Toronto Lawyers Association TLA

June 15, 2020

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

Via Email: amanda.iarusso@ontario.ca

Dear Attorney General Downey,

**RE: Possible Amendments to the *Courts of Justice Act* and Potential Elimination of Civil Jury Trials in Ontario (Your Reference No. M-2020-6430)**

I am writing to you on behalf of the Toronto Lawyers Association ("TLA"). The TLA is the voice of its 3,700 members who practice law in all disciplines across the Greater Toronto Area.

On the evening of June 5, 2020, the TLA received the Ontario Ministry of the Attorney General's letter to stakeholders regarding potential amendments to the *Courts of Justice Act*, including the potential elimination of some or all civil jury trials in Ontario, and seeking stakeholders' responses by June 15, 2020.

We have received a copy of the letter from the Federation of Law Organizations to you, and agree with the concerns expressed in that letter. We encourage the Ministry to undertake a longer and more fulsome consultation process before the right to a civil jury trial is eliminated for any cause of action.

Any proposal to eliminate or restrict litigants' access to civil jury trials is a major reform, and warrants considered analysis before any such restrictions are imposed. We must be careful to avoid sacrificing substance over form in implementing potential efficiencies in our civil justice system because of the COVID-19 pandemic, or for any other reason.

On June 10, 2020, the TLA issued a request to its members for commentary on the Ministry's June 5, 2020 letter. We have received 16 responses, all of which are attached in Appendix "A" to this submission. We encourage you to read them as they represent the diverse opinions of legal professionals in Toronto.

Taking these comments into consideration, the TLA's Advocacy Committee has reviewed and considered the Ministry's questions. This Committee, like the Board as a whole, has representation from a wide variety of practice areas, including both members of the plaintiff's personal injury bar and the insurance defence bar. Given the request for immediate feedback, on behalf of its membership, the TLA provides the Ministry with its preliminary answers to the following questions:

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?*

***Should Civil Juries Be Eliminated Altogether?***

The TLA is of the view that civil juries **should not** be eliminated in Ontario at this time. There are current legislative mechanisms by which the judiciary could exercise its discretionary gatekeeping function to ensure that overly complicated matters, or matters not reasonably suited for a jury trial for a variety of reasons, proceed to trial by Judge alone. As an example of potential reform, this judicial scrutiny could take place as part of the pre-trial conference process through which each action must proceed. This would ensure a reasoned, case-by-case analysis of the propriety of civil jury use as opposed to a blanket elimination or restriction of their use based on area of law or type of action.

In answering the Ministry's questions, we have considered the current legislation, the rationale for the use of civil jury trials in our civil justice system and the value added to the civil justice system through their use.

***The Current Legislation***

The current wording of Section 108(1) of the *Courts of Justice Act* states as follows:

> 108 (1) In an action in the Superior Court of Justice that is not in the Small Claims Court, a party may require that the issues of fact be tried or the damages assessed, or both, by a jury, unless otherwise provided. R.S.O. 1990, c. C.43, s. 108 (1); 1996, c. 25, s. 9 (17).

Section 108(2) restricts the use of civil juries in actions proceeding under Rule 76 of the *Rules of Civil Procedure* unless a Jury Notice has been delivered in the action prior to January 1, 2020. The Ministry's amendments to the Simplified Procedure, Rule 76, only just came into force in January 2020, raising the monetary limit to $200,000 and eliminating juries for these cases. The Ministry, Courts and the profession have not yet had a reasonable opportunity to study the effects of these changes on trial outcomes and improving courtroom efficiencies. As a great many personal injury cases fall within the new monetary jurisdiction, we urge the Ministry to delay further changes to the civil jury system until the effects of the amendments to Rule 76 can be reasonably evaluated. It is likely that this amendment will already result in a significant reduction in the number of civil

jury trials in Ontario. An assessment of the impact of the elimination of jury trials in the context of actions under Rule 76 is viewed by the TLA as a critical and necessary step to inform any potential future partial or complete elimination of civil juries in cases outside of the simplified rules actions.

Although not tested by empirical data, civil jury trials often conclude with damages awards of less than $200,000. If the amendments to Rule 76 result in many cases being properly brought under that Rule, there should be no concern about civil jury trials causing undue inefficiencies in our system because they will occur with less frequency. The cost sanctions for bringing actions under the ordinary procedure (and thereby permitting a civil jury trial) should have a substantial deterrent effect against cases being brought under the ordinary rules, if the reasonable expectation is an award under $200,000. However, since only a few months have passed since the Simplified Rule amendment, it is too soon to tell whether fewer jury notices are being filed, and fewer jury trials scheduled.

Section 108(2) also restricts the use of civil juries in actions that involve a claim for any of the following kinds of relief: injunction or mandatory order; partition or sale of real property; relief in proceedings referred to in the Schedule to section 21.8; dissolution of a partnership or taking of partnership or other accounts; foreclosure or redemption of a mortgage; sale and distribution of the proceeds of property subject to any lien or charge; execution of a trust; rectification, setting aside or cancellation of a deed or other written instrument; specific performance of a contract; declaratory relief; other equitable relief; and relief against a municipality. Additionally, jury trials are effectively never used in commercial cases.

While the *Courts of Justice Act* and the *Rules of Civil Procedure* afford parties the right to a jury trial (with some enumerated exceptions), they also allow for Judges to exercise discretion on a case-by-case basis to order Judge-alone trials. Section 108(3) specifically allows for the Court to order that issues of fact may be tried or damages assessed, or both, without a jury. Additionally, Rule 47.02 (2) permits a Judge to strike out a jury notice on the ground that the action ought to be tried without a jury. Rule 47.02(3) provides that even where an order striking out a jury notice is refused, the refusal does not affect the discretion of the trial Judge, in a proper case, to try the action without a jury. Hence, the Court already has a broad discretion to compel a trial without a jury in cases where the Judge concludes that trial by jury is inappropriate. If the Ministry is seeking to gain efficiencies by reducing the use of jury trials in complex or otherwise inappropriate cases, it is the TLA's view that Judges are in a better position to decide which actions, if tried by a jury, would create disproportionate inefficiencies in our Courts.

***The Rationale For The Use Of Civil Jury Trials And Their Value In Our Civil Justice System***

The substantive right to a civil jury trial has long been recognized. It is an integral part of Ontario's civil justice system[1]. The right to trial by civil jury is, therefore, not one to be taken away lightly[2].

[1] *Kapoor v. Kuzmanovski,* 2018 ONSC 4770 at para. 77

[2] *Hunt (Litigation Guardian of) v. Sutton Group Incentive Realty Inc.* (2002), 60 O.R. (3d) 665 (C.A.) at para. 73

There is an important social and public policy rationale for the continued use of civil juries in Ontario. Ontario is a diverse province, with individuals from many social, cultural, racial and religious backgrounds. While smaller communities may be comprised of relatively homogeneous populations, urban centres are heterogeneous. Against this social backdrop, civil juries provide a vast array of life experiences including different socioeconomic, racial, cultural and gender-based perspectives. Jurors inherently bring with them community values and approach cases with their own unique lens.

To eliminate civil juries in Ontario, in whole or in part, would erode the development of law based upon the evolving social values of the populations to which the law applies. The law must develop in accordance with social norms and mores. Judges, while eminently qualified to render decisions in our Courts, arguably lack the diverse life experiences of the vast majority of our public. It is unlikely that judicial study or training can compensate for the lived experiences of civil jurors.

***Alternate Approaches To Increased Efficiencies In Our Civil Justice System***

If the Ministry's main concern with civil juries is that jury trials are typically lengthier (and therefore less efficient) than Judge-alone trials, we currently lack empirical data demonstrating that a shift to Judge-alone trials would have the desired impact of reducing Court backlogs and improving systemic access to justice issues. We do not know if more, or fewer, or the same number of cases would proceed to trial in the absence of a jury. Eliminating juries does not necessarily translate into more available courts for a static number of trials. It should be noted that while the elimination or restriction of the use of civil juries in Ontario may create efficiencies for individual actions, it may produce the unintended consequence of encouraging litigants to pursue trials (as opposed to settlement) due to what is perceived as a more timely and affordable process.

Further, while a jury trial may take up more court time, it does provide speedier access to justice in that the decision will be delivered promptly by the jury, and not held on reserve by a trial Judge for sometimes months while the Judge labours over his or her reasons for judgment. Appeals from jury trials are few and far between.

The TLA does not support a blanket elimination or restriction of civil jury trials based on type of action or area of law as a middle ground. Trials are as unique as the individual litigants. Some may be more suited to a jury than others, regardless of the cause of action.

Rather, the TLA proposes that the *Rules of Civil Procedure* be amended to afford greater discretion to judges to strike jury notices at the pre-trial stage where, having regard to the matters in issue in any given action and the overall conduct of the proceeding, to proceed via jury trial would be disproportionately time-consuming, rendering that process unfair to the jurors or unduly burdensome to the courts.

Although the concept of restricting the use of civil juries to increase systemic efficiencies does not appear to have been considered in the jurisprudence to date, there is ample caselaw on the issue of striking jury notices where actions are overly complex. For example, in *Kempf v. Nguyen*[3], the Court of Appeal for Ontario reviewed the principles espoused in *Cowles v. Balac*[4] pertaining to striking out jury notices and appellate reviews of such decisions. In *Cowles,* O'Connor A.C.J.O. states that on such reviews, the appellate court should inquire into whether there was a reasonable basis for the trial Judge's exercise of discretion. If not, the trial Judge will have made a reversible error[5]. Complexity of a case is a proper consideration in determining whether a jury notice should be struck[6]. While O'Connor A.C.J.O. was referring to complexity as it relates to facts, evidence and legal principles to be applied, there seems to be no reason as to why systemic inefficiency cannot also be considered a form of complexity that might warrant ordering a Judge-alone trial on a case-by-case basis.

For those concerned with the prospect of Judges exercising discretion to strike jury notices improperly, the appellate court provides a meaningful oversight mechanism in ensuring that trial Judges' discretion is exercised reasonably.

The concept of permitting the judiciary to control the use of civil juries is not new. This recommendation was made in Justice Coulter Osborne's Findings and Recommendations to the Ministry of the Attorney General in November 2007 as part of the Civil Justice Reform Project[7]. In His Honour's Report, he stated as follows:

> The *Courts of Justice Act* should be amended to permit the court to dispense with a jury on its own motion. It should prescribe the following test to be applied by the court when deciding whether or not to strike a jury notice:
>
> > Whether justice will be served better with or without a jury, after considering all relevant factors, including the facts of the case, the technical nature of the evidence, the complexity or uncertainty of the relevant law, the predominance of substantive legal issues over factual issues, the interwoven issues of fact and law, and counsels' positions;…[8]

On the issue of proportionality and the cost of litigation, Justice Osborne stated "The Rules of Civil Procedure should include, as an overarching principle of interpretation, that the court and the

[3] *Kempf v. Nguyen*, 2015 ONCA 114
[4] *Cowles v. Balac* (2006), 83 O.R. (3d) 660 (C.A.), leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 496
[5] *Ibid* at para. 52
[6] *Ibid* at paras. 48-49
[7] Civil Justice Reform Project – Findings and Recommendations (2007) [https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/]
[8] *Ibid*, List of Recommendations at para. 28

parties must deal with a case in a manner that is proportionate to what is involved, the jurisprudential importance of the case and the complexity of the proceeding."[9]

***If Civil Jury Trials Were To Be Eliminated, Are There Certain Action Types That Should Be Exempt?***

There are certain causes of action that draw particularly upon societal norms and mores in both assessing liability and damages. Subject to our recommendation, above, regarding providing judges with greater discretion to do away with civil juries, we agree with and adopt the submissions of our members Mr. Talach and Ms Wilkinson, Ms. Jellinek and Ms. Merritt that civil sexual abuse cases should continue to have the option of trial by jury.

Other causes of action that require consideration of social norms and mores, and therefore, for which civil trials ought not to be abolished are: privacy breaches, defamation, malicious arrest and prosecution, civil contempt, and Charter breaches.

Thank you for considering these comments. Our Advocacy Committee would be pleased to discuss these comments with the Ministry, should you find additional consultation beneficial.

Yours very truly,

Brett Harrison
President
Toronto Lawyers Association

[9] *Ibid*, List of Recommendations at para. 79

**APPENDIX "A"**

**Responses to TLA's June 10, 2020 Email Request for Commentary**

"My input is scrap the time wasting jury trials. Please pass on my input."

"I fully support the temporary suspension of all civil jury trials to deal with pandemic-related backlog. I support the permanent end to civil juries with specific exceptions for matters of public/community importance (ie. matters of import beyond the parties to the case) or matters involving a person's character, for example: professional negligence, matters involving punitive damages, defamation or malicious prosecution."

"I am in agreement with the Attorney General that all forms of Civil Juries be eliminated. The reason is it only causes delay, makes litigation more expensive in addition to putting jurors in uncomfortable position as they have to leave their work, stay away from families. People at large are always reluctant to be called for Jury Duty. COVID 19 has almost made it impossible to have a jury trial any time sooner."

"Mr Downey,

Your letter of June 5, 2020 respecting a proposal to eliminate civil jury trials in Ontario, and addressed to "stakeholders", has come to my attention. As a practitioner called to the Bar in 1981, and having taken over 100 civil jury trials to verdict, I suppose that I qualify as a stakeholder. The comments which follow are personal to me, and are not those of my firm, my partners or my clients. I have copied this email to the appropriate representatives of the Advocates' Society, Canadian Defence Lawyers, OTLA and the Ontario Bar Association.

I start with the observation that a request for feedback dated June 5 with a deadline for response by June 15, particularly in this environment, is not indicative of a sincere desire to obtain feedback. This important issue requires due consideration. I urge you to abandon the June 15 deadline to allow for fulsome responses from the individuals and organizations which might have useful input.

I recognize that this issue has developed a political connotation. The issue as to the value of civil jury trials should not be viewed with the bias of anyone's short term view of what is best for his our her group. There is a perception that liability insurers insist on jury trials, and that the plaintiffs' bar prefers that matters proceed non-jury. However, some of my insurance clients prefer that matters proceed non jury. Some plaintiffs' counsel prefer to have their cases heard by a jury. In my early days of practice, it was almost universally held that plaintiffs preferred juries. Now, anecdotally at least, it seems that it is the defence which prefers juries. This will likely change again. This should not be considered as a plaintiff group versus defence group issue. This is not a political issue.

Of the civil trials I have been personally involved in, I have won my share and have lost my share. In most I acted for the defence, in many for the plaintiff. In every case however, I have come away with the view that the jury got it mostly right. The balance of thought and experience which six jurors bring to the process is likely, in my view, to result in a fair outcome. No single judge can apply the depth of life experience to the case that six jurors, properly instructed, can do. There is

no evidence that judges sitting alone are more capable of making findings of fact or assessments of damages which are "better" than those rendered by juries.

There are thousands of cases in which judges have extolled the virtues and benefits of the civil jury system. I will trouble you with reference to a single example – *Ward v James* [1966] 1 Q.B. 273. I can do no better than to cite Lord Denning at some length:

*On the general question of the suitability of trial by jury for personal injuries cases, the defendants' criticisms amount to an attack on the whole system of trial by jury. But for 500 years the normal method of trial in all civil cases was by jury, which is the foundation of our liberties and is a common law right which is highly valued. The mode of trial was not altered until the Common Law Procedure Act, 1854. Such a highly valued common law right cannot be taken away except by clear words in a statute. It was largely taken away during the 1914 to 1918 war but largely restored by the Act of 1933. Some cases, such as those relating to sale of goods, are not now heard by juries, but they do not touch the life or reputation of the ordinary citizen. In cases which do, such as personal injuries actions and defamation actions, the right to trial by jury is important. Jury trial in personal injuries cases has declined in recent years, not because of any defect in the system, but because they are not asked for: see per Lord Devlin in the >Hamlyn Lectures, 8th series, Trial by Jury, Chap. 6, p. 143. Nevertheless the right to trial by jury remains. Juries have tried personal injuries actions ever since the eighteenth century and there has been no real dissatisfaction with their awards until the last few years: see Morey v. Woodfield (No. 2) [FN70]; Warren v. King [FN71] and Every v. Miles. [FN72] Lack of uniformity of awards may give ground for criticism. In some cases a jury may go badly wrong, but so [*287] might a judge alone. Defects in a system are not a ground for abolishing the whole system. Criticism has developed since the publication of awards of damages by Current Law since 1947 and by Kemp and Kemp on Damages since 1954. It would be startling to think that those publications were to have the effect of abolishing trial by jury in personal injuries actions. There is a considerable body of judicial opinion since Bird v. Cocking & Son Ltd. [FN73] that a jury is a proper tribunal for the trial of these cases: see, for example, Rushton v. National Coal Board [FN74]; Waldon v. War Office [FN75]; Dolbey v. Goodwin, [FN76] per Lord Goddard C. J. [FN77]; Bocock v. Enfield Rollings Mills Ltd. , [FN78] per Singleton L. J. [FN79] and Scott v. Musial, [FN80] where Morris L. J. [FN81] quoted the views of other judges to the effect that a jury was the proper tribunal to try serious personal injuries cases. In Pease v. George [FN82] all three members of this court said the same. Those cases show that judges have taken the view that juries, unaided as they are, are good tribunals, perhaps the best for deciding these cases. There may be certain categories of cases, such as loss of a limb or an eye, where knowledge of the scale of awards given in other cases might assist a jury in coming to a decision, but there can be no scale for cases such as nervous illness, life-long headaches resulting from injury, or a brain injury turning a boy into a criminal psychotic. In such cases there is no reason why a jury should not be able to assess the damages as well as a judge, to whom awards in comparable cases are rarely cited.*

Today, an Ontario jury receives extensive and detailed instructions on how to proceed. They are not asked to render a verdict at large. Rather, they are asked to answer specific questions. The judge and/or counsel may suggest a range of damages. The risk of a jury going rogue (or "badly wrong" as suggest by Lord Denning) is very low, and certainly no higher than the risk of a single judge doing much the same. A senior Superior Court judge once told me that if a jury of six citizens was of the opinion that the general damages assessment for a particular injury was $x, who was he to think otherwise?

If the real motivation for the proposal to do away with civil jury trials in Ontario has to do with achieving some savings in costs, then you should just say so. We can certainly save some money, I am sure, but at the social cost of a diminishment in the quality of justice.

I hope that my comments are of some benefit to you and your colleagues, as you consider this important issue."

"A few thoughts:

- The current Civil Jury system is a remnant of a time when citizens could be tried by their "peers".
- It should not, however, be viewed as an inferior form of justice – rather it is a different form of justice and so the question for MAG as a public policy must be: can we afford to give up the different form of justice?
- A judge alone trial differs markedly in both its pace and the advocacy skills required – the plain spoken counsel will get her or his message across more effectively to a jury than a technician schooled in lawyer's speak – the different form of justice, familiar to the criminal bar, is now likely confined to the personal injury and defamation bars as no self-respecting commercial litigator would ever advise her or his client to file a Jury Notice whether prosecuting or defending a civil claim. Truth is most modern commercial litigators have never seen or tried a Jury case and would not know how to conduct one if asked.
- Those of us of a certain vintage who have had the privilege of trying both jury and non-jury Civil cases would likely agree the jury trial is only suited for trials up to a certain length and complexity – although technology could and should improve both the efficient running and the jury panelists engagement in such cases – but it begs the question of what purpose is truly served.
- MAG is likely looking more administratively at the "cost" of continuing to equip court houses, house jury panels, and manage the court time consumed by choosing juries, staffing for this and etc. particularly in the current COVID environment –
    - and this is a legitimate concern particularly in Toronto as it could impact the design, layout and functional space available at the new court house complex currently under construction
    - the question for MAG is whether the cost for different Civil justice is sustainable for the select class of cases where a Jury Notice is most likely to be served and filed as of right –

- some provinces either never had them or did away with them except in defamation cases where the public might be best placed to judge the value of injury to reputation or etc. –

- so it might make sense to keep the right to a Jury trial in such cases, while eliminating it in all other cases –

- this would mean a jury pool being tapped only occasionally for such cases, leaving the pool more available for the criminal side and also reducing the number of civil courts requiring physical space for a jury panel, jury deliberation room, security attendant to the effort particularly in larger centres, while also reducing judge administration time and etc.

- In sum,

    - a complete end would spell also the end of that different kind of justice which should remain as it does serve a purpose in a certain kind of case – a public policy issue, whereas restricting the right to Civil Jury trials to just defamation cases would preserve it at a much reduced cost and focused on those types of cases where a jury trial makes some sense.

    - Those in the Personal Injury bar (both defence and plaintiff) would likely argue there is no substitute for the 6 sensible members of the public making factual findings where credibility is at issue and the "story" needs telling –

    - Having tried such cases earlier in my career, I do not hold the view that the jury system as a different form of justice is necessarily the best or most efficient for such cases.

- Overall, there is not the public policy component to drive keeping the right to a Jury Notice in personal injury cases, in my view, particularly given the highly expert-driven approach now taken to cases of any consequence litigated in that area – on smaller p.i. cases there is simply no improvement in the result and while these were routinely tried in a previous era, such cases did not get bogged down the way even judge-alone cases do these days – so with the increased court time and resources required, given the choice, the public would question why a jury is required to try the facts of a personal injury case – whereas a defamation case might resonate more meaningfully for the judgment of one's community or "peers".

Hopefully some of this is of assistance in the TLA's submission…"

**Rob Talach, Beckett Personal Injury Lawyers**
**Claire Wilkinson, Martin & Hillyer**
**Simona Jellinek, Jellinek Law Office Professional Corporation**
**Loretta P. Merritt, Torkin Manes** (combined in 1 commentary)

"Rob Talach, Claire Wilkinson and Simona Jellinek (who practice in the area of civil sexual assault) all agree that taking away the right to a jury in civil sexual assault cases is a mistake. Juries are a critical part of access to justice for sexual abuse survivors. For these plaintiffs pursuing civil litigation is an important step in the healing journey. Survivors are looking for much more than money; they are looking to be heard, to hold people to account, to shift the blame (children wrongly blame themselves), for healing, for justice, for closure, etc.

The courts have long recognized that civil sexual assault cases are different) and special considerations apply (see KM v. HM in the SCC).

For many abuse survivors holding institutions and perpetrators to account to juries made up of members of the public is a critical reason they pursue civil claims.

To eliminate juries is to take away an important element of control and thus to re-victimize sexual abuse survivors.

Below are some comments prepared by Rob Talach. Rob has given me permission to share them with you.

**Civil Jury Trials for Sexual Abuse Lawsuits**
Sexual abuse is a devastating and prevalent aspect of society. An aggravating element is the fact that victims are hesitant to disclose and pursue legal recourse. To limit the individual and collective damage of sexual abuse and to encourage victims to apply the legal system, governments have carved out various exceptions within the law. One clear example is the absence of limitation periods in both criminal and civil law. Another is the mandate for an increased scale of costs for victim plaintiffs. There is even a specific Act entitled the Victim's Bill of Rights, 1995. Retaining the option of a civil jury trial is another exception which should be seriously considered for the following reasons:

1. Society's Moral Standards & Legitimacy – sexual abuse cases are often about society's moral standard, analogous to the "community standards" test. For it to be a true community standard it should be judged by actual everyday members of that society. This adds legitimacy to trial outcomes and avoids the "judges are out of touch" view of verdicts. Law needs input from the citizenry and civil jury trials do that.

2. Balanced Rights – in a sexual abuse scenario there are two fundamental parties; the perpetrator and the victim. In the criminal setting the perpetrator has a right to trial by either judge or judge and jury. To eliminate the option of a civil jury trial for the victim gives them less legal rights than the perpetrator. The existing "offender-centric" nature of the

criminal legal system has already deterred victims. Victims will feel even less empowered if their jury option in civil lawsuits is taken away. Balance must be maintained.

3. Distrust of Authority –this is a common effect of sexual abuse and is also a major inhibitor of victims engaging with the legal system. When the trier of fact is a judge they represent an authority figure and may limit the willingness of victims to pursue legal remedy. A jury of average citizens does not represent authority in a way adverse to victims. Related to this is the vindication of a trial outcome which represents society's judgment and not that of an individual person. This can be a very powerful aspect of healing for victims and a message to perpetrators and their enabling institutions.

4. Educating the public – service on a jury is an education, not only in the subject matter of the trial but also in the legal system itself. Jurors who serve on sexual abuse civil trials leave the courtroom better educated in an important subject and become advocates and ambassadors of the legal system in that area of law. Continuing with civil jury trials in sexual cases maintains the "justice academy" which is a central side-effect of service on a jury. This makes society more aware, vigilant and compassionate to victims.

5. Duration & Frequency – one of the drivers for the elimination of juries is lengthy trials. Sexual abuse cases don't tend to be long complex ordeals which take jurors away from their lives for months. This advantage of the elimination of juries does not apply in cases of sexual abuse. The spectre of a civil jury trial can also be an incentive towards resolution for the parties and in my experiences reduces the frequency of trials. This provides efficiency to the court system and can avoid the trauma of a trial for the victim plaintiff.

6. Defendant's Rights – in this connected online society, an adverse finding in a civil case will be broadcasted to the world and carry considerable reputational harm. While not as serious as a criminal finding, it is harmful to the defendant in ways beyond their personal liberty. It therefore should be a right for a defendant to have access to a civil jury as a trial option as they do in the criminal setting. Again, to give the option to the one party without extending the option to the other creates an imbalance and the wrong perception of the legal system."

"I used to do jury trials years ago. In some cases, they were preferred for various reasons. They are a vital part of our civil system. At the end of the day, if juries were eliminated, there may not be better access to timely justice, particularly given limited judicial resources. If a judge has to prepare reasons, this can take many months in some cases. A jury returns a verdict at the end of trial. In my experience most juries are comprised of very conscientious individuals who follow the

arguments and evidence remarkably well. Some judges particularly excel in presiding over jury trials and make counsel's job enjoyable."

"I have done litigation in Ontario for 50 years. There is one principle that those who want to abolish juries will ever have a response to that ever has any merit. The principle is 'Juries are a timeless answer to make the Administration of Justice fair because what is legal is not always fair'."

"I understand the TLA is considering a formal submission on the governments proposal to end the civil jury system. I would strongly urge you to do so. Having practiced civil litigation for 33 years now, I am convinced that a trial of the issues by a group of peers, having no legal training and relying only on the evidence presented and instructions provided by the presiding Judge, is the best and fairest method to achieve a just result. We should not place the goals of efficiency, expediency and cost savings ahead of justice."

"In my experience, use of civil juries is rare; however, I am in favour of retaining the option. In sum, I think their availability and occasional use serves as a useful brake on judicial excess and bias, if I can put it that way. Perhaps you can find a more diplomatic way to say, but in short, there are circumstances where a party can have a higher degree of confidence in a fair result with a jury than with a judge. I wouldn't want to lose that."

"I will advise briefly in this short email that I am totally against the suspension of the Jury system in the short term or long term.

I question further why the Attorney General is allowing such a short period of time for submissions of lawyers (for their clients) with respect to such a fundamental issue and actual cornerstone of the Justice system in this province."

*"Jury trials in civil cases seem to exist in Ontario solely to keep damages awards low."*
-Justice Frederick Myer in *Mandel v. Fakhim*, 2016 ONSC 6538 (CanLII)

*If anything, the fact the jurors are savvy about car insurance leans in the other direction. Jurors are aware that larger insurance awards can increase the costs of the car insurance premiums they pay. The Ontario Law Reform Commission noted that one speculative explanation for the tendency of juries to make lower awards than judges was "the jurors' self-interest in keeping insurance premiums low": Report on the Use of Jury Trials in Civil Cases (Toronto: Ontario Law Reform Commission, 1996), at p. 28.*
-Justice Lauwers in *Girao v. Cunningham*, 2020 ONCA 260 at para. 81

I am responding to Ms. Rataic-Lang's email of June 10, 2020 regarding submissions on civil jury trial amendments. I am a personal injury lawyer and, as can be expected, I am in favour of a complete abolition of jury trials in this province for civil matters with the following exceptions:

1) Defamation/slander/libel;

2) Civil fraud;

3) False imprisonment;

4) Malicious arrest;

5) Malicious prosecution; and

6) Sexual assault.

I am opposed to jury trials on the basis of the cost to a injured party. In my experience, a trial that could be conducted in five to seven days is often two to three times longer if it involves a jury. In trials, an inordinate amount of time is spent between counsel on what the jury can and cannot hear. In motor vehicle accident claims, for example, juries are not told about the threshold or the statutory deductible. In some instances, counsel dispute there being any evidence of an accident benefit settlement on the basis that the jury may be prejudiced. This has implications on what the plaintiff can recover in the way of damages since the jury is not aware of the deductions for collateral benefits by a judge.

I am also opposed to jury trials as jurors are not provided with guidance on the how damages have been assessed in the past for similar types of injury. As noted by Lord Denning in *Ward v. James*[1966] 1 Q. B. 273:

> **"These recent cases show the desirability of three things: First, assessability: In cases of grave injury, where the body is wrecked or the brain destroyed, it is very difficult to assess a fair compensation in money, so difficult that the award must basically be a conventional figure, derived from experience or from awards in comparable cases. Secondly, uniformity: There should be some measure of uniformity in awards so that similar decisions are given in similar cases; otherwise there will be great dissatisfaction in the community, and much criticism of the administration of justice. Thirdly, predictability: Parties should be able to predict with some measure of accuracy the sum which is likely to be awarded in a particular case, for by this means cases can be settled peaceably and not brought to court, a thing very much to the public good. None of these three is achieved when the damages are left ab large to the jury. Under the present practice the judge does not give them any help at all to assess the figure. The result is that awards may vary greatly, from being much too high to much too low. There is no uniformity and no predictability."**

I note that juries have been prohibited in the UK except in limited circumstances since 1981. According to s. 69 of the *Seniors Court Act 1981*:

Trial by jury.

(1) Where, on the application of any party to an action to be tried in the Queen's Bench Division, the court is satisfied that there is in issue—

(a) a charge of fraud against that party; or

(b) a claim in respect of malicious prosecution or false imprisonment **(since removed due to the *Defamation Act 2013 (c.26*);** or

(c) any question or issue of a kind prescribed for the purposes of this paragraph,

the action shall be tried with a jury, unless the court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury or unless the court is of opinion that the trial will involve section 6 proceedings.

(2) An application under subsection (1) must be made not later than such time before the trial as may be prescribed.

(3) An action to be tried in the Queen's Bench Division which does not by virtue of subsection (1) fall to be tried with a jury shall be tried without a jury unless the court in its discretion orders it to be tried with a jury.

(3A) An action in the Queen's Bench Division which by virtue of subsection (1) or (3) is being, or is to be, tried with a jury may, at any stage in the proceedings, be tried without a jury if the court concerned—

(a) is of opinion that the action involves, or will involve, section 6 proceedings, and

(b) in its discretion orders the action to be tried without a jury.

(3B)Where the court makes an order under subsection (3A)(b), it may make such other orders as it considers appropriate (including an order dismissing the jury).

(4) Nothing in subsections (1) to (3B) shall affect the power of the court to order, in accordance with rules of court, that different questions of fact arising in any action be tried by different modes of trial; and where any such order is made, subsection (1) shall have effect only as respects questions relating to any such charge, claim, question or issue as is mentioned in that subsection.

(5) Where for the purpose of disposing of any action or other matter which is being tried in the High Court by a judge with a jury it is necessary to ascertain the law of any other country which is applicable to the facts of the case, any question as to the effect of the evidence given with respect to that law shall, instead of being submitted to the jury, be decided by the judge alone.

(6) In this section "section 6 proceedings" has the meaning given by section 14(1) of the Justice and Security Act 2013 (certain civil proceedings in which closed material applications may be made).

As a final note, I believe that there is an access to justice issue. Many of my clients are looking to resolve their claims as soon as possible because they do want to get on with their lives. I have found that getting a matter to trial, especially when it involves a jury, results in the matter being delayed on average two years. Thus, the injured person cannot access justice in a timely fashion and this can have an immense emotional toll on the client. I do admit that this is simply anecdotal but this has been my observation.

Thank you for your time.

“I understand that OTLA will be making a submission with respect to possible amendments to the Courts of Justice Act pertaining to the operation of juries, at least for the next several months.

Whether or not the use of juries is appropriate on a long term basis is one matter, however, the short term problem which is being created is that juries will not likely be sitting in the Province of Ontario (at least in Toronto) for the next several months. All matters which were scheduled to be heard in Toronto commencing in mid-March and continuing up to June 30, had to be adjourned. Unless the Act is amended to provide for no juries in actions in which Jury Notices have been delivered from and after September 1, 2020, at least for a few months, further matters will have to be adjourned, for periods up to two and three years.

Accordingly, at least for the short term, and in an effort to avoid adjournment of matters on a wholesale basis, matters should be permitted to proceed before a Judge alone. Regardless of the allegedly fundamental right to proceed before a jury in many actions, that right should not prevail over the reasonable right of litigants to have their cases heard in a timely matter. For example, I have two lengthy jury actions to proceed in September and November 2020. The September action concerns accidents which took place in 2009 and 2012. The November action concerns accidents which took place in 2009 and 2010. It would be unjust for those cases not to be permitted to proceed as scheduled.”

“Dear Ms. Amanda Iarusso,
Re: Your Reference #: M-2020-6430

I write this submission in favour of keeping juries on civil cases, particularly those involving motor vehicle accidents, falls, or other incidents, even if insurance is in the background.

I have been a lawyer in Toronto since 1979. I was president of the Toronto Lawyers Association in 2010.

My practice is currently on behalf of the defence in most situations, but historically about 25% of my practice was on behalf of plaintiffs.

We now have a situation where juries are excluded from cases in simplified procedure.

It is my view that this situation should be maintained for perhaps three years until any factual analysis can be done concerning the impact on the public, and the impact on the civil justice system.

During my term as a member of the Board of Directors of the TLA, I was specifically on the simplified procedure committee for I believe four years. We had quarterly meetings. It was my experience that the judges on our committee were against juries at that time. At each meeting, I asked the representative from the court as to how many jury trials had proceeded in simplified procedure. The answer for four years, four meetings a year, was always zero.

The risk of proceeding with a jury causes all sides to reflect properly on their claim and assists the administration of justice by resolving and disposing of those actions.

There are fewer trials as I result. I am concerned with comments from friends of mine who only do work for plaintiffs, that they will push more cases to trial by judge alone. Their view is that they will get more money and have no risk as they currently face with a jury.

I am concerned that we will now inundate the court system with trials by judge alone, which will take more time from the court.

It is my view that juries act as a balance to what is sometimes perceived to be the rarified view from the bench.

Juries bring common sense, a common touch, and a ground view of the reality that the public sees. They do not bring any elitist view to their deliberations.

I am also concerned by the charter rights of the named defendant in any case. This applies whether or not the defendant has insurance.

Compulsory insurance on motor vehicles in Ontario has a minimum limit of $200,000. However, there are numerous owners of vehicles who have chosen not to get insurance.

Most statements of claim are in the amount of $1 million or $2 million. The defendants should have the right to elect trial by jury. If they are insured, their insurer must protect them to the limits of their policy only.

The system of justice could be brought into disrepute if an uninsured motorist could elect trial by jury in view of that person's charter rights, while an insured person would not have that entitlement.

When I act for defendants, I am always impressed with the common sense brought to bear by the insured person/defendant. They always question the intent of the plaintiff. They worry about personal consequences to them, whether it is a direct payment, or an increase to their premiums. They like the fact that a jury will hear their case.

The administration of justice is assisted by concerns that all sides have when a jury is hearing a case. Too often, a judge at a pre-trial will give an opinion that is viewed as absolute truth, but may appear to the public to be not in keeping with their view of the case.

We oppose any suggestion that the courts become a place where only a judge can make the decision, rather than as a place where the views of the public can shine through.

Thank you for considering these submissions."

"Further to the request for input regarding Civil juries, we can advise that a number of our firm's insurance company clientele remain in favour of jury trials for civil matters as they have historically found juries to be the most insightful and conscientious appraisers of the facts, standards of care and damages and that juries' views best reflect society's perspective on the matters before them.

Additionally, a number of existing matters have been strategized and litigated thus far with an eventual jury trial in mind, and switching mid-course to a Judge-alone trial may be problematic and unfair."

"Dear Hon. Doug Downey:

Friends and Families for Safe Streets is a group of people whose loved ones were killed in traffic crashes, or who have survived a crash with serious, life-altering injuries. The price of joining our group is an unbearably painful one that nobody should ever have to pay. At the time of the crashes that harmed us, we or our loved ones were walking or riding a bike – using the street as Vulnerable Road Users. We are writing to encourage the abolishment of juries for personal injury cases.

One of our major activities is running a monthly peer support group for victims and bereaved family members. Without exception, at every single meeting our attendees talk about the terrible and draining stress of our personal injury cases against the drivers who killed our loved ones or maimed our bodies. We live in abject dread at the prospect of fighting against a hostile system that is stacked against us, when we did nothing wrong and are not at fault.

Road violence victims are simply ordinary people who didn't sign up for a fight. When we are facing a civil personal injury case against an outright hostile insurance company, we are at our most broken and struggling to carry on with our shattered lives. All we are asking for is the justice and compensation rightfully due to us through a driver's liability policy. The thought of asking for something so simple, and being forced to face a well-resourced insurance company bound and determined to delay and deny justice at every turn, is extremely stressful. It is documented that certain jurors can carry an unacceptable bias against various members within our community. Victims of road violence, people who have been disabled or killed, come in all ages, ethnicities, and from all walks of life. Unfortunately, many characteristics of victims cause them to face day-to-day prejudice and bias. Some of those biases may exist simply based on the fact they were walking or riding a bike and not part of the greater driving public. At times, these biases can seep into the court, and instead of having the issue decided on the facts, the unintentional bias dictates the outcome. Insurance companies know this, but they near-unanimously request jury trials to exploit this bias, and minimize their rightful responsibility to provide compensation to victims on liability policies they made the voluntary choice to issue.

Worse, our members have been shocked to find out that there is no mechanism to evaluate a juror for bias before a trial. This makes the process of a jury trial highly speculative and risky for someone whose life has already been devastated. The general public understanding of a trial is that evidence and case law are be the factors impartially dictating the outcome, but we are told by our lawyers that the jury will be six people off the street and it is unknown what background or bias they may have. The lawyer normally is only granted the name, address and the occupation of the juror and no independent questioning of the juror is generally allowed. Judges have said the same thing at

pre-trials – it's a roll of the dice, as some would say. Cases unfortunately proceed despite this uncertainty.

Further, jury trials take a shocking amount of time to actually happen. Almost nobody in our group has had their personal injury case be resolved or settled in anything less than 6 years, and for many it takes even longer. That is an unacceptable amount of time to be forced to struggle along with inadequate resources to deal with the traumatic outcome of a sudden, violent bereavement or severe injury. A main reason for the delay is waiting for a jury trial in a backlogged court system where we are the last priority. For all the years spent waiting, victims can't afford desperately-needed physiotherapy or mental health care, and their condition deteriorates instead of getting better. It means that children go without grief counselling when their parent is killed. It also means costs of the limited range of medical treatments covered by OHIP, which leaves very significant health care gaps, is transferred to the general taxpaying public, which is patently unfair when the damage was caused by an insured driver. After all, the entire point of liability insurance is to take care of these costs without dipping into the public purse. Excessive delays and shifting expenses to taxpayers only serves the insurance company's interests. These delays and increased taxpayer burdens are the opposite of being in the public's best interest.

Abolishing the jury in personal injury cases would address all of these issues. It would eliminate the undue stress and hostility that victims and families face, and guarantee fairness by eliminating bias carried by jurors. It would speed up personal injury cases greatly and help people move on with their lives sooner. Remember, justice delayed is justice denied. The issue of delays has become especially important in the time of Covid-19 where courts are closed for the foreseeable future, and we don't know when juries will be able to congregate again. Obviously, a huge number of personal injury cases will face long delays, and innocent people will be negatively impacted.

Beyond improving timely access to impartial justice, from an economic perspective, forcing people to take time off from their employment and potentially away from their families for jury duty to do a task that a judge is better suited to do is a waste of time and resources. Also a waste of resources is the expense of clerks and other court employees that is invoked by a jury trial. Abolishing juries for personal injury cases would speed up our processes and save Ontarians a lot of money.

For all of these reasons and from our painful personal experiences, we strongly urge the abolition of juries for personal injury cases.

Thank you for your consideration."