload/Files/PDF/Advocacy/Submissions/OntarioRulesofCivilProcedure/Simplified_Procedure_and_Jury_Trials-Consultation_Document.pdf, [accessed on June 10, 2020].

which strongly suggests that matters scheduled to be heard before a jury are indeed more likely to settle, and are more likely to settle more quickly".[14] This is a compelling argument in favour so long as civil juries aren't creating widespread backlog in the civil trial list.

A more effective way to encourage settlement would be to increase the pre-judgment interest rates. In so doing, parties and institutional defendants in particular would be more motivated to critically assess files at the outset.

Arguments Against Civil Juries

i. Lack of representation and juror comprehension

While jurors have been lauded for their fact-finding abilities and function as the conscience of the community, recent studies demonstrate that jurors in Ontario may not present an accurate representation of the public. Jurors also generally have a low comprehension of the matters they are tasked with deciding.

The randomness of the selection process recently came under well-deserved scrutiny by then Justice Giovanna Toscano Roccamo in her June 2018 report titled, "*Report to the Canadian Judicial Counsel on Jury Selection in Ontario*".[15] This study consisted of an

[14] 1996, Ontario Law Reform Commission, "Report on Civil Juries", p.23. It is important to note that judges and lawyers surveyed by the Law Reform Commission attributed the increased rate of settlement to the unpredictability of jurors.

[15] Justice Giovanna Toscano Roccamo, June 2018 report titled, "*Report to the Canadian Judicial Counsel on Jury Selection in Ontario*". See also the Toronto Star & Ryerson School of Journalism investigation documenting the racial makeup of 632 jurors in 52 criminal trials since 2016 in Toronto and Brampton ["How a Broken Jury List Makes Ontario Justice Whiter, Richer and less like your Community"]. Justice Roccamo makes the following observations regarding this study, "*The Toronto Star investigation concluded that the province's jury selection process, based on property assessment rolls, leaves many Ontarians, particularly racialized accused, facing overwhelmingly white juries. However, the investigation does not consider the actual data pertaining to the jury panels taken from the jury rolls for Toronto and Brampton, as compared to the 2016 Census tracts. Instead, the data was drawn from observations about sitting juries after the "in court" selection process, including*

empirical analysis on civil jury data trends in Ontario, including two geocoding studies examining the characteristics of jurors on jury panel lists for 2016 for two judicial centers in the East Region: Ottawa and Bellville. Justice Toscano Roccamo's study found that:

- *Response rates to First Nations jury questionnaires delivered in 2015 and 2016 remain low. Of over 6,000 questionnaires sent, only 10% were returned and over half of respondents were ineligible. […]*[16]

- *In Ottawa, disability and occupation as determined by section 3(1) of the Jury Act (e.g., lawyer, MP, etc), account for the largest factors in determining ineligibility. […]*[17]

- *The Ottawa Jury Roll is predominantly Anglophone. However, the number of bilingual jurors is steadily increasing. […]*[18]

- *[o]ver 5,500 juror 10 addresses to geographic profiles of a particular area. The geographic profiles highlight demographic trends in jury representativeness over several categories such as income, language, racial identity, property ownership, gender and aboriginal identity […]* [19]

- *The Ottawa Geocoding Study … pertaining to the Ottawa juror panels for the period from June 2016 to July 2017 suggests that Ottawa juries were predominately populated by white, higher income earners, property owners, reporting English as their mother tongue. (See pages 9-10 in relation to the profile of the most and least represented census tracts.) […]*[20]

- *The Belleville Geocoding Study … was undertaken to examine the representativeness of the jury roll as it relates to a court centre incorporating a First Nations' community within the East Region. The data suggests that Hastings County, which includes Belleville, and the First Nations reserve in the Tyendinaga Mohawk Territory, did not reflect the stark divides and contrasts in juror demographics seen in a larger urban centre, like Ottawa. However, the*

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peremptory challenges". See page 10 of her Honour's Report at "*Report to the Canadian Judicial Counsel on Jury Selection in Ontario*".

[16] *Ibid.*, p. 8.
[17] *Ibid.*, p. 8.
[18] *Ibid.*, p. 8.
[19] *Ibid.*, p. 10.
[20] *Ibid.*, p. 11.

> *Census Subdivision statistics suggest that not a single juror among prospective jurors on any panel list was drawn from the First Nations reserve. Like in the Ottawa Study, findings also generally revealed that 12 the most represented Census tracts in the juror panels tended to have a lower percentage of visible minorities, a lower percentage of Indigenous people, higher incomes and higher levels of home ownership. (See pages 2-3, 9-10, 39-420.*[21]

Interestingly, the study also found that specific centers within Ontario have been found to have impartial juries based on insurance premiums:[22]

> *It is also noteworthy that in Brampton, a judicial centre in the Central West Region, there was a court challenge by the plaintiff to the jury array in* Kapoor v. Kuzmanovski, *CV-09-4318. The challenge was supported by social science evidence to the effect that members of the Brampton array, who pay the highest motor vehicle insurance premiums in Ontario, could not be expected to be impartial if a significant award of damages to the plaintiff could contribute to increased insurance premiums. Cases such as this one are being referenced in the current debate over whether jury notices are being filed by the defence bar in motor vehicle accident cases in order to benefit from the trend toward unfavourable jury verdicts against plaintiffs. In a climate of jury awards favourable to the defence bar, any amendments to the rules of process limiting the availability of jury trials might well be perceived as an access to justice issue by both sides of the debate.*

By way of conclusion, the study found that the modern jury in these areas did not always represent the "conscience of the community". The jury selection process tended to exclude from service racial and linguistic minorities, low-income earners, students and caregivers.[23]

[21] *Ibid.*, p. 11-12.
[22] *Ibid.*, p. 9.
[23] Justice Giovanna Toscano Roccamo in her June 2018 report titled, "*Report to the Canadian Judicial Counsel on Jury Selection in Ontario", pp. 2,*

Compounding the lack of representation of the community among jurors, is their varied comprehension of complex evidence presented at trial. Many, if not most, civil cases are now decided on the basis of a litany of experts providing complicated evidence and opinions in many specialized areas including engineering, medical and, economic issues.

Civil trials, especially in the motor vehicle accident context, see the presentation of complex expert reports and nuanced law.[24] The law and its application in this area especially has become burdensome and, at times, unwieldy for those who are legally trained let alone lay people. At least judges can ask the experts question to explain things they are having a hard time with – jurors cannot.

While it may be easy for a juror to assess the credibility of a lay witness; it is a much more difficult task with experts. Further, some members of the CCLA advised of their anecdotal belief that jurors seem, at times, to simply render a decision based on which of the parties they like or do not like. They do not have to go through the process of identifying the evidence they rely upon and why – a requirement of judicial reasoning.

Evidence misunderstood is justice denied, especially when a decision of the jury will typically not be overruled by an appeal court. A jury verdict will not be set aside unless it is so plainly unreasonable and unjust as to satisfy the appeal court that no jury reviewing the evidence as a whole and acting judicially could have reached the verdict.[25]

While juror comprehension can be boosted through proper judicial addresses, the use of plain language, written instructions, jury trees and preliminary instructions, many CCLA members remain concerned that jurors are not equipped to analyze complex expert evidence.

[24] 1996, Ontario Law Reform Commission, "*Report on the Use of Jury Trials in Civil Cases"*, pp. 29-30.
[25] McCannell v. McLean, [1937] S.C.R. 341, and *Graham v. Hodgkinson* (1983), 40 O.R. (2d) 697 (C.A.).

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This concern does not necessarily call for the abolition of civil juries outright. It can be addressed by encouraging judges to use their discretion under the rules to strike Jury Notices in the face of complex evidence and modifying the way that jurors are instructed to increase comprehension.

Lack of consistent jury verdicts

Members of the CCLA have expressed concern regarding the lack of consistent jury verdicts and their negative impact on the utility of judicial pre-trial conferences.

The proposition that certain civil cases remain appropriate for civil jury trials while others do not was powerfully stated by Lord Delvin. Speaking about a civil case of carelessness, he said:[26]

> *In a case which was unique I should say unhesitatingly that a question of carelessness was better settled by a jury than by any other tribunal. Where there is no precedent to act as a guide, a common opinion is better than a single one. But cases that come up for trial rarely are unique.... Whenever cases about carelessness belong to a type, it is inevitable that there should also grow up a typical standard of care; it is not something that can be put into a formula which the jury can be told to apply; it depends upon a knowledge of the sort of approach that is generally made to cases of the type... where a case belongs to a type, it is an informed mind that is needed rather than a fresh one.*

Lord Devlin accepted that jury verdicts are inherently inconsistent. He acknowledged that this undermines the importance of risk analysis. As cited by the Law Reform Commission report on Civil Juries, Lord Delvin concludes that while juries are useful instruments of justice when the community must opine, the types of cases for which they are suited are rare.

[26] Lord Delvin, *Trial by Jury* (rev. ed., 1966), at 142-43, cited in the Ontario Law Reform Commission Report on Civil Jury Trials, pp. 22-23, *supra*.

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Many CCLA members observed that the unpredictability of juries drastically undermines the effectiveness of procedural tools designed to settle cases pre-trial. Parties attend a pre-trial to obtain an informed judicial opinion. The pre-trial judge, having been fully briefed, will opine on the merits of the case should it proceed to trial. Normally this judicial candor has the salutary effect of bringing the parties to settlement. However, the common rejoinder in the face of a Jury Notice is "what will a jury do?". The judge's critical analysis is thereby rendered ineffective for the purposes of settlement.

Cost-benefit argument

The Ontario Law Reform Commission found the Cost Benefit Argument to be the most persuasive argument advanced by those seeking the abolition or partial abolition of the civil jury:[27]

> *This argument assumes that jury trials are more lengthy and more expensive than non-jury trials. It further assumes that trials by judge alone deal adequately with disputes, rendering the jury an unnecessary added expense. However, the cost study conducted by the Commission in connection with this report, discussed below, demonstrates that jury trials do not take as long, and are not as costly, as is often suggested.*

Anecdotal evidence from the CCLA membership is that jury trails, on average, take 30% to 50% longer than judge alone trials.

A 1990 Law Reform Commission Study indicated that the total cost of civil juror's fees and expenses for the period of July 1, 1990 to June 30, 1991 was between $250,000 and $350,000.[28]

[27] 1996, Ontario Law Reform Commission, "*Report on the Use of Jury Trials in Civil Cases"*, pp. 26-27.
[28] *Ibid.*,p. 27.

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Notably, this study did not consider additional court time, costs of additional clerks, sheriffs, court staff and judges to administer the process; additional lawyer time to prepare for a jury; additional judicial resources to conduct the trial due to the need for evidentiary objections to take place in the absence of the jury; and the increased likelihood of having the matter sent back for retrial by the Court of Appeal in the event of an improper jury address. In short, the costs of a jury trials are significantly higher across the system. The cost-benefit argument is persuasive.

Further, many of the CCLA members is of the view that, subject to certain well laid out exceptions which trigger public interest or impact upon a person's character, we can no longer afford the luxury of a civil jury system to try cases which involve a dispute between two private parties. While the Law Commission may have made findings in 1996, those findings are questionable today as jury trials have become quite lengthy and complex, especially in the motor vehicle line of cases as compared to twenty-five years ago. This may also impact the survey of jurors who have been asked to sit on increasingly lengthy civil disputes. For this reason, many in our CCLA membership believe that now is the time to act.

Tactical device argument

Many CCLA members criticize the use of jury notices to strategically delay the adjudication of a dispute. The Ontario Law Reform Commission Report on Civil Juries,[29] the *Royal Commission Inquiry into Civil Rights*,[30] and the Ontario Law Reform Commission *Report on Administration of Ontario Courts*[31] noted the consistent use of juries as a tactical device

[29] 1996, Ontario Law Reform Commission, "*Report on the Use of Jury Trials in Civil Cases"*, pp. 27-28.
[30] 1968, "*Ontario Royal Commission Inquiry into Civil Rights*", Report No. 1, Vol. 2 (McRuer Report), p. 860.
[31] 1973, Ontario Law Reform Commission, "*Report on Administration of Ontario Courts"*, Part I, at p. 336.

misused by defendants and, to a lesser extent, by plaintiffs. They unanimously recommended that the availability of jury trials be limited in civil cases for this reason.

Specifically, anecdotal and empirical evidence suggests that individuals and insurers who lack confidence in the merits of their case request a jury because they rely on the unpredictability of the jury to promote settlement. In so doing, institutional defendants such as insurance companies seek to exploit the following tactical advantages that juries provide: extend the timeline for when the matter is likely to be heard; insurance defense lawyers tend to have more jury trial experience vs. plaintiff counsel; and jury awards in Ontario have become lower than awards by judges for comparable cases.

We operate within an adversarial system. As such, the use of civil jury trials to obtain a tactical advantage is not inherently improper. That being said, the CCLA states that the use of civil jury trials by Parties to intentionally delay the plaintiff's day in Court is not acceptable. Justice delayed justice denied.

Members of the CCLA community emphasized that settlements will also be more durable and more acceptable when based on a more predictable and rational outcome, as opposed to a forced settlement because you really do not know what could happen and you can not afford to take the risk. This is because the increased costs of a civil jury trial favour the party with the economic wherewithal to take the risk on. Our civil justice system already has too many features which favour the party with greater economic means. We should therefore be looking for ways to remove economic imbalance from the civil justice equation not to maintain or increase them.

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PART III - PROPOSAL OF THE CCLA

Given the significant backlog created by COVID-19, the CCLA proposes the following interim measures regarding civil juries:

1. With the exception of Jury Notices in defamation and Coroner's Inquests, the interim proposal sees all current and future Jury Notices suspended with retroactive effect for a period of 24 months;

2. The suspension is to be re-assessed thereafter;

3. During the suspension period, all trials on the jury list will be converted to judge alone trials. They will maintain their position on the trial list vis-à-vis all others so as not to "loose their dates";

4. A working group ("**Working Group**") composed of members of the judiciary, legal community, Ministry of the Attorney General, and Government of Ontario should be struck to study the impact of the interim suspension of civil jury trials on trial delays, the consistency of damage awards, and the rates of appeal;

5. Court administrators and judicial partners are to gather empirical evidence in major centers on trial delays, rates of appeal, number of re-trials awarded on appeal, quantum of damages awarded by judges, cost savings and public feedback so that the Government and the Working Group may better assess whether permanent reforms are in the public interest; and

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6. Lastly, the Government of Ontario will ensure that adequate resources are available for trials to proceed. This includes infrastructure for virtual hearings, the training of court staff on virtual hearings and the requisite equipment to support them. It also means making it a priority to open actual court rooms for those matters that cannot readily be done in a virtual setting. Of the 24 court rooms in Ottawa, we need as many as possible open and operating where virtual trails are not possible to service child protection, criminal and civil matters.

PART IV – CONCLUSION

The pandemic has caused us all to reconsider many aspects of how we live and work in this province. The civil justice system is not and should not be exempt. This crisis has served to highlight many significant problems in our justice system and has afforded us the opportunity to make changes that are long overdue. Certainly, the question of whether we can continue to have juries for civil cases is one of many issues and we embrace the opportunity to participate in the discussion.

In the current environment, we feel it is best to approach the issue in two stages. Right now, we have a number of cases where jury notices have been served and trial dates have been set. Typically, those trial dates were set two to three years ago. Realistically, the notion of holding a jury trial in the next year (and maybe more) is not feasible. And if a case is removed from the trial list now because it cannot be heard by a jury, it likely will not be heard for at least another two years and perhaps even longer. The issue comes down to weighing the right of the party who served the jury notice against the right of a litigant to have the matter tried in a timely fashion. It is trite to say that justice delayed is justice denied.

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This pandemic has called upon us all to make necessary sacrifices. In the context of these many sacrifices, it is appropriate to propose the loss of having a jury decide a civil dispute versus a judge alone in order to see that justice be done.

We understand that our Chief Justices and Regional Senior Justices are working hard to find ways to get our civil justice system operational as soon as possible. That may mean virtual hearings and trials. But even in the context of a trial in person, it could be workable with a judge alone when it would not be with a jury.

Accordingly, as a first step, it is our recommendation that in all cases currently on the trial list with jury notices save and except for defamation matters and Coroner's Inquests, the jury notice should be struck, the cases should maintain their position on the trial list and be tried by judge alone as soon as our Chief Justices and Regional Senior Justices deem that possible.

The second stage of the process would involve a more expansive study of whether we truly need or should have juries decide civil cases for all civil actions. We may eventually conclude that civil jury trials are no longer required in all cases. However, as long as we address the issue of jury cases currently on the trial lists, we do not perceive a pressing urgency to decide this issue for the long term. It will give us time to collect and consider the empirical data for the cost of jury trials for the Attorney General, the Parties, and more broadly society as a whole. It will allow for a fulsome democratic debate on the merits of civil jury versus judge alone trials.

Also, it is the view of the CCLA that the issue of whether we should have juries decide civil cases is but one of many problems which confront our civil justice system. Our clients

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and society writ large – the beneficiaries of our justice system - are greatly concerned about the cost and time required to decide civil cases. This is compounded by the huge gap between where our courts are in terms of technology as opposed to the rest of society. We have a window to make change and we look forward to working with the Attorney General in this regard. Thank you for the opportunity to provide you with our input.

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