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June 15, 2020

The Honourable Douglas Downey
Attorney General of Ontario
200 – 20 Toronto Street
Toronto, ON,

Dear Attorney General Downey:

On Friday June 5, 2020 at 6:24 pm. we received your email seeking input regarding the availability of civil juries pursuant to the Courts of Justice Act. As you are aware, FOLA is an organization representing the Associations and members of the forty-six law county and district law associations across Ontario. Together with the Toronto Lawyers' Association our members represent approximately 12,000 lawyers across the Province. We point this out simply to suggest that in a period of five business days, a comprehensive and meaningful consultation with the lawyers we represent is simply not possible nor reasonable.

In response to your email, we have composed a committee of three: Chair Bill Woodward, Past Chair Mike Winward and Second Vice-Chair and East Region Representative, Kristin Muszynski. Mr. Woodward and Ms. Muszynski practice insurance defence and Mr. Winward practices plaintiff personal injury. We believe that the makeup of our committee creates a point of view that is objective and non-partisan.

The questions that we have been asked to respond to are:

1. Should civil juries be eliminated altogether? Or
2. If civil jury trials were to be eliminated, are there certain action types that should be exempt?

Although we fully appreciate the current health crisis that is being faced as a result of the Covid-19 pandemic, we suggest that the fundamental right to a jury trial in a civil case requires more careful consideration before it is eliminated. We respect that measures will be required to prevent the spread of Covid-19, but note that the government is re-opening many aspects of daily life and it appears that such measures to protect the health of our citizens can be applied to the operation of our courts.

The issue of the elimination of juries in civil matters was considered by the Ontario Law Reform Commission in 1996. The Commission received a request for consideration in late 1993 and subsequently published a preliminary paper in March



1994. The final report was delivered in October 1996. Through this process, the Commission completed a thorough analysis of the various arguments both for and against the use of juries in the civil setting. It was noted that these arguments had been made for over 150 years.

Although the request for input received last week does not suggest any reason for considering the elimination of civil juries at this time, beyond the current health crisis, it appears that the same foundations for such a fundamental change of our system of civil justice continue to be advanced now, just as they were 24 years ago. These arguments were thoroughly and thoughtfully considered by the Commission and outlined in their report, including concerns raised regarding the costs and efficiency of jury trials, the complexity of cases that may be beyond the capacity of a jury, the burden created on the administration of justice and the potential bias of jurors in reaching a verdict.

We have received approximately 20 responses in the short time frame provided. These responses appear to reflect the same longstanding arguments both for and against the use of juries in civil cases. Although we do not intend to belabour the point, the Commission extended their review beyond anecdotal commentary and complaint and relied heavily upon empirical data from a variety of sources, including data from the Ministry of the Attorney General. We have not been provided any data or studies that would suggest that such a fundamental right should be eliminated in response to a discrete event such as the pandemic we are currently facing.

With the opportunity for a more fulsome study and analysis, it may well be that the conclusions reached by the Commission in 1996 are still applicable today. On reading the Commission's report, it is noteworthy that at the consultation stage, many of the arguments that were advanced in favour of abolishing civil juries were subsequently refuted after a statistical analysis was completed and past studies were reviewed. Specifically, the Commission concluded that a substantial cost saving could not be demonstrated with the elimination of juries. Additionally, it was demonstrated that the unpredictability of a verdict was not a sufficient basis upon which to eliminate juries. That is to say, if a case was "predictable" it would presumably resolve regardless of whether a jury was in place. Further, concerns regarding the competence of a jury were largely addressed by the trial judge's responsibility to provide guidance through his or her jury charge pursuant to the Courts of Justice Act. Although we have not conducted a review of the case law over the last twenty-four years, it does not appear that Ontario's appeal courts have been overly active in setting aside jury verdicts, suggesting that juries are usually competent to render a verdict.

We have concerns about the unintended consequences of such a significant change in our judicial system without the benefit of a more complete review. It has been suggested that "the right to a jury trial is a substantive right which should not be taken away except for cogent reasons". It appears that some studies have indicated that more trials may occur



when tried before a judge only. In addition, the advent of "virtual trials" presents a number of issues which will require study and review, both in jury and judge alone cases.

At this stage, we do not have sufficient information to simply answer the questions you have posed, nor do we feel that appropriate review and consultation has occurred. In recognition of the current health crisis and the concerns for access to justice that civil litigants currently have, we support consideration of temporary measures to suspend jury notices to allow cases to proceed as non-jury trials. Temporarily suspending jury trials will allow a chance to clear the backlog created by Covid-19 and allow more time for meaningful consultation and study on the long term jury retention issue.

We urge you to also consider that in many regions, the backlog of civil jury cases has not been created solely by the pandemic. In most, if not all, judicial regions, systemic issues within our administration of justice, including the lack of judicial resources, developments in the law which prioritize criminal and family matters and the lack and/or deterioration of infrastructure to support the legal needs of our expanding population has resulted in significant civil trial delays.

We would be pleased to continue this dialogue with a view to implementing temporary measures to address the concerns arising from the Covid-19 pandemic.

Yours truly,

William G. Woodward
FOLA Chair