Civil Juries in British Columbia:
Anachronism or Cornerstone of the Civil Justice Process?

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CONTENTS

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A. Introduction

The civil jury is a vestigial encrustation on the justice system that drives up costs, clogs court calendars and leads all too often to mistrials and the need for re-trial. The civil jury is part of the bedrock of democracy and infuses the values of the community into the civil justice process. These opposing views of the jury are the themes running through almost all commentary on this ancient feature of the civil justice systems of common law Canada that is both disdained and revered.

In July 2020, the Attorney General sought comment on proposals for dealing with a massive backlog of postponed civil, criminal, and family law trials resulting from the coronavirus pandemic. The backlog was anticipated to continue to disrupt the court system after the public health emergency ended and take years to clear. Among the proposals for dealing with the backlog was a one-year suspension of civil jury trials. Civil jury trials were then, and remain, temporarily suspended due to the pandemic. At the same time as seeking comment on proposals to deal with the backlog of postponed trials, the Attorney General also invited comment on the possible elimination or restriction of civil juries as a permanent measure. Subsequently, the suspension of civil jury trials was extended in two stages in light of the continuing public health emergency until 8 October 2022.

In November 2020, the Ministry of Attorney General requested BCLI to carry out comparative legal research on civil juries and outline options for reform that would extend beyond the end of the emergency period. This invitation was presented, and accepted, on the footing that BCLI would conduct the research and carry out informal consultations in connection therewith, but would not itself make recommendations or take a stance as an organization on changes to the status of civil juries. This paper contains the results of

BCLI's research and consultation and presents several possible options for reform with discussion of their implications, without containing any recommendation to proceed with any one of them or expression of preference for one over another.

Essentially, the reform options discussed in this paper are:

1. Preservation of civil juries, with or without changes to law and practice concerning jury instructions and the powers of the trial court and Court of Appeal to review problematic verdicts.

2. Restriction of jury trial to particular causes of action where it is conventionally considered the appropriate mode of trial: defamation, false imprisonment, and malicious prosecution. This option too could be accompanied by reforms to law and practice relating to jury instructions and the powers of the trial and appellate courts to review verdicts.

3. Abolition of jury trial in civil matters.

4. Indefinite extension of the current suspension of jury trials to permit consultation on the previous three options and determine if court systems work better without civil jury trials.

All of these options are open to the provincial legislature. In dicta repeated in many lower court judgments, the Supreme Court of Canada has referred to trial of a civil cause of action by jury as "a substantive right of great importance of which a party ought not to be deprived except for cogent reasons."[1] In contrast to criminal juries, however, no constitutional barrier prevents a province from restricting the availability of civil juries or even eliminating them altogether, as one province has done.

We would sound a note of caution, however. All academic and professional discourse regarding the civil jury in Canada suffers from a lack of comprehensive empirical data on the cost and efficiency of civil juries. As a result, it is excessively anecdotal and speculative, permeated by assumptions untested against hard empirical evidence. This paper is not an

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[1] *King v. Colonial Homes Ltd.*, [1956] S.C.R. 528 at 533. See also *Bhullar v. Atwal* (1995), 15 B.C.L.R. (3d) 198 (S.C.).

exception, although it attempts to make use of empirical data that are currently available. Empirical studies conducted in the past that we have been able to identify are now quite dated, although they may retain value in pointing to tendencies in the use of juries and in jury behaviour that might persist over time.

We cannot be confident about the cogency of arguments based on economic and other cost-benefit considerations that are canvassed in this paper because the hard numerical data that might tend to confirm or refute them are not available and indeed may not exist. As we believe the paper will demonstrate, information gaps about the usage of civil juries and the administrative burden they impose need to be filled in order for a fully reliable profile of the civil jury to emerge.

B. The Civil Jury in British Columbia – Overview

1. Historical Note

In the mid-nineteenth century, when British Columbia's court system was being created, trial by judge and jury was the norm for actions at common law. A proclamation of Governor Douglas of 8 March 1860 authorized the inclusion of non-British subjects on jury panels, and permitted seven-member juries in civil matters if the usual twelve jurors could not conveniently be found in reasonable time.[2]

In 1876, British Columbia enacted a statute entitled "An Act for giving to the parties to civil causes in the Supreme Court the option of having such causes tried by a Judge or Jury."[3] This statute made non-jury trial the normal mode for all civil actions unless a party gave written notice to the other party demanding trial of the issues or assessment of damages by a jury.[4] It required the party giving the jury notice to pay the incremental cost of the jury

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[2] Smith, K., "History and use of Civil Juries" in *Jury Trials 1981* (Vancouver: Continuing Legal Education, 1981) at 8.

[3] S.B.C. 1876, No. 17.

[4] *Ibid.*, s. 1.

initially, subject to recovering the same as taxed costs if that party was successful.[5] It also allowed the parties to waive the jury notice by consent and have the trial proceed by judge alone.[6] Another statute passed in 1876 specified that a civil jury should consist of eight jurors, as well as fixing the number and allocation of peremptory challenges in selecting juries.[7]

The *Supreme Court Rules, 1890* provided that no proceedings should take place henceforth under the 1876 statute.[8] Instead, the rules provided for a right to jury trial in actions for libel, slander, false imprisonment, malicious prosecution and breach of promise of marriage, if timely notice was given to the opposing party.[9] Juries were prohibited in the adjudication of certain other matters, corresponding to many of those now listed in the present Rule 12-6(2).[10] In remaining categories of matters, a party could apply for an order directing a jury trial.[11] The court or a judge could order that a trial take place without a jury on the ground that the trial would require a "prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in their or his opinion conveniently be made with a jury."[12]

This scheme was carried forward in successive iterations of the rules of court, and much of it is still recognizable under the present jury legislation and rules.

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[5] *Ibid.*, s. 2.

[6] *Ibid.*, s. 4.

[7] *An Act respecting the challenging and number of Jurors in Civil Cases*, S.B.C. 1876, No. 23, s. 3.

[8] M.R. 336.

[9] M.R. 329.

[10] M.R. 330.

[11] M.R. 333.

[12] M.R. 332.

Use of civil juries reportedly atrophied in British Columbia from the late nineteenth century until it revived in in the 1950's in relation to personal injury actions.[13] This remains the area in which civil juries are most frequently employed, though the number of actual jury trials is very low in proportion to the number of jury notices that are filed.[14]

2. When Jury Trial Is and Is Not Available

In British Columbia, a civil action in the Supreme Court is tried without a jury unless a party opts to file and serve a Notice Requiring Trial by Jury (jury notice) in Form 47 within 21 days after service of the notice of trial, and at least 45 days before the trial date.[15] This step is open to a party except in specified categories of civil proceedings. The majority of these involve equitable, statutory, and discretionary remedies.

A jury is *not* available in proceedings concerning:

- administration of the estate of a deceased person,
- dissolution of a partnership or the taking of partnership or other accounts,
- redemption or foreclosure of a mortgage,
- sale and distribution of the proceeds of property subject to any lien or charge,
- execution of trusts,
- rectification, setting aside or cancellation of a deed or other written instrument,
- specific performance of a contract,
- partition or sale of real estate,
- custody or guardianship of an infant or the care of an infant's estate.[16]

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[13] Smith, *supra*, note 2 at 10. See also Hon. J.C. Bouck, "Civil Jury Trials – Assessing Non-Pecuniary Damages – Civil Jury Reform" (2002) 81:3 Can. Bar Rev. 493 at 512.

[14] See Tables 1 and 6a in the Appendix.

[15] *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Rr. 12-6(1), (3).

[16] *Ibid.*, R. 12-6(2).

In addition, a jury is unavailable in any proceeding that must be started by petition or requisition.[17]

Fast track actions have been added more recently to the catalogue of proceedings that must be heard without a jury.[18] Proceedings that are subject to the fast track rule (Rule 15) are ones

- in which the only claims are for money, real property, a builder's lien or personal property in which the amount in issue is not more than $100,000,
- that can be tried in 3 days or less, or
- that are brought under the fast track rule by consent or by order.[19]

Actions against the Crown form another statutory exception to the availability of jury trial. No claim against the Crown in right of British Columbia may be tried with a jury.[20] The same is true with respect to a claim against the Crown in right of Canada if the claim is one that is governed by federal law.[21]

3. Jury Fees and Other Pre-Trial Matters Relating to Civil Juries

(a) Jury fees

A party who has filed and served a jury notice and who continues to seek jury trial must pay the sheriff "a sum sufficient to pay for the jury and jury process" at least 45 days before the trial date.[22] The sheriff requires an initial deposit of $1500 by this deadline. This is an estimate of the amount required to pay for the jury and jury process up to and including the first day of trial, jurors' *per diem* payment and allowances for that day of trial, the

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[17] *Ibid.*

[18] *Ibid.*, R. 15-1(10).

[19] *Ibid.*, R. 15-1(1).

[20] *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, s. 4(2).

[21] *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, s. 26.

[22] *Jury Act*, R.S.B.C. 1996, c. 242, s. 17(1).

sheriff staff expense for accompaniment of the jury, and associated administrative expense.[23] If the initial deposit is not made 45 days before the trial date, jurors will not be empanelled and the trial will be by judge alone.

If the trial proceeds with a jury, an additional deposit of $800 per day is required for the second day through the tenth day of trial, $900 per day from day 11 through 49, and $1200 per day thereafter as long as the trial continues. If these amounts are not paid to the sheriff before court opens on each day, the trial will not continue. The daily deposit requirements reflect jurors' *per diem* entitlements and expenses, and an estimate of the cost in sheriffs' time in summoning and empanelling jurors, attending court, escorting the jury, and related administration.[24]

The amounts required to be deposited with the sheriff are treated as costs in the cause, meaning that they are recoverable as costs of the action if the party who has paid them is successful in the outcome.[25]

(b) Jurors' entitlements and allowances

Jurors are entitled to receive $20 per day for the first 10 days of trial, $60 per day for each day thereafter up to and including the 49th day, and $100 per day for each subsequent day until the conclusion of the trial.[26] Jurors are also entitled to receive specified allowances for parking, for travel to and from court, and for child care needed to perform jury duty.[27]

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[23] *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General*), 2016 BCSC 1391 at paras. 71-72; aff'd 2017 BCCA 324.

[24] *Ibid.,* at para.73. The party responsible for paying the jury fees is provided with an actual statement of the cost associated with the jury at the end of the trial. If the amounts on deposit do not cover that cost, an additional amount will be demanded from the party to cover the shortfall: *ibid.*, at para. 74.

[25] *Supra*, note 22, s. 17(3).

[26] *Jury Regulation*, B.C. Reg. 282/95, s. 1.

[27] *Ibid.*, s. 3.

(c) Jury summoning and empanelment

Provincial voter lists are used by sheriffs to summon jurors.[28] Parties may challenge jurors for cause during selection.[29] Each party may also challenge up to four potential jurors peremptorily.[30] In civil matters, the trial often starts immediately after jury selection.

A civil jury in British Columbia has eight members.[31] Unanimity is not required for a verdict. It is sufficient if 75 per cent of the jurors agree on a question put to them, provided the jury has deliberated for at least three hours.[32]

4. Applications to Strike A Jury Notice

In actions other than ones for defamation, false imprisonment and malicious prosecution, a party may apply under Rule 12-6(5) within seven days of service of a jury notice for an order that the trial take place without a jury. This is commonly referred to as an order "striking the jury notice." The court may make the order on the ground that

(i) the issues require prolonged examination of documents or accounts or a scientific or local investigation that cannot be made conveniently with a jury,

(ii) the issues are of an intricate or complex character, or

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[28] Ministry of Attorney General, "Self-registration for juror database" webpage, online: https://forms.gov.bc.ca/justice/self-registration-for-juror-database/. Persons qualified to serve as jurors but whose names do not appear on a voter list may register to volunteer for jury duty.

[29] *Supra*, note 22, s. 20(2).

[30] *Ibid.*, s. 20(3). If there are multiple plaintiffs and defendants, s. 21 of the *Jury Act*, *supra*, note 22 sets out how peremptory challenges are to be allocated between the parties on each "side" of the action.

[31] *Ibid.*, s. 20(1).

[32] *Ibid.*, ss. 22(1), (2).

(iii) the extra time and cost involved in requiring that the trial be heard by the court with a jury would be disproportionate to the amount involved in the action.[33]

Exercise of this discretion to strike a jury notice is highly dependent upon the facts of individual cases, however, and upon the attitude of individual chambers judges toward the sanctity of jury trial. The cases decided under this rule are not readily reconcilable, and it is difficult to draw governing principles from them.

In commenting on the application of the discretion to strike a jury notice on these grounds, the Court of Appeal has stated that the right to jury trial is "imbedded deeply in the history of our law," and a litigant is not to be deprived of that right unless the case is clearly within an exception created by law.[34] It is clear that the onus rests on the applicant to justify displacing an opposing party's presumptive right to jury trial, and the onus has been said to be one that is not easily satisfied.[35]

A marked reluctance to strike out a jury notice can be observed in many of the case authorities, even when the scientific evidence at trial will be voluminous, many expert witnesses will be called, and the jury will be required to deal with conflicting expert opinions. Latterly, there seems to be a tendency to assume more readily that juries are capable of dealing with complex medical, scientific, actuarial, and economic evidence and conflicting expert opinion.[36]

The following factors have been held to be among those a chambers judge should consider in deciding an application to strike a jury notice:

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[33] *Supra*, note 15, R. 12-6(5)(a). The time limit on application to strike a jury notice does not apply if the proceeding in which it was filed is one in which jury trial is unavailable, and the application may be made in such a case at any time: R. 12-6(5)(b).

[34] *McDonald v. Inland Natural Gas Co.* (1966), 57 W.W.R. 87 (B.C.C.A.)

[35] *MacPherson v. Czaban* (2002), 5 B.C.L.R. (4th) 258 (C.A.), at para. 17; leave to appeal refused [2003] 1 S.C.R. ix; *Rados v. Pannu*, 2015 BCCA 459 at para. 22.

[36] In *Forstved v. Kokabi*, 2018 BCSC 1878 (M.), Master Dick stated said at para. 24: " The current trend on applications to strike is to acknowledge the capacity of a jury to absorb and understand conflicting medical evidence in cases, most notably serious personal injury cases."

- the anticipated length of the trial;
- the number of experts to be called;
- the volume of expert evidence;
- the nature and character of the expert evidence;
- the extent to which there are conflicts in the expert evidence;
- the nature of the inquiries the trier of fact will be asked to make to resolve those conflicts, including by having regard to scientific literature;
- the extent to which the case necessarily involves reference to unfamiliar medical terminology;
- the number of issues to be resolved by the jury;
- the character of those issues; and
- complexities that may arise as a consequence of the interaction between issues.[37]

The Court of Appeal has emphasized, however, that the analysis the chambers judge must make does not consist of simply adding up the number of experts, medical issues, and documents that will be submitted as evidence. These are factors that may bear upon the issue of convenience in relation to the jury, but are not determinative.[38] In the context of the rule allowing for striking out a jury notice, "convenience" means

> [t]he ability to have a proper trial, which includes not just an understanding of the evidence as it is being given, but also an ability to retain this understanding throughout a long trial in a form which permits an analysis of the evidence in relation to the difficult questions which must be decided at the end of the case.[39]

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[37] *Rados v. Pannu,* 2015 BCSC 453, at para. 38; aff'd 2015 BCCA 459. See also *Forstved v. Kokabi*, 2018 BCSC 1878 (M.) at para. 25.

[38] *Rados v. Pannu*, 2015 BCCA 459 at para. 30.

[39] *Wipfli v. Britten* (1982), 32 B.C.L.R. 343 per McEachern C.J.S.C. (as he then was) at 347; see also *Adamson v. Charity*, 2006 BCSC 1642, at paras. 9-10.

Issues in a case may be said to be of an "intricate or complex character" for the purpose of the rule if their interaction is complex, and not because of their number alone.[40] Issues are sufficiently complex to justify striking out a jury notice if a judge would experience difficulty in framing questions for the jury.[41]

The third ground on which a jury notice may be struck, namely that the extra time and cost involved in requiring that the trial be heard by the court with a jury would be disproportionate to the amount involved in the action, was added fairly recently when the current *Supreme Court Civil Rules* were introduced. It has been interpreted as being referable to the object stated in Rules 1-3(1) and (2) of furthering the "just, speedy and inexpensive determination of every proceeding" in a manner proportionate to the amount in issue, the importance of the issues, and the complexity of the proceeding.[42] Under it, jury notices have been struck in order to expedite trials because of the delay that would otherwise result from the suspension of jury trials due to the pandemic.[43]

5. Patterns in Usage of the Civil Jury in BC

Statistical information on the use of juries in Supreme Court litigation between fiscal 2010/11 and 2019/20 was extracted and compiled by the Court Services Branch and provided to BCLI for use in this study. This information is contained in the Appendix. We were cautioned that the systems track distinct elements of a civil jury case and use different dates for case tracking purposes, resulting in differences that make them less than fully comparable. The tables in the Appendix represent, however, the best data available to

[40] *Holland v. Hallonquist* (1968), 63 W.W.R. 207 (C.A.); *MacDonald v. Smith* (1983), 48 B.C.L.R. 285 (S.C.).

[41] *Rados v. Pannu*, 2015 BCSC 453, at para. 34; aff'd 2015 BCCA 459. In Ontario, the opposite has been held, i.e. that it is an improper exercise of discretion to strike a jury notice on the ground that it would be too difficult for the court to explain the relevant law to a jury: *Epstein Equestrian Enterprises Inc. v. Frank Jonkman & Sons Ltd.*, 2012 ONSC 5191 at para. 12.

[42] *Cotter v. Point Grey Golf and Country Club*, 2015 BCSC 447, at para. 22.

[43] *Vacchiamo v. Chen*, 2020 BCSC 1035 (M.); *Cheung v. Dhaliwal*, 2020 BCSC 911 (M.)

us at the present time on the volume and nature of civil jury cases and trials in the BC court system.

The number of jury notices filed in a fiscal period cannot be compared directly with the number of jury trials relating to them because the interval between filing of a jury notice and trial will generally span more than one fiscal period. Some idea of the discrepancy between the volume of jury notices filed and those that result in an actual jury trial can be gained, however, by examining the total numbers of filings and jury trials taking place over several fiscal periods. This comparison shows that jury selection will actually take place in very few actions in which a jury notice has been filed, and jury trials will be completed in still fewer.

From the beginning of 2015/16 to the end of 2019/20 inclusive, jury notices were filed in 21,374 actions in British Columbia.[44] In the same period covering five fiscal years, 120 civil jury trials were completed.[45] While jury notices will have been struck in some of the actions in which they were filed, the large discrepancy between these two numbers strongly suggests that jury notices are filed for reasons other than to signify a real intention to seek jury trial. This inference to which the two numbers point is supported by our conversations with civil litigation practitioners. The prospect of jury trial of course draws the opposing party's attention to an increased financial liability for costs and heightens the perception of risk due to a less predictable outcome. Whatever tactical benefit in pre-trial settlement negotiations a jury notice may bring evaporates if jury fees are not paid 45 days before trial, as is often the case, but it can be utilized until that point.

In practice, the overwhelming majority of jury notices are filed in motor vehicle accident (MVA) actions.[46] A few hundred are filed each year in proceedings involving other civil

[44] Source: Court Services Branch, Ministry of Attorney General. (See Table 1 in the Appendix.) Unless otherwise specified, statistics referred to in this paper relating to civil juries in British Columbia were those provided by the Court Services Branch, Ministry of Attorney General.

[45] See Table 6a.

[46] See Tables 1 and 2 in the Appendix.

claims, and very few in family law proceedings. The heaviest concentrations of jury notice filings are in the Vancouver and New Westminster registries of the Supreme Court.[47] This pattern appears relatively consistent over the last ten fiscal years. There were significant increases in the number of jury notices filed in MVA actions in each of the four fiscal years preceding 2020/21, as shown in the table below:

Civil Proceedings involving one or more jury notice filings 2015/16–2019/20[48]

Fiscal year first jury notice filed	MVA	General civil	Family	Statutory/ Enforcement	Foreclosure	Total actions with jury notices
2015/16	2,397	210				2,607
2016/17	3,489	286	1			3,776
2017/18	4,023	298				4,321
2018/19	4,814	316	3		1	5,134
2019/20	5,216	320				5,536

See also Table 1 in the Appendix.

The increased volume in jury notice filings between 2017/18 and 2019/19 overlapped with the enactment of legislation to divert MVA claims likely to involve damages of $50,000 or less to the Civil Resolution Tribunal, and to prevent MVA actions based on claims within the expanded jurisdiction of the Tribunal from being brought in the Supreme Court in most cases.[49] In 2019/20 legislation to take effect in 2021 was introduced to largely remove

[47] See Table 2 in the Appendix. From Table 2, it is possible to determine that in 2019/20, for example, 79% of all Supreme Court civil actions in which a jury notice had been filed were in the Vancouver and New Westminster registries. In 2018/19, 79.7% of all civil actions with jury notice filings were in these two registries.

[48] See note 44, *supra*. Adapted from Table 1 in the Appendix.

[49] *Civil Resolution Tribunal Amendment Act, 2018*, S.B.C. 2018, c. 17. See also *Accident Claims Regulation*, B.C. Reg. 233/2018, s. 7.

MVA compensation from the realm of tort.[50] The announcement of these legal developments might be expected to cause a rush to commence civil actions in the Supreme Court before the changes became effective, and this could partially explain the increases in jury notices filed in 2018/19 and 2019/20. The largest year-over-year increase in jury notice filings in the past 10 fiscal years nevertheless occurred between 2015/16 and 2016/17, before significant changes in motor vehicle accident compensation and policy changes concerning MVA litigation were announced.

Altogether, 238 civil jury trials took place between 2010/11 and 2019/20, representing approximately 30 per cent of all jury trials in the province.[51] Undoubtedly the greatest number by far of civil jury filings and jury trials take place in Vancouver and New Westminster. Twelve Supreme Court registries in British Columbia had no civil jury trials whatsoever.[52]

C. The Civil Jury Elsewhere in Canada

1. General

Québec abolished civil juries in 1976.[53] In other provinces, jury trial is typically available at the option of a party in specific causes of action: defamation, malicious arrest, malicious prosecution, and false imprisonment. They are also available in actions for seduction, criminal conversation, and breach of promise of marriage in provinces that still permit those causes of action.

Several provinces restrict jury trial in other civil matters to actions in which the amount in issue exceeds a specified value threshold.

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[50] *Attorney General Statutes (Vehicle Insurance) Amendment Act, 2020*, S.B.C. 2020, c. 10.

[51] This total is derived from Table 7 in the Appendix, which presents counts of jury trials recorded as having been completed (by judgment, mistrial or settlement after the trial process was initiated) at each Supreme Court registry.

[52] No civil jury trials took place from 2010 to 2020 at the Supreme Court registries not listed in Table 7.

[53] *Jurors Act*, S.Q. 1976, c. 9 s. 56.

A civil jury consists of six jurors in the other provinces and territories, except for New Brunswick, Nova Scotia, and PEI, where it consists of seven. British Columbia is the only jurisdiction specifying a panel consisting of eight jurors.

2. Civil Juries by Province and Territory

(a) Alberta

Jury trial is available, on application by a party, in actions in Alberta for defamation, false imprisonment, malicious prosecution, seduction, and breach of promise of marriage.[54] It is also available in an action based on tort or contract if the amount claimed is greater than a prescribed amount (currently $75,000) and an action for recovery of property with a value in excess of a prescribed amount ($75,000).[55]

Notwithstanding this, a judge may order that a proceeding be tried without a jury under the summary trial procedure under the Rules of Court, or if it appears on application by a party that the trial might involve prolonged examination of documents or accounts, or a scientific or long investigation, that in a judge's opinion cannot conveniently be made by a jury.[56] An action against the Crown in right of Alberta must be tried without a jury.[57]

Six jurors constitute a civil jury in Alberta, any five of whom may return a verdict.[58]

(b) Saskatchewan

A party may demand jury trial in actions for libel, slander, malicious arrest, malicious prosecution, false imprisonment, or if the amount claimed exceeds $10,000.[59]

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[54] *Jury Act*, R.S.A. 2000, c. J-3, s. 17(1).

[55] *Ibid.* See also Alta. Reg. 68/1983, s. 4.1.

[56] *Ibid.*, ss. 17(1.1), (2).

[57] *Proceedings Against the Crown Act*, R.S.A. 2000, c. P-25, s. 14.

[58] *Supra*, note 54, ss. 13(1), (2).

[59] *The Jury Act, 1998*, S.S. 1998, c. J-4.2, s. 18(1).

The party demanding a jury must deposit an amount the local registrar considers sufficient for the fees and expenses of the jury for the estimated length of the trial.[60] That party is liable for the full cost of the jury, and is not entitled to recover any portion of the cost from the opposing party, regardless of the outcome of the trial.[61] The trial judge nevertheless has discretion to apportion the costs between the parties as the judge considers appropriate in actions for libel, slander, malicious arrest, malicious prosecution, false imprisonment, and actions for personal injury or death where the amount claimed is greater than $10,000.[62]

A judge may order an action to be tried with a jury if the ends of justice will be best served if findings of fact are made by community representatives, or if the outcome is likely to affect a significant number of non-parties.[63] A judge who makes such an order may also order that no deposit is required and that there shall be no order as to the costs of the jury.[64]

In an action against the Crown in right of Saskatchewan, a jury is prohibited.[65]

A Saskatchewan civil jury consists of six jurors, five of whom may return a verdict.[66]

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[60] *Ibid.*, s. 18(2).

[61] *Ibid.*

[62] *Ibid.*, s. 18(3).

[63] *Ibid.*, s. 19(1).

[64] *Ibid.*, s. 19(2).

[65] *The Proceedings Against the Crown Act, 2019*, S.S. 2019, c. P-27.01, s. 14.

[66] *Supra*, note 59, s. 16.

(c) Manitoba

In Manitoba actions for defamation, malicious arrest, malicious prosecution, and false imprisonment require a jury, unless the parties waive jury trial.[67] Other actions may only be tried by a jury pursuant to a judge's order.[68]

In an action against the provincial Crown, juries are prohibited.[69]

A civil jury in Manitoba consists of six jurors.[70] Five jurors may return a verdict.[71] If the parties agree to trial by five jurors instead of six, the verdict must be unanimous.[72]

(d) Ontario

A party to an action in Ontario may opt for jury trial apart from specified categories of proceedings.[73]

Proceedings in which juries are not available are ones for an injunction or mandatory order, partition or sale of real property, dissolution of partnership, foreclosure or redemption of a mortgage, sale and distribution of proceeds of property subject to any lien or charge, execution of a trust, rectification, cancellation of a deed, specific performance, declaratory relief, other equitable relief, and relief against a municipality.[74] Proceedings for relief under various provincial and federal statutes referred to in the schedule to

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[67] *The Court of Queen's Bench Act*, CCSM c. C280, s. 64(1).

[68] *Ibid.*, s. 64(2).

[69] *The Proceedings Against the Crown Act*, CCSM c. P140, s. 12.

[70] *The Jury Act*, CCSM c. J30, s. 32(1).

[71] *Ibid.*, s. 32(2).

[72] *Ibid.*, s. 32(3).

[73] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 108(1).

[74] *Ibid.*, s. 108(2).

section 21.8 of the *Courts of Justice Act* must also be heard by a judge alone.[75] These pertain mainly to marriage, divorce and other family law proceedings, and changes of name.

In addition, an action that is subject to the simplified procedure under Rule 76 of the Ontario *Rules of Civil Procedure*[76] must also be tried without a jury.[77]

The simplified procedure is mandatory for claims that are exclusively for money or real or personal property where the amount in issue or the fair market value of the property is $200,000 or less exclusive of interest and costs. The $200,000 threshold has been in effect since January 2021. The previous figure was $100,000.

Juries are prohibited in actions against the Crown in right of Ontario or an officer or employee of the provincial Crown, in addition to the ban on juries in actions against a municipality.[78]

A civil jury in Ontario consists of six jurors.[79] Five jurors may return a verdict or an answer to any question.[80]

(e) Québec

There are no civil juries in Québec, as mentioned above.

(f) New Brunswick

The New Brunswick *Rules of Court* state that a party to a civil proceeding may bring a motion to have it tried by jury "if the questions at issue are more fit for trial by a jury."[81]

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[75] *Ibid.*, para. 1.

[76] R.R.O. 1990, Regulation 194.

[77] *Supra*, note 73, s. 108(2), para. 2.

[78] *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sch. 17, s. 20.

[79] *Supra*, note 73, s. 108(4).

[80] *Ibid.*, s. 108(6).

[81] *Rules of Court*, N.B. Reg 82-73, Rule 46.01(1).

If a party to an action for libel, slander, breach of promise of marriage, malicious arrest, malicious prosecution, or false imprisonment serves and files a jury notice at least 14 days before the motions day at which the action is to be set down for trial, the action will be tried by jury.[82]

A civil jury in New Brunswick consists of seven jurors.[83] Five may return a verdict if all seven have not agreed after deliberating for at least three hours.[84]

(g) Nova Scotia

Actions for libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution, and false imprisonment must be tried with a jury unless the parties consent to a non-jury trial.[85]

In other actions, a party may require issues of fact or an assessment of damages to be tried with a jury by filing a notice at least 60 days before the first day of the sittings at which the trial is to take place. The trial may be ordered to take place before a judge alone despite the jury notice on application before trial, or at the direction of the judge at the trial.[86]

Actions against the Crown in right of Nova Scotia must be tried without a jury.[87]

A civil jury in Nova Scotia consists of seven jurors, any five of whom may return a verdict.[88]

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[82] *Ibid.*, Rule 46.01(2).

[83] *Jury Act*, R.S.N.B. 2016, c. 103, s. 15.

[84] *Ibid.*, s. 18(1).

[85] *Judicature Act*, R.S.N.S. 1989, c. 240, s. 34(a)(i).

[86] *Ibid.*, s. 34(a)(ii).

[87] *Proceedings Against the Crown Act*, R.S.N.S. 1989, c. 360, s. 14.

[88] *Juries Act*, S.N.S. 1998, c. 16, s. 15(2).

(h) Prince Edward Island

Actions within the monetary jurisdiction of the Small Claims Section of the P.E.I. Supreme Court must be tried without a jury.[89] The Small Claims Section has jurisdiction over claims not exceeding $16,000.[90]

A proceeding against the provincial Crown must be tried without a jury.[91]

Unlike the case in British Columbia, the trial judge may give "guidance" regarding the amount of damages when charging a civil jury in the trial of a personal injury claim, and the parties may make submissions to the jury on the amount of damages as well.[92] Furthermore, the P.E.I. Court of Appeal is empowered to substitute its own assessment of damages "if it considers just."[93] As explained later, this is a much wider appellate jurisdiction than the British Columbia Court of Appeal has to review a jury award.

A P.E.I. civil jury consists of seven jurors.[94] Five jurors may return a verdict or answer a question put to the jury if the jury has deliberated for at least three hours without reaching full unanimity.[95]

(i) Newfoundland and Labrador

A party may seek jury trial in Newfoundland and Labrador by indicating this in a certificate of readiness filed under rules of court.[96] If the action is one for defamation, malicious prosecution or false imprisonment, the court must order that issues of fact be tried by

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[89] *Judicature Act*, R.S.P.E.I. 1988, c. J-2.1, s. 15(h).

[90] *Small Claims Regulations*, P.E.I. Reg. EC741/08, s. 2.

[91] *Crown Proceedings Act*, R.S.P.E.I. 1988, c. C-32, s. 11.

[92] *Supra*, note 89, s. 53(2).

[93] *Ibid.*, s. 53(3).

[94] *Jury Act*, R.S.P.E.I. 1988, c. J-5.1, s. 24.

[95] *Ibid.*

[96] *Jury Act, 1991*, S.N.L. 1991, c. 16, ss. 32(1), (3).

jury.[97] In other cases, the court has discretion whether to accede to a party's request for a jury.[98] A trial judge sitting alone may also order a matter or issue, or the whole case, to be tried before a jury.[99]

Proceedings in the Family Division of the Supreme Court of Newfoundland and Labrador are heard without a jury.[100] Juries are also prohibited in proceedings against the Crown in right of the province.[101]

A civil jury in Newfoundland and Labrador has six jurors.[102] Five may return a verdict after three hours of deliberation.[103]

(j) Yukon

Jury trial may be had in actions for libel, slander, false imprisonment, malicious prosecution, seduction, breach of promise of marriage, an action in tort or contract where the amount claimed exceeds $1,000, or recovery of real property, provided that a security deposit for the cost of the jury is made.[104] A party to any of those actions desiring jury trial must apply to the court not less than 90 days before the trial date.[105]

In actions in which jury trial is possible, a judge may direct trial without jury or that the jury be dismissed if the judge is of opinion that the trial will involve prolonged examination

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[97] *Ibid.*, s. 32(2). This was formerly true as well in actions for breach of promise of marriage and seduction, but those causes of action were abolished in Newfoundland and Labrador by the *Obsolete Actions Extinguishment Act*, S.N.L. 2012, c. 22, ss. 2, 3.

[98] *Ibid.*, ss. 32(3), 36.

[99] *Ibid.*, s. 37.

[100] *Judicature Act*, R.S.N.L. 1990, c. J-4, s. 43.8.

[101] *Proceedings Against the Crown Act*, R.S.N.L. c. P-26, s. 12.

[102] *Supra*, note 96, s. 31.1(1).

[103] *Ibid.*, ss. 31.1(1), (2).

[104] *Jury Act*, R.S.Y. 2002, c. 129, ss. 2(1), 3(1).

[105] *Ibid.*

of documents or accounts or any scientific investigation that cannot conveniently be made by a jury.[106]

The federal *Crown Liability and Proceedings Act* likely applies to bar jury trial in an action against the government of the Yukon.[107]

A civil jury in the Yukon Territory consists of six jurors, any five of whom can return a verdict.[108]

(k) Northwest Territories

The Northwest Territories have provisions on civil juries that are similar to those of Yukon.[109]

(l) Nunavut

Nunavut provisions on civil juries are similar to those of Yukon and the Northwest Territories.[110]

D. Overview of the Civil Jury in Selected Major Common Law Jurisdictions

1. United Kingdom

Civil matters were tried only by judge and jury in the English common law courts until the mid-nineteenth century. Today, however, the trial of all but a few categories of civil claims in the Queen's Bench Division of the High Court is by judge alone.[111]

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[106] *Ibid.*, s. 2(2).

[107] *Supra*, note 21.

[108] *Supra*, note 104, s. 25(1).

[109] See *Jury Act*, R.S.N.W.T. 1988, c. J-2, ss. 2, 3. An application for jury trial may be made up to two weeks before the date fixed for trial, as opposed to 90 days before trial in Yukon: s. 2(1).

[110] See *Jury Act*, N.S.N.W.T. (Nu) 1988, c. J-2, ss. 2, 3.

[111] *Senior Courts Act 1981*, c. 54, s. 69(3). The High Court retains a discretion under s. 69(3) to order trial by jury in actions in the Queen's Bench Division other than those belonging to the categories in which jury trial is expressly made available under s. 69(1) on the application of a party.

In actions for malicious prosecution or false imprisonment, jury trial is available on the application of a party, and in actions for fraud on the application of a defendant.[112] The court is not bound to grant the application for trial by jury, even in that limited group of actions. The court may decline to order trial by jury on three grounds, two of which are identical to ones on which a jury notice may be struck out in British Columbia, namely that the trial will require prolonged examination of documents or accounts, or a scientific or local investigation that cannot be made conveniently with a jury.[113] The third ground on which jury trial may be refused in actions for malicious prosecution, false imprisonment or fraud is that, in the opinion of the court, an application will be made in the course of the trial for non-disclosure of sensitive material connected with national security.[114]

The position is essentially the same in the County Courts.[115]

Libel and slander were included in the group of causes of action in which jury trial was available on application by a party until 2014. Now defamation actions in England and Wales must be tried by a judge alone unless the court orders jury trial.[116]

In 1965, the Court of Appeal held in *Ward v. James* that personal injury claims were unsuited for jury trial other than in exceptional circumstances because of the technical knowledge needed to assess damages.[117] This has continued to be the dominant view in the courts of England and Wales.[118]

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[112] *Ibid.*, s. 69(1).

[113] *Ibid.*

[114] *Ibid.*

[115] *County Courts Act 1984*, c. 28, s. 66(2), (3). A civil jury in the County Court consists of eight jurors. Certain proceedings listed in s. 66(1) of the *County Courts Act 1984* must be tried without a jury, including admiralty cases and various statutory claims.

[116] *Defamation Act 2013*, c. 26, ss. 11(1), (2).

[117] [1966] 1 Q.B. 273 (C.A.).

[118] Russell Brown and Moin Yahya, "Respecting Civil Juries" (2005) 30:1 Adv. Q. 110 at 110.

2. AUSTRALIA

The states of Australia vary in the extent to which jury trial is available in a civil matter. South Australia and the Australian Capital Territory have abolished civil juries altogether.[119]

New South Wales provides that actions are to be tried without a jury unless a party files a requisition for a jury, pays a prescribed fee, and the court is satisfied that the interests of justice require trial by jury.[120] These strictures do not apply to an action for defamation.[121]

In Victoria, civil proceedings are tried without a jury unless a plaintiff in an action based on contract or tort gives notice in the writ of summons, or the defendant, by notice to the plaintiff and the court, specifies that a jury is demanded.[122] The court may direct trial without jury notwithstanding the party's demand if the court is of opinion the action should not be tried before a jury.[123] An initiative to abolish civil juries in Victoria in 1993 was met with public opposition and abandoned.[124]

Queensland's rules on jury trial are less restrictive by comparison. Queensland allows a party to an action to elect trial by jury in the party's pleadings, unless a relevant statute excludes it.[125] The court may also grant a later application for trial by jury if a party did not elect jury trial initially, or order on its own initiative that a question of fact be tried by a

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[119] *Juries Act 1927* (SA), s. 5; *Supreme Court Act 1933* (ACT), s. 22.

[120] *Supreme Court Act 1970* (NSW), ss. 85(1), (2); *District Court Act 1973* (NSW), s. 76A. Issues of fact under workers' compensation legislation specified in these provisions must be decided by the court rather than the jury, as well as any other question of fact the trial court reserves for decision by it rather than the jury: *Supreme Court Act 1970*, s. 85(5); *District Court Act 1973*, s. 77(5).

[121] *Supreme Court Act 1970* (NSW), s. 85(6); *District Court Act 1973* (NSW), s. 76A(4).

[122] *Supreme Court (General Civil Procedure) Rules 2015* (Vic), Rules 47.02(1), (2); *County Court Civil Procedure Rules 2018* (Vic), Rules 47.02(1), (2). A civil jury in Victoria consists of six members: Rule 47.02(4) (Supreme Court); Rule 47.02(4) (County Court).

[123] *Supreme Court (General Civil Procedure) Rules 2015* (Vic), Rule 47.02(3); *County Court Civil Procedure Rules 2018* (Vic), Rule 47.02(3).

[124] Jacqueline Horan, "Perceptions of the Civil Jury System" (2005) 31 Monash L.R. 120 at 122.

[125] *Uniform Civil Procedure Rules 1999* (Qld), Rule 472.

jury.[126] A Queensland procedural rule that formerly allowed the court to disallow trial by jury where it had been elected on grounds that it would require prolonged examination of records or a scientific investigation that could not be conveniently carried out with a jury has been repealed.[127]

Western Australia provides that an action for fraud, libel, slander, malicious prosecution, false imprisonment, seduction, or breach of promise of marriage must be tried with a jury on the pre-trial application of a party.[128] This is subject to the court's power to disallow a jury in these actions if the court has the opinion that the trial will require any prolonged examination of documents or accounts, or any scientific or local examination which cannot conveniently be made with a jury.[129] The Western Australia legislation also provides that any action may be ordered to be tried with or without a jury in the court's discretion.[130]

Tasmania allows jury trial in any matter that could have been the subject of an action at law before the *Supreme Court Civil Procedure Act 1932* of the state entered into force, subject to the court's power to disallow a jury on the ground the trial will require prolonged examination or any scientific or local investigation which it is not convenient for a jury to perform.[131] If no order is made to authorize trial by jury, the mode of trial is by judge alone.[132]

The Northern Territory has a unique provision requiring a defamation action to be tried by a judge alone.[133] The Northern Territory allows for jury trial in other civil matters only by

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[126] *Ibid.*, Rule 475.

[127] *Ibid.*, Rule 474 (repealed).

[128] *Supreme Court Act 1935* (WA), s. 42(1). In actions for fraud, jury trial is available as of right only on application of the defendant.

[129] *Ibid.*

[130] *Ibid.*, s. 42(2).

[131] *Supreme Court Rules 2000* (Tas), Rules 557, 558.

[132] *Ibid.*, Rule 556.

[133] *Juries Act 1962* (NT), s. 6A.

order made on application by a party, or on the court's own initiative if it appears just to permit trial by jury of an issue or a question of fact.[134]

3. New Zealand

In New Zealand civil juries are permitted only in actions for defamation, false imprisonment, or malicious prosecution on notice by a party to the action.[135] On application, the High Court may disallow jury trial if the trial will involve difficult questions of law, or require any prolonged examination of documents or accounts, or any investigation in which difficult questions in relation to scientific, technical, business, or professional matters are likely to arise, and which cannot conveniently be made with a jury.[136]

If a claim for defamation, false imprisonment, or malicious prosecution is made in the same action with other causes of action for which jury trial is prohibited, the action must be heard by a judge alone.[137]

E. The Case For and Against the Civil Jury

1. Not A New Debate

The debate about whether the civil jury is an institution worth preserving is an old one. It has gone on in Ontario since the 1850's, when legislative change made non-jury trial an option for the first time in common law actions.[138] The landmark 1968 McRuer Report on civil liberties contained a recommendation for abolition of the civil jury except in defamation actions, because McRuer concluded that civil juries had outlived their

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[134] *Ibid.*, ss. 7(1)-(3) inclusive. When jury trial is ordered in a civil matter, the jury consists of four jurors: s. 7(4).

[135] *Senior Courts Act 2016*, 2016, No. 48, ss. 16(1), (6).

[136] *Ibid.*, s. 16(3), (6).

[137] *Ibid.*, s. 16(5).

[138] Paul Romney, "From Constitutionalism to Legalism: Trial by Jury, Responsible Government and the Rule of Law in the Canadian Political Culture" (1989), 7 Law & Hist. 121 at 138.

usefulness and had become means by which insurance companies could drive unfair settlements, and thus a source of imbalance in the civil justice system:

> The conclusion we have come to is that trial of civil cases by a jury is a procedure that has outlived its usefulness in Ontario. Instead of the jury being used as a protection for the weak, it is now a weapon in the hands of the strong. The uncertainty of the verdicts of jurors increases the hazards of litigation. This uncertainty is a very compelling force brought to bear on the inexperienced litigant when considering settlement with a formidable and experienced opponent. In most personal injury cases the plaintiff is opposed by an opponent of great experience. The conclusion we have come to is that the trial by jury in all civil cases, except those based on defamation, should be abolished.[139]

The Ontario Law Reform Commission also recommended the abolition of civil juries except in the trial of actions for defamation, malicious arrest, malicious prosecution and false imprisonment in a 1973 report on court administration in Ontario. It made this recommendation primarily for the same reasons McRuer had given, namely that the ability to invoke jury trial was being exploited for "tactical advantage" by insurers.[140] The recommendation for abolition provoked a strong reaction from the Ontario Bar in favour of preservation, however.

In the early 1990's the Attorney General of Ontario referred the question of civil juries again to the former Ontario Law Reform Commission. After extensive study and consultation, including an empirical investigation of civil jury practice in Ontario discussed below, the former Commission issued a report in 1996 in which it reversed its earlier position. Instead, the 1996 report recommended preserving the civil jury and expanding its availability to include actions against the provincial Crown and municipalities.[141] There

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[139] Hon. James Chalmers McRuer, *Royal Commission Inquiry into Civil Rights*, Report No. 1., vol. 2 (Toronto: Queen's Printer, 1968) at 860. McRuer's assessment in 1968 was echoed by the words of an Ontario trial judge in 2016: "While jury trials in civil cases seem to exist in Ontario solely to keep damages awards low in the interest of insurance companies, rather than to facilitate injured parties being judged by their peers, the fact is that the jury system is still the law of the land." *Mandel v. Fakhim,* 2016 ONCS 6538, per Myers, J. at para. 9; rev'd 2018 ONSC 7580 (Div. Ct.).

[140] Ontario Law Reform Commission, *Administration of Ontario Courts* Part 1 (Toronto: Publications Ontario, 1973) at 336.

[141] Ontario Law Reform Commission, *Report on the Use of Jury Trials in Civil Cases* (Toronto: Publications Ontario, 1996) at 79 and 83.

were additional recommendations for lessening inconvenience to jurors and improving their compensation, and to amend rules of civil procedure to provide greater guidance to trial courts in dealing with applications to strike a jury notice. (The Ontario rule concerning the striking of a jury notice was then, and remains, much less explicit than the British Columbia rule discussed above.)

The question of civil juries arose again in the Civil Justice Reform Project conducted by the Ontario Ministry of Attorney General, which concluded with a report by the Hon. Coulter A. Osborne in 2007.[142] Despite referring to what he described as the "unfortunate reality" of insurers using jury notices to heighten the litigation risk for plaintiffs, Osborne was not satisfied that a sufficiently strong case could be made for abolition of civil juries or for making them available to litigants only pursuant to an order.

Osborne recommended that juries be prohibited in cases under the simplified procedure rule (equivalent to British Columbia's fast track rule) and also that the monetary limit for simplified actions should be raised. Actions for defamation, malicious prosecution and false imprisonment would be excepted because of the "strong historical right to a jury in a case engaging community values."

Two recommendations of the Osborne Report were implemented as of 1 January 2020, when juries were eliminated from simplified actions by a rule change.[143] Concurrently, the simplified procedure rule in Ontario was expanded to apply to claims where the amount in issue is below $200,000.[144]

In early June 2020, the Attorney General of Ontario set a letter to "stakeholders," which included many Bar organizations, seeking submissions within ten days on whether civil juries should be eliminated altogether or restricted to certain causes of action. Despite the

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[142] Hon. Coulter A. Osborne, "Civil Juries" in *Summary of Findings and Recommendations of the Civil Justice Reform Project*. Toronto: Ontario Ministry of Attorney General, 2007, online at https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/090_civil.php.

[143] *Rules of Civil Procedure*, *supra*, note 76, Rule 76.01(1), as amended.

[144] *Ibid.*, Rule 76.02(1), as amended.

very short timeline specified in the Attorney General's letter, there was a considerable level of sharply divided response.

The Ontario Bar, in particular, was sharply divided on the merits of civil juries. Numerous lawyers and law firms posted submissions and articles either for or against abolition. The Ontario Trial Lawyers Association (OTLA) urged the permanent elimination of civil juries except in relation to claims or actions for defamation, the intentional torts of malicious prosecution and false imprisonment, professional and institutional negligence in health care, and punitive damages.[145] The reason given by OTLA for retaining jury trial for these causes of action was that they "trigger a public interest and engage community values or a person's character."[146] The OTLA submission stated that these positions were taken because of the results of a survey of its members that OTLA had conducted previous to the Attorney General's letter.

Access to Justice Group, a group consisting of "law firms and individuals who advocate for changes to Ontario's auto insurance product from a consumer perspective" took a position in favour of abolition similar to that of OTLA, asserting that abolition would relieve pressure on court resources and increase transparency and certainty in personal injury litigation.[147] The Access to Justice Group also maintained that the increased uncertainty of result in a jury trial was being exploited by insurers, and abolition of civil juries would relieve against this tactic.

Canadian Defence Lawyers, a national body representing defence counsel, vigorously defended the civil jury and decried the Attorney General's short timeline for public vetting of a system change of such magnitude. Canadian Defence Lawyers maintained that no

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[145] Ontario Trial Lawyers Association Submission to the Attorney General: Potential amendment to the Courts of Justice Act regarding civil juries, 15 June 2020 at 1.

[146] *Ibid.*

[147] Access to Justice letter to A. Iarusso, Director of Policy and Legal Affairs, Ministry of the Attorney General (Ont.), 12 June 2020 at 2-3, 6.

"definitive empirical study" had been conducted to support "vacuous cries" that civil jury trial caused delay and backlog in the courts.[148]

The Federation of Ontario Law Associations (FOLA), representing 46 county and district law associations in the province, replied to say that it had collected 20 responses from its member organizations that raised longstanding arguments both for and against civil juries. The FOLA response said it lacked sufficient information to reply to the Attorney General's questions, called for further discussion, and referred to the Ontario Law Reform Commission report of 1996 as having continued relevance.[149]

Fair Association of Victims for Accident Insurance Reform (FAIR) responded in favour of abolishing civil juries in the interests of timely resolution of claims and reducing legal costs.[150]

As of mid-May 2021, the Ontario Ministry of Attorney General had not publicly announced any decision to proceed with abolition or greater restriction of civil jury trials.

In British Columbia, the debate over the value of civil juries has gone on for nearly as long as in Ontario, with equal inconclusiveness. Chief Justice Begbie is quoted as having said in the nineteenth century:

> Juries were called in courts of law to decide the fact, because we placed more reliance in the judgement of twelve men of one sort than in that of one man of another sort. For my own part, I have always had every reason to be satisfied with the findings of juries during the whole period of my own official experience in this colony [British Columbia].[151]

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[148] Canadian Defence Lawyers letter to Hon. Douglas Downey re Proposed Amendments to the Courts of Justice Act regarding juries, 15 June 2020 at 4.

[149] Federation of Law Associations letter to Hon. Douglas Downey, 15 June 2020 at 2-3.

[150] FAIR submission to Attorney General of Ontario re Civil Juries, 15 June 2020.

[151] David R. Williams, *The man for a new country: Sir Matthew Baillie Begbie* (Sidney, B.C.: Gray's Publishing, 1977) at 72.

As mentioned above, however, the British Columbia Legislative Assembly moved to give litigants the choice of a less elaborate trial by a single judge as early as 1876.

In 2011, the Trial Lawyers Association of British Columbia issued an extensive brief advocating wholesale change in the rules of court to make jury trial the default option. It further advocated expanding the availability of jury trial to the categories of proceedings from which it is now excluded, including actions and applications for equitable remedies in which jury trial had no historical role.[152]

Civil juries are a divisive subject amongst legal practitioners. As Mr. Justice J.C. Bouck, also a strong proponent of civil jury trial, stated in a 1981 article, "Many judges and lawyers privately debate the need to continue having civil trials with a jury. Seldom is there any agreement."[153]

2. Arguments For the Civil Jury

(a) The jury is a democratizing institution

The jury is the only aspect of legal process by which the ordinary citizen participates in the administration of justice and as such, it is seen by its proponents as an essential element of democracy. The point was made by de Tocqueville, an early commentator on the American legal and political system:

> To look upon the jury as a mere judicial institution is to confine our attention to a very narrow view of it; for however great its influence may be upon the decisions of the law courts, that influence is very subordinate to the powerful effects which it produces on the destinies of the community at large. The jury is above all a political institution, and it must be regarded in this light in order to be duly appreciated….
>
> I am so entirely convinced that the jury is pre-eminently a political institution that I still consider it in this light when it is applied in civil causes. Laws are always unstable unless they are founded upon the manners of a nation; manners are the only durable and resisting power in a people. When the jury is reserved for criminal offences, the

[152] See Robert D. Holmes, "Civil Jury Rules: Report and Recommendations" (Vancouver, Trial Lawyers Association of British Columbia, 2011).

[153] Hon. J.C. Bouck, "The Civil Jury Trial in British Columbia" (1981) 39 The Advocate 105.

> people only witnesses its occasional action in certain particular cases; the ordinary course of life goes on without its interference, and it is considered as an instrument, but not as the only instrument, of obtaining justice. This is true a fortiori when the jury is only applied to certain criminal causes.
>
> When, on the contrary, the influence of the jury is extended to civil causes, its application is constantly palpable; it affects all the interests of the community; everyone co-operates in its work: it thus penetrates into all the usages of life, it fashions the human mind to its peculiar forms, and is gradually associated with the idea of justice itself. [154]

The justice system is constantly criticized as being controlled by its insiders: lawyers, judges, court and government officials. If juries were abolished, the civil justice system could credibly be described as entirely insider-dominated. The legitimacy of the civil justice system may come into greater question if the citizenry were to be excluded entirely from participation in resolving disputes between citizens by abolition of the non-elitist jury.

Serving on a jury is argued to have educational value in a civic sense, because jury service is for many the only means by which they will ever have exposure to the actual operation of the courts.[155] The Ontario Law Reform Commission found some evidence in canvassing former jurors that serving on a jury tends to increase jurors' appreciation of the civil justice system. Slightly more than half of those responding jurors who held no opinion about juries before serving came to have a favourable opinion of jury trial. Of those who had a favourable impression of the jury before serving, approximately twice as many had a more favourable impression afterwards as those who did not. Of those who had an unfavourable

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[154] Alexis de Tocqueville, *Democracy in America*, vol. 1, Ch. XVI, Part II (1835), online: http://www.gutenberg.org/files/815/815-h/815-h.htm.

[155] *Supra*, note 141 at 25. See also Charles W. Joiner, *Civil Justice and the Jury* (Englewood Cliffs, N.J.: Prentice-Hall, 1962) at 66-67.

opinion of juries before service, approximately an equal number had better and worse opinion of juries after serving.[156]

The democratizing argument is weakened, however, by what is said to be the relative ease of escaping jury service. We are informed anecdotally by practitioners that prospective jurors are readily excused on the basis of their assertions of economic and other hardship, with the result that retired, financially secure persons are over-represented on juries. Recently there has also been much controversy over the lack of representation of indigenous persons and visible minorities on juries, although that may have different causes. The ideal of the jury as a cross-section of the community may not coincide with reality. To the extent that it does not, the democratizing argument for preserving the civil jury loses force.

(b) The jury is a safeguard against the abuse of power

Lord Devlin famously wrote: "[T]rial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.[157]" More recently, a justice of the Supreme Court of Canada said: "Juries are a safeguard of democracy and society quite properly respects and trusts their verdicts…If they are to remain the bulwark of freedom their decisions should not be lightly dismissed."[158] The argument that the jury is a check on the abuse of political and economic power is a widely held view, and a variation on the theme that the jury is a vital civic institution as well as a legal one. According to its proponents, community participation in the administration of justice is a means of protecting the weak and combatting real and apprehended bias in favour of established interests.

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[156] *Supra*, note 141 at 69. A survey of civil jurors conducted in the Australian state of Victoria in 2001 indicated that jurors favourably disposed to the jury system before serving on a civil jury usually retained that position afterwards, which corresponds to the Ontario findings. See Horan, *supra*, note 124.

[157] Patrick Devlin, *Trial by Jury*, Hamlyn Lectures (London: Stevens, 1956) at 164.

[158] Cory, J. in dissent in *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155, [1993] S.C.J. No. 90 at para. 75.

This argument has more force in relation to the criminal jury, which decides a contest between an individual and the state. It may apply with similar force to some civil claims for malicious prosecution and false imprisonment, if the factual matrix includes the exercise by the defendant of some form of actual or purported authority. It has less force in general civil disputes, where the parties are not an individual and the Crown, but are typically private litigants.[159] Civil actions between an individual and an emanation of the Crown are not uncommon, but modern legislation in British Columbia, as in other parts of Canada, precludes jury trial in those actions.[160]

(c) The civil jury brings community standards to bear on dispute resolution

An argument for preserving civil juries that finds support in a good deal of judicial dicta is that the civil jury allows for community values and a general sense of proportionality to be reflected in the resolution of private disputes. For example,

> [J]uries bring to the assessment of the evidence a common sense that derives from wide and varied experiences in life. As well, a jury's assessment of damages is influenced by the community's values and its opinions of what would be fair, just, and reasonable in the circumstances.[161]

In the words of the late Mr. Justice J.C. Bouck:

> [T]here is the obvious benefit a jury brings to the judicial process by introducing the common sense of the community to the facts and law in a particular case. A jury educates lawyers and judges with respect to the public's attitude about the law and so keeps us all in touch with reality. Even if a jury does return a peculiar verdict from time to time, it forms no precedent and is soon lost to memory.[162]

In a 2011 brief, the Trial Lawyers Association of British Columbia points to the reasonableness standard that pervades so many aspects of private law, and states it is

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[159] Ontario Law Reform Commission, *supra*, note 141 at 19-20.

[160] *Ibid.*

[161] *Boyd v. Harris*, 2004 BCCA 146 per Smith, J.A. at para. 10.

[162] *Supra*, note 153 at 105.

"passing strange" that anyone would question that the collective wisdom of the jury is not at least equivalent to that of a trial judge.[163]

The vaunted ability of a jury to apply a standard derived from viewing the facts through a lay community lens is probably at its highest in defamation cases, where the jury is considered particularly valuable for the obvious reason that the cause of action is based on the effect of allegedly defamatory statements on the plaintiff's reputation in the community.[164] The other causes of action in which the majority of jurisdictions surveyed permit jury trial, namely malicious prosecution and false imprisonment, involve security of the person and may engage the community's sense of boundaries of propriety and reasonable conduct.[165] In other civil matters, particularly those in which determining whether a standard of care has been breached requires grappling with technical information and expert opinion, the jury's capability to reflect community values may bring little if any incremental value to adjudication.

The community values argument is often raised in relation to the assessment of damages by a jury for non-pecuniary loss in personal injury actions. Damages for non-pecuniary loss are "at large," rather than being quantified by provable past loss or actuarial calculations of the present value of future loss. As such, the quality of the assessment depends on a sense of realism and proportionality, but the assertion that juries are well-placed to assess non-pecuniary loss is undermined by the rule that the jury cannot be instructed about awards in similar cases or even a range of such awards, nor can counsel make submissions on the appropriate size of an award for non-pecuniary loss.[166]

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[163] *Supra*, note 152 at 9.

[164] *Supra*, note 141 at 21.

[165] *Ibid.*

[166] *Brisson v. Brisson*, 2002 BCCA 279. The jury can be instructed about the judicially imposed "cap" (currently approximately $385,000) on damages for non-pecuniary loss in catastrophic cases so that they will not exceed it: *Ter Neuzen v. Korn*, [1995] 3 S.C.R. 674 at paras. 112-114; *Little v. Schlechyer*, 2020 BCCA 381.

(d) A jury is a better judge of credibility than a single judge

This is the "twelve heads are better than one" argument. It may seem self-evident that decisions as subjective as assessments of credibility are inherently more reliable when multiple decision-makers agree than when the decision is made by a sole decision-maker. There have been empirical studies, not necessarily using the jury as a model, that suggest group decision-making based on a set of facts produces more reliable results than those reached by a single decision-maker.[167] It has been postulated that the reason for the greater reliability of results is that the biases, prejudgments, and errors in recall and reasoning of individuals are exposed, and diluted or negated, in the group dynamics of the deliberative process.[168]

Nevertheless, results were obtained in the largest and most intensive study of the American jury attempted to date that tend to cast doubt on the proposition that jury decision-making is of a superior order than adjudication by a single trial judge. This study was the University of Chicago Jury Project that ran from 1953 to 1959. In one of the research exercises, over 8,000 verdicts in criminal cases and personal injury actions were compared with a hypothetical judgment which the trial judge would have rendered if sitting alone. Six hundred trial judges across the U.S. took part in the survey. The judge's opinion and the actual jury verdict coincided in 80 per cent of the criminal cases overall, and in 79 per cent of personal injury cases.[169]

The damages awarded by juries averaged 20 per cent higher than what the judge would have awarded, however.[170] This lends credence to the forensic folklore that U.S. juries give outsized awards and are feared by insurance companies, while Canadian juries are reputed to do the opposite, so that insurers set greater store by them.

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[167] See Joiner, *supra*, note 155 at 25-35.

[168] *Ibid.*, at 26.

[169] Harry Kalven, "The Dignity of the Civil Jury" (1964) 50 Virginia L.Rev. 1055 at 1064-1065.

[170] *Ibid.*, at 1065.

The University of Chicago Jury Project results are capable of two equally valid interpretations. As they indicate juries will reach the same result as a judge would in the great majority of cases, they partially refute the "twelve lay heads are better than one judicial head" argument, and might militate towards dispensing with the jury in civil cases. (The criminal jury cannot be jettisoned in Canada, of course, as it is entrenched in the constitution.) Leaving aside quantum of damages, if we get the same results with non-jury trials nearly all of the time, why keep the more elaborate and costly jury trial?

The second view is that the University of Chicago Jury Project results may be seen as a vindication of the lay jury as a decision-making body, since it will reach the same result as the legally trained judge most of the time. In effect, the University of Chicago Jury Project results suggest the argument regarding the benefit of collective judgment is equivocal in the abolition/retention debate.

(e) The availability of jury trial leads to more settlements

Those who support retention of civil juries contend that the ability of either party to opt for jury trial leads to settlements more often than would be the case if all civil actions were tried by a judge alone, thus relieving the burden on the court system. The Ontario Law Reform Commission referred to this as the "catalyst" argument in favour of the civil jury.

In what was likely the most extensive study of civil juries that has been carried out in Canada, the former Ontario Law Reform Commission examined data compiled by the Ministry of the Attorney General on jury trials in 1992/93 from six courthouses in four judicial regions of Ontario, including Toronto.[171] It did indeed find that jury cases settled after the start of trial 9.3 per cent more often than non-jury trials.[172]

The overwhelming majority of the jury trials reviewed in the Ontario Law Reform Commission study involved tort claims, and about 75 per cent were MVA claims. The

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[171] *Supra*, note 141 at 42-43. The Commission considered (at p. 44) that this sample accounted for approximately half of the civil jury trials that took place in Ontario in 1992/93.

[172] *Ibid.*, at 45.

Commission was also able to determine that 72.5 per cent of jury notices in the sample were filed by defendants, consistent with the common belief that juries are demanded most often by insurers with conduct of the defence of actions against their insureds.[173]

The available British Columbia data on settlements in jury cases is contained in Table 3 in the Appendix. Table 3 shows British Columbia Supreme Court jury cases from 2010 to 2020 in which the entries for the cases were cancelled with "settled" shown as the reason. When these numbers are compared with the number of jury trials actually completed in the same period (Table 6a), there does appear to be a significant number of settlements versus completed trials. We do not have data to compare the rate of settlements in actions in which a jury notice has been filed with that of actions in which one was not filed, however. Without the data to enable that comparison, the assertion that the prospect of jury trial leads more frequently to settlements can neither be confirmed nor refuted in relation to British Columbia's experience.

3. Arguments Against the Civil Jury

(a) Costliness of jury procedure

There is no question that a jury adds significantly to the cost of litigation in individual actions. Jury fees are an expense that one party may willingly assume initially. If successful, that party may recover the fees from the unsuccessful party. The unsuccessful party may have opposed jury trial but will have to bear this incremental cost which, from that litigant's standpoint, will have been unnecessarily incurred.

There is also no question that when *individual* proceedings are considered in isolation, jury procedure imposes incremental cost on the court system. Pre-trial applications to contest jury notices impose some additional chambers caseload. There is the sheriffs' staff time in summoning jurors, attending at selection, and managing the jury and the jury expenses throughout the trial and the deliberations. Additional court staff time is involved. Two clerks, rather than one, are present during jury selection. Staff overtime and statutory

[173] *Ibid.*, at 46.

holiday pay may need to be paid because court and sheriff staff need to be on hand or on standby when deliberations continue through weekends and holidays, and because the court may need to reconvene outside regular sitting hours when a jury returns a verdict.

We do not have all the data to enable measurement of the incremental cost imposed by jury procedure on the court system on a *system-wide* basis. The collection of jury fees no doubt allows at least partial recovery of incremental cost that arises in each action involving a jury, but there may be additional factors that mitigate the cost to the system as a whole. Any attempt to determine the cost of civil juries would need to take into account these additional offsets that may result in system-wide savings.

Such an attempt was made by the former Ontario Law Reform Commission. The Commission made a careful estimate of the extra cost of involving a jury in a four-day civil trial in Ontario using data from a twelve-month period in 1992-93. The Commission found that it was approximately equivalent to the jury fees that were being charged to litigants in several other provinces at that time, including the jury fees that were then in effect in British Columbia.[174] As noted above, it was also found that jury trials settled nearly ten per cent more often once they had commenced than did non-jury trials.[175] Settlement also occurred earlier in jury trials than in cases tried before a judge alone.[176]

Having made these findings, the Commission sought to determine whether abolition of juries in civil matters would result in a system-wide reduction in cost. It was ultimately unable to reach a conclusion on whether abolition of civil juries would net significant system-wide savings, because this would have required, first, the cost of appeals of jury verdicts to be added into the cost that would be eliminated by abolition of the jury, and

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[174] *Supra*, note 141 at 54.

[175] *Ibid.*, at 45. In addition to the empirical evidence obtained by the Ontario Law Reform Commission regarding settlements after the start of trial, there was anecdotal evidence provided by Regional Senior Justices that pretrial settlements occurred far more often if a jury notice had been served in the action. The Commission noted (pp. 37-38) that actual statistics were available from one region, which showed that non-jury cases in that region were between five and six times as likely to proceed to trial as were jury cases (15-18 per cent of non-jury cases as compared to three per cent of jury cases).

[176] *Ibid.*, at 47.

second, the value of the overall efficiencies in the court system from the higher rate of settlement of jury cases would need to be offset against savings resulting from abolition. There were no data available to allow a value to be placed on these two factors. The Ontario Law Reform Commission study nevertheless cast a great deal of doubt on the commonly held assumption that the use of civil juries inevitably results in a net system-wide incremental cost.

(b) Trial length and delay

It is nearly universally assumed that jury trials are longer than non-jury trials and thus tie up court resources to a greater extent than non-jury cases. Extra procedures are involved in a jury trial, such as juror summoning, jury selection, the jury charge, the ushering in and ushering out of the jury during *voir dires* and hearings of motions, and the jury's deliberations with possible multiple redirections before a verdict is returned. The Law Society's educational materials advise lawyers to include at least two extra days in a trial time estimate if a jury is involved.

The intuitive assumption that jury trials must take up more courtroom time was challenged, however, in the Ontario Law Reform Commission's study of civil jury trials in Ontario in 1992/93. It was found that the mean length of civil jury and non-jury trials was virtually identical.[177] In addition, jury cases actually took less court time in the aggregate than non-jury cases because of a higher rate of settlement after the start of trial.[178]

In British Columbia, we currently have data showing the mean length of a jury trial between 2010/11 and 2019/20 was 10 days.[179] These data are available because of the systemic need to manage the jury process. Data on the mean length of non-jury civil trials, or of civil trials generally, does not appear to be tracked at the present time insofar as we

[177] *Ibid.*, at 54-56.

[178] *Ibid.*

[179] See Table 6b in the Appendix.

are aware, and would be needed in order to test the assumption that jury trials take up more court time and resources on a long-term basis.

(c) Jury notice used for tactical purposes

The very high volume of jury notices filed in comparison to the number of jury trials that actually occur in British Columbia over time (see Tables 1 and 6a in the Appendix) points to a long-term trend to use the jury notice as a tactical device to pressure opposing parties by driving up their potential risk exposure, should they lose and incur liability for costs. The party serving the jury notice is also relying on the unpredictability of juries to put pressure on the opposing party. The obvious purpose is to induce acceptance of a lower or higher settlement, as the case may be.

We are told that it is not uncommon for both parties to file jury notices, with neither intending in reality to seek jury trial. If jury notices are routinely filed and it is known that jury fees will seldom be paid, the tactic loses much of its effectiveness in creating incentive towards settlement.

Arguably, the institution of the civil jury has been debased when jury notices are being used purely as a pressure tactic without any real intention of paying jury fees to force a jury trial. Nevertheless, opinions will differ on whether this necessarily entails that the civil jury has outlived its usefulness.

(d) Unpredictability of juries and non-juridical adjudication

Juries do not provide reasons for their verdicts, and jury deliberations cannot be disclosed. British Columbia juries cannot be instructed regarding an appropriate range of general damages established in similar cases, nor can counsel make submissions to them on this. The weight of evidence is entirely a matter for the jury to decide, and provided there is some evidence to support a verdict and the answers given are not so inconsistent as to prevent giving judgment, the trial court must accept it. Furthermore, the standard of review on appeal of a jury verdict is highly deferential.

These conditions create the possibility for juries to ignore, discount, or misunderstand evidence and their instructions on the law, yet still render a binding verdict that may be extremely difficult to overturn on appeal. The possibility of arbitrary, non-juridical decision-making by a jury is real.[180] Many counsel dislike juries for this reason and avoid them.

The question may be asked why a mechanism in the civil justice system that allows for arbitrary, practically unappealable adjudication should be preserved. This question is normally answered by discounting unreasonable and perverse verdicts as anomalous and by restating the traditional, supposed attributes of the jury as being a cross-section of the community bringing community values into the resolution of private disputes. For reasons given earlier, these answers are less than satisfactory.

(e) Likelihood of mistrial and necessity of re-trial

Jury proceedings are notoriously fraught with procedural pitfalls leading to mistrial. The rules of evidence must be more strictly applied than before a judge sitting alone. When inadmissible evidence is heard, or when verdicts are inconsistent or incoherent, the only remedy in many cases is re-trial, at great cost and inconvenience to the parties. This is still true, despite the fact that the Supreme Court of Canada has reversed the former rule that any mention of insurance in a jury trial results in mistrial and obligatory discharge of the jury.[181]

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[180] Examples of juries misunderstanding or ignoring instructions on the law and rendering arbitrary and/or inconsistent verdicts abound. Two recent cases illustrate the point. In *Harder v. Poettker*, 2015 BCSC 1280, rev'd 2016 BCCA 477 a jury awarded pecuniary damages for out of pocket medical expenses and loss of housekeeping capacity, but nothing for non-pecuniary loss (pain and suffering), despite the fact that the pecuniary damages could only have been incurred as a result of non-pecuniary loss. In *Thomas v. Foskett*, 2018 BCSC 2369, rev'd in part 2020 BCCA 322, in which liability was admitted, the jury awarded damages for cost of future care and loss of future income, but only a nominal amount for non-pecuniary loss, and failed to award $650 in agreed-upon expenses of the plaintiff. The nominal award made by the jury for non-pecuniary loss was logically inconsistent with the need to award damages for cost of future care.

[181] *Hamstra (Guardian ad litem of) v. British Columbia Rugby Union*, [1997] 1 S.C.R. 1092, overruling *Bowhey v. Theakston*, [1951] S.C.R. 679.

F. How Essential Is the Civil Jury?

None of the arguments commonly advanced for or against retention of the civil jury are conclusive in themselves. All are relatively easily contradicted, which is probably why the debate over the merits of civil juries has gone on for so long without resolution in our province and others. Rather than weighing the arguments typically advanced for and against civil juries, it may be more useful to consider what would be lost if the civil jury were to be abolished or further restricted, and what would be gained.

First, it may be noted that other jurisdictions like Quebec and South Australia have abolished civil juries without any lasting controversy. In the UK, their use has been narrowly confined for many decades, and recently even defamation was removed from the list of causes of action where a civil jury is available to a party on application. Again, there has been no lasting controversy. We do not hear of movement in these jurisdictions to restore the civil jury. So what would be lost by following suit in British Columbia?

Public participation in resolving legal disputes between private parties, or between a private party and a public authority that is not an emanation of the Crown, would be eliminated. The court system might be increasingly seen as elitist and insular. There would be a loss of the practical insight and community values that juries reputedly bring to decision-making, particularly in relation to the assessment of general damages. As explained above, however, it is questionable that juries today are sufficiently representative of a cross-section of the community to live up to this ideal model.

There would be a loss of a tactical device, namely threat of unpredictable jury trial, that probably favours institutional defendants. Arguably, this would be a gain by leading to greater fairness and balance in the civil justice system.

Litigants would no longer be able to obtain an immediate result at the end of a Supreme Court civil trial, except in the relatively small minority of cases where judgment can be given orally from the bench.

If in fact actions in which jury notices are filed and jury trials that actually start settle at a higher rate than those without a jury, as may be the case, the associated savings to litigants and the court system would not be realized.

What would be gained by abolition or by narrowly confining the scope of civil jury trial? Additional court time would be freed, because jury trials are assumed to take longer and the blocks of trial time set aside for jury trial on the basis of that assumption would become available for other matters. Costs associated purely with jury trials, such as staff time in jury summoning, selection and jury management during trial would be limited to criminal trials or incurred in fewer civil actions. Mistrials in civil matters necessitating re-trial would be reduced if civil juries were confined to fewer causes of action, and practically eliminated in the event of abolition.

There would be some cost savings in court administration. The savings might well be less than what might be thought likely because of offsetting factors such as fewer settlements, and settlements occurring a later stage. There might be little effect in the overall volume of appeals, but there would be fewer re-trials.

All told, there might be some economic benefit to elimination or restriction of civil jury trials and some relief of administrative burdens, but it is not possible to estimate their extent without a great deal more data. If the status quo is altered, there would be some initial controversy. Elements of the legal profession and institutional defendants can be expected to resist the change, but lasting controversy is unlikely.

G. Policy Options

1. Retain the Civil Jury With or Without Implementation of Rationalizing Reforms and Increasing the Monetary Threshold for Jury Trial

(a) Retaining the status quo

The civil jury can be left as it is, of course, if the legislative assessment is that there is no need to alter the status quo. Retention could be accompanied nevertheless by reforms mentioned below that have been proposed to rationalize and improve the function of the

civil jury and reduce the number of occasions when re-trial is necessary. In addition, the monetary threshold for jury trial imposed by the fast track rule could be raised to further reduce the volume of jury cases, if that is seen as desirable to simplify trial scheduling and reduce demands on court administration and sheriffs' time. Making jury fees non-recoverable as part of a costs award would go some distance to curb the misuse of jury notices for tactical purposes. These potential reforms are discussed under subheadings (b) through (f) immediately below.

(b) Allow the jury to be charged regarding appropriate range of general damages

The former Law Reform Commission of British Columbia recommended in 1984 that trial judges should be allowed to inform the jury about a range of damages awarded in similar cases so that they will be less likely to make an award that generates a need for an appeal and re-trial.[182] Since then, it has been settled that the trial judge can inform the jury of the upper limit set by the Supreme Court of Canada on damages for non-pecuniary loss in personal injury cases, and can give judgment for an amount of damages for non-pecuniary loss within the legal limit if the jury returns a verdict exceeding it.[183] The Court of Appeal has also clarified in unequivocal terms its jurisdiction to vary a wholly unreasonable and disproportionate jury award.[184]

These developments in case law since 1984 still leave a large amount of room for juries to make inordinately large or small awards, which can lead to appeals that might be avoided if the jury could be instructed about the range of awards of general damages made in similar cases. The jury would be told at the same time that the range of awards is only a guideline and they remain able to assess damages as they see fit. In a personal injury case, this would be accompanied by a further instruction about the legal upper limit for non-

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[182] Law Reform Commission of British Columbia, *Report on Review of Civil Jury Awards* (Vancouver: The Commission, 1984) at 50.

[183] See note 166, *supra*.

[184] *Vaillancourt v. Molnar Estate*, 2002 BCCA 685 at paras. 7-20.

pecuniary loss fixed by the Supreme Court of Canada. Jury awards of damages would likely become more predictable and consistent with judgments in similar non-jury cases.

(c) Unify the tests for appellate review of quantum of a jury award with that applicable to a judge alone

There are different standards of appellate review of the quantum of a jury award and that of a trial judge. An award made by a trial judge sitting alone may be varied by the Court of Appeal if it is so inordinately high or low that it must be a wholly erroneous estimate of the damages.[185] The Court of Appeal may only vary the quantum of an award made by a jury if it is "wholly disproportionate" or "shockingly unreasonable."[186] The reasons for this difference are the sanctity that has been attached to the concept of the jury, the absence of reasons in a verdict, and the traditional principle that assessment of damages is solely the purview of the jury. The difference in the standard of review would appear to have no justification if juries could be instructed about the range of general damages typically awarded in similar cases.

The former Law Reform Commission recommended that the two tests be unified so that the standard of review applicable to quantum of an award made by a judge would apply also to jury awards.[187] This would reduce risk from the proverbial unpredictability of jury verdicts and the difficulty of securing redress from inordinately low or high jury awards on appeal. It might also tend to curb the tendency to file jury notices as a tactical device, inasmuch as the tactic is predicated on fear of unpredictability on the part of juries.

(d) Empower trial judges to review the quantum of a jury verdict and give judgment for an amount reasonable on the evidence

Trial judges can now reduce a jury award for non-pecuniary loss in a personal injury case that exceeds the legal upper limit fixed by the Supreme Court of Canada and give judgment

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[185] *Moskaleva v. Laurie*, 2009 BCCA 260, at para. 127; *Boyd v. Harris*, 2004 BCCA 146 at paras 13-14; *Foreman v. Foster*, 2001 BCCA 26, at para. 32; *Nance v. B.C. Electric Railway Co*, [1951] A.C. 601 at 613-614 (P.C.).

[186] *Moskaleva v. Laurie*, *supra*, note 185, at para. 127.

[187] *Supra*, note 182 at 45.

accordingly. Apart from this, a trial judge must accept the verdict even if it is for a disproportionately large or small amount. Redress must be sought on appeal.

The former Law Reform Commission recommended that the trial judge be given the power to vary the size of a disproportionate award to conform to the evidence and give judgment for that amount.[188] This would be somewhat analogous, but not identical, to the authority American trial judges have to adjust disproportionate jury awards. It would avoid the need for appeals regarding only quantum, and like the unification of the standard of review on appeal might have the effect of lessening the tendency to exploit the unpredictability of juries by tactical use of jury notices.

(e) Increase the monetary ceiling for the option of jury trial in civil matters

Currently, the fast track rule (Rule 15) applies to a large range of actions in which damages claimed are $100,000 or less. Jury trial is not available in those actions. The corresponding simplified procedure rule in Ontario, which also excludes jury trial as an option, now applies to actions in which the amount in issue is $200,000 or less. Raising the monetary ceiling for the application of Rule 15 would be another means of restricting the volume of jury trials, if that is the policy chosen.

(f) Make jury fees non-recoverable as costs

Tactical use of jury notices to enlarge the financial exposure opposing parties face in the event they lose at trial could be discouraged by amending section 17(3) of the *Jury Act*[189] to make jury fees non-recoverable as costs from an opposing party. In other words, the party who serves a jury notice would bear the expense of having a jury, regardless of the outcome of the action. This is essentially the position in Saskatchewan, as mentioned above, although Saskatchewan also preserves a discretion for the court to depart from the default rule of non-recoverability and apportion the expense of the jury between the

[188] *Ibid.*, at 47.

[189] *Supra*, note 22.

parties.[190] The discretion to apportion might be exercised, for example, if both plaintiff and defendant have served jury notices in the action.

Replacing the present section 17(3) with the Saskatchewan rule, accompanied by a residual discretion in the court to apportion the jury fees in a proper case when awarding costs, would bring about greater fairness when the parties have unequal bargaining power and probably reduce the number of actions in which jury notices are filed.

2. Restrict Jury Trial to Specified Causes of Action

As described above, numerous jurisdictions limit jury trial in civil matters as of right to a few causes of action. Typically, these are ones in which injury to reputation and affront to personal liberty are in issue, and ones in which juries have traditionally been employed because of the ability to provide the sense of the community regarding the nature of the injury. These are actions for defamation and the intentional torts of malicious prosecution and false imprisonment.

If British Columbia were to limit jury trial to defamation, malicious prosecution, and false imprisonment, it would join a group of other provinces and common law countries that have done so without significant controversy or regular demands for restoration of jury trial on a broader scale. These actions are also relatively uncommon, so that retention of jury trial in relation to them would be unlikely to impose significant burdens on the court system.

3. Abolition of Civil Juries

There is no constitutional obstacle to the abolition of the mode of trial by civil jury. It is not part of the constitutionally protected core of superior court jurisdiction.[191] It is open to British Columbia to abolish the civil jury in matters under provincial legislative jurisdiction.

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[190] *Supra*, note 59.

[191] *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2017 BCCA 324, at para. 56; leave to appeal refused 2018 CanLII 68340 (S.C.C.).

This more ambitious step, following the examples of Quebec, South Australia, and the Australian Capital Territory, could be expected to generate some level of resistance. Resistance would probably not be broad-based, however. The civil justice system functions mainly without juries in any case.

Motor vehicle accident litigation dominates the use of civil juries in British Columbia, and the "enhanced care" structural changes now in effect in automobile insurance will minimize court litigation over the long term. In the short term, it is understood that a significant volume of MVA litigation remains backlogged and is expected to take several years to work through. The recent decision holding unconstitutional portions of the amendments that took effect in April 2019 vesting exclusive jurisdiction in the Civil Resolution Tribunal to determine what constitutes minor injury for insurance purposes in an MVA case, and restricting access to the Supreme Court for resolution of MVA injury claims under a $50,000 value ceiling, has likely caused that backlog to expand.[192]

Nevertheless, if abolition of the civil jury is the option chosen, this change might be better-received if it applied only to actions started on or after the effective date of the implementing legislation.[193]

A possible drawback of abolishing the civil jury might be that the reputed higher settlement rate of actions in which jury notices have been filed would disappear, potentially leaving more actions reaching the trial stage and thus adding to the congestion of court calendars. This, however, is speculative, like almost all discussion of the merits of retention or abolition of the civil jury in the absence of comprehensive statistical and financial information.

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[192] *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2021 BCSC 348.

[193] In *R. v. Chouhan*, 2021 SCC 26, which concerned the temporal application of amendments abolishing peremptory challenges in selection of criminal juries, the majority in the Supreme Court of Canada held the amendments in question to be purely procedural and thus presumptively applicable to pending matters. Nevertheless, neither the majority nor minority judgments in *R. v. Chouhan* contain any suggestion that the right to jury trial itself is not substantive, as characterized in *King v. Colonial Homes Ltd.* and *Bhullar v. Atwal*, *supra*, note 1. See also *Sidhu v. Hiebert*, 2020 BCSC 183 at para. 18.

4. Extending the Suspension of Jury Trials Indefinitely

Jury trials are currently suspended until 8 October 2022. The Supreme Court registries have just resumed accepting jury notices for trials scheduled to start after that date. An additional option would be to extend the suspension indefinitely or to a remote date several years away in order to permit a full consultation with the judiciary, the legal profession, court administration, sheriffs, and other stakeholders and allow for public debate on the merits of retaining or abolishing civil juries, restricting them to a few causes of action, or effecting other reforms.

The extension could also be structured as an experiment to assess how the civil justice system, and in particular, Supreme Court trial scheduling, performs in the absence of jury cases. Data could be collected on whether, and to what extent, cost savings are realized, and a fuller cost-benefit analysis carried out on the implications of retention or abolition of the civil jury. The results might be useful to inform the ultimate policy decision.

APPENDIX

Tables 1-7 Compiled by Strategic Information and Applications Group, Court Services Branch, Ministry of Attorney General

TABLE 1

Civil Cases with a Notice Requiring Trial by Jury (NTJ) by Type of Case & Fiscal Year

Table 1: Total Civil Jury Trials Elected by Type of Case (Unique Cases with Notice of Trial by Jury (NTJ) Filed)

	Unique Cases With NTJ Filed [1]					
Fiscal Year First NTJ Filed	**Motor Vehicle Accidents**	**Supreme Civil (General)**	**Family Law Proceedings**	**Enforcement/ Legislated Statute**	**Foreclosure**	**TOTAL**
FY 10/11	2,763	233				2,996
FY 11/12	2,263	221	1			2,485
FY 12/13	2,102	226	1			2,329
FY 13/14	2,254	217				2,471
FY 14/15	2,095	199	1	1		2,296
FY 15/16	2,397	210				2,607
FY 16/17	3,489	286	1			3,776
FY 17/18	4,023	298				4,321
FY 18/19	4,814	316	3		1	5,134
FY 19/20	5,216	320				5,536

Data source: CMIS, CEIS_ODS, February 8, 2021

Notes: Data are preliminary and subject to change.

1: Count of unique cases where one or more Notice Requiring Trial by Jury (NTJ) was filed. Counts are based on the fiscal year when the first NTJ was filed, and case counts exclude transferred cases.

TABLE 2

Civil Cases with a Notice Requiring Trial by Jury (NTJ) by Fiscal Year & Court Location

Table 2: Total Civil Jury Trials Elected (Unique Cases with NTJ Filed) by Court Location

Court Location	Fiscal Year First NTJ Filed[1]									
	FY 10/11	FY 11/12	FY 12/13	FY 13/14	FY 14/15	FY 15/16	FY 16/17	FY 17/18	FY 18/19	FY 19/20
CAMPBELL RIVER LAW COURTS	25	14	25	22	8	11	9	15	27	33
CHILLIWACK LAW COURTS	170	136	113	150	121	110	149	188	192	207
COURTENAY LAW COURTS	11	10	11	16	11	17	12	33	31	49
CRANBROOK LAW COURTS	5	6	4	5	2	3	4	7	4	4
DAWSON CREEK LAW COURTS	1	0	1	0	0	0	1	0	1	2
DUNCAN LAW COURTS	22	9	8	5	6	8	4	5	6	6
FORT ST JOHN LAW COURTS	0	0	0	0	0	0	0	0	0	2
GOLDEN LAW COURTS	0	0	1	0	0	0	0	0	0	0
KAMLOOPS LAW COURTS	66	58	66	52	54	67	78	79	88	88
KELOWNA LAW COURTS	102	82	110	99	88	103	120	140	159	183
NANAIMO LAW COURTS	65	55	57	63	78	89	87	109	118	141
NELSON LAW COURTS	7	8	6	14	16	7	7	10	8	7
NEW WESTMINSTER LAW COURTS	577	418	350	357	327	406	649	781	948	973
PENTICTON LAW COURTS	22	23	23	25	18	34	30	30	47	42
PORT ALBERNI LAW COURTS	0	1	0	4	0	1	1	0	0	0
POWELL RIVER LAW COURTS	10	6	6	3	4	5	3	3	3	2
PRINCE GEORGE LAW COURTS	15	7	11	7	9	5	9	12	10	18
PRINCE RUPERT LAW COURTS	0	0	0	0	0	1	0	1	0	0

QUESNEL LAW COURTS	0	0	0	0	1	0	0	0	0	1
ROSSLAND LAW COURTS	4	1	4	5	3	4	3	2	3	1
SALMON ARM LAW COURTS	0	0	0	1	2	0	0	1	0	0
SMITHERS LAW COURTS	1	0	0	0	0	0	0	1	1	0
TERRACE LAW COURTS	1	1	0	0	2	0	0	0	0	0
VANCOUVER LAW COURTS	1,599	1,374	1,254	1,388	1,306	1,485	2,300	2,590	3,146	3,410
VERNON LAW COURTS	46	28	38	38	33	41	70	40	45	65
VICTORIA LAW COURTS	245	246	241	215	207	210	237	272	292	299
WILLIAMS LAKE LAW COURTS	2	2	0	2	0	0	3	2	5	3
PROVINCE TOTAL	**2,996**	**2,485**	**2,329**	**2,471**	**2,296**	**2,607**	**3,776**	**4,321**	**5,134**	**5,536**

Data source: CMIS, CEIS_ODS, February 8, 2021

Notes: Data are preliminary and subject to change.

1: Count of unique new cases where one or more Notice Requiring Trial by Jury (NTJ) was filed. Counts are based on the fiscal year when the first NTJ was filed, and case counts exclude transferred cases.

TABLE 3

Settled Civil Jury Trials by Fiscal Year

Table 3: Settled Civil Jury Management System (JMS) Cases [1,2]

Fiscal Year Trial Opened in JMS [3]	Total Settled Civil Jury Management System (JMS) Cases
FY 10/11	58
FY 11/12	78
FY 12/13	66
FY 13/14	71
FY 14/15	97
FY 16/17	106
FY 16/17	93
FY 17/18	139
FY 18/19	183
FY 19/20	230

Data source: JMS, Cases Table, February 8, 2021

Notes: Data are preliminary and subject to change

1: Counts of Settled Jury Trials are sourced from the Jury Management System (JMS) application where the Case Start Date is between April 1, 2010 and March 31, 2020. The Case Start Date is the date that the JMS user creates the trial in JMS.

2: Caution should be taken against comparing JMS data with data reported from other case tracking systems (JUSTIN and CEIS) given their differing date definitions.

3: Settlement can occur at a number of points in a civil case. These data specifically represent the scenario where jury fees have been paid, the civil jury trial was entered into JMS, and the jury trial was cancelled with a cancel reason of "Settled". As such, these data are a subset of all civil jury trials settled and will not cover cases settled before jury fees were paid.

TABLE 4

Civil Jury Selections by Fiscal Year

Table 4: Number of Civil Jury Panels Created [1,2,3]

Fiscal Year	Total Civil Jury Panels
FY 10/11	20
FY 11/12	27
FY 12/13	23
FY 13/14	23
FY 14/15	20
FY 15/16	21
FY 16/17	15
FY 17/18	12
FY 18/19	21
FY 19/20	34
Total	216

Data source: JMS, Empanelled Trials View, January 28, 2021

Notes: Data are preliminary and subject to change

1: Data specific to jury selection are not collected; however, as creating a jury panel is the next step in the process following jury selection, these data are offered as an alternative.

2: Summons are sent to a large group of citizens, then a proportion of those citizens attend a jury selection and a panel is created from those selected. As such a panel is created in the Jury Management System (JMS) for the jury trial and counted as one panel for the purposes of this report.

3: Counts of jury panels are sourced from the Jury Management System (JMS) application where the Empanel Date is between April 1, 2010 and March 31, 2020. The Empanel Date is the date that the JMS user enters the panel/juror information into JMS.

4: Caution should be taken against comparing JMS data with data reported from other case tracking systems (JUSTIN and CEIS) given their differing date definitions.

TABLE 5

Civil Jury Selections by Court Location between Fiscal Year 2010/11 and 2019/20

Table 5: Number of Civil Jury Panels Created by Court Location [1,2]

	Fiscal Year										Total Civil Jury Panels
Court Location	**FY 10/11**	**FY 11/12**	**FY 12/13**	**FY 13/14**	**FY 14/15**	**FY 15/16**	**FY 16/17**	**FY 17/18**	**FY 18/19**	**FY 19/20**	
Chilliwack Law Courts		1									**1**
Cranbrook Law Courts					1						**1**
Kamloops Law Courts	2		3		2			3	1	1	**12**
Kelowna Law Courts	1	1	2	1		1				1	**7**
Nanaimo Law Courts		1		2				1		1	**5**
Nelson Law Courts					2						**2**
New Westminster Law Courts	3	6	2	4	3	6	4	2	2	5	**37**
Penticton Law Courts			1							2	**3**
Port Alberni Law Courts		1									**1**
Powell River Law Courts		1	1				1				**3**
Prince George Law Courts			1								**1**
Rossland Law Courts	1										**1**
Vancouver Law Courts	9	14	11	14	9	12	8	5	15	18	**115**
Vernon Law Courts						1	1	1			**3**
Victoria Law Courts	4	2	2	2	3	1	1		3	6	**24**
Total	**20**	**27**	**23**	**23**	**20**	**21**	**15**	**12**	**21**	**34**	**216**

Data source: JMS, Empanelled Trials View, January 28, 2021

Notes: Data are preliminary and subject to change.

1: Data specific to jury selection are not collected; however, as creating a jury panel is the next step in the process following jury selection, these data are offered as an alternative.

2: Summons are sent to a large group of citizens, then a proportion of those citizens attend a jury selection and a panel is created from those selected. As such a panel is created in the Jury Management System (JMS) for the jury trial and counted as one panel for the purposes of this report.

3: Counts of jury panels are sourced from the Jury Management System (JMS) application where the Empanel Date is between April 1, 2010 and March 31, 2020. The Empanel Date is the date that the JMS user enters the panel/juror information into JMS.

4: Caution should be taken against comparing JMS data with data reported from other case tracking systems (JUSTIN and CEIS) given their differing date definitions.

TABLE 6

Supreme Court Civil Completed Jury Trials and Trial Length Statistics by Fiscal Year

Table 6a: Number of Completed Civil Jury Trials

Fiscal Year	FY 10/11	FY 11/12	FY 12/13	FY 13/14	FY 14/15	FY 15/16	FY 16/17	FY 17/18	FY 18/19	FY 19/20	10 Year Annual Average
Total Civil Jury Trials	25	29	28	20	16	23	22	12	29	34	**24**

Table 6b: Civil Jury Trial Length Statistics

Civil Jury Trial Length Statistics	FY 10/11	FY 11/12	FY 12/13	FY 13/14	FY 14/15	FY 15/16	FY 16/17	FY 17/18	FY 18/19	FY 19/20	10 Year Period
Maximum Length in Days	21	23	26	21	38	20	23	23	32	25	**38**
Minimum Length in Days	1	1	2	2	2	2	1	3	1	2	**1**
Median Length in Days	7	9	9	13	10	8	10	12	7	9	**9**
Mean Length in Days	8	8	10	12	11	9	10	12	9	10	**10**

Data source: Courts, Sheriff Jury Trials table, February 5, 2021

Notes: Data are preliminary and subject to change.

1: The counts of Completed Supreme Court Jury Trials are sourced from the BC Sheriff Services and reflect the date and fiscal year in which a jury trial is completed.

2: Completed Jury Trials refer to jury trials which have commenced in court and have concluded. Concluded jury trials include cases where jurors attended court for at least one day and have been compensated for fees and expenses, and will include cases which settled or resulted in a mistrial during the course of the trial.

3: Caution should be taken against comparing Completed Trial data with data reported from other case tracking systems (JMS, JUSTIN and CEIS) given their differing date definitions

TABLE 7

Supreme Court Completed Civil Jury Trials by Court Location & Fiscal Year

Table 7: Number of Completed Civil Jury Trials by Court Location

	Fiscal Year										
Court Location	**FY 10/11**	**FY 11/12**	**FY 12/13**	**FY 13/14**	**FY 14/15**	**FY 15/16**	**FY 16/17**	**FY 17/18**	**FY 18/19**	**FY 19/20**	**Total**
Chilliwack Law Courts		1								1	**2**
Duncan Law Courts		1									**1**
Kamloops Law Courts	2		1						1	1	**5**
Kelowna Law Courts	2	1	4	1		2		1		1	**12**
Nanaimo Law Courts		1						1		1	**3**
Nelson Law Courts					1						**1**
New Westminster Law Courts	8	6	9	3	4	9	10	5	11	7	**72**
Penticton Law Courts			1							1	**2**
Powell River Law Courts		1	1				1				**3**
Vancouver Law Courts	9	15	11	14	9	10	9	5	14	18	**114**
Vernon Law Courts						1	1				**2**
Victoria Law Courts	4	3	1	2	2	1	1		3	4	**21**
Total Civil Jury Trials	**25**	**29**	**28**	**20**	**16**	**23**	**22**	**12**	**29**	**34**	**238**

Data source: Courts, Sheriff Jury Trials table, February 5, 2021

Notes: Data are preliminary and subject to change.

1: The counts of Completed Supreme Court Jury Trials are sourced from the BC Sheriff Services and reflect the date and fiscal year in which a jury trial is completed.

2: Completed Jury Trials refer to jury trials which have commenced in court and have concluded. Concluded jury trials include cases where jurors attended court for at least one day and have been compensated for fees and expenses, and will include cases which settled or resulted in a mistrial during the course of the trial.

3: Caution should be taken against comparing Completed Trial data with data reported from other case tracking systems (JMS, JUSTIN and CEIS) given their differing date definitions