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PROFESSIONAL CORP.

DELIVERED VIA EMAIL: **amanda.iarusso@ontario.ca**

September 11, 2020

The Right Honourable Douglas Downey
Attorney General of Ontario
c/o Amanda Iarusso
Director of Policy and Legal Affairs
720 Bay Street
Toronto, ON M7A 2S9

Dear Mr. Downey:

Re: Justice Sector Consultation

Please accept my submission in response to your letter of August 24, 2020.

I want to thank you for the opportunity to contribute to this incredibly important discussion. I am extraordinarily happy to see the Ministry investing in the matter of access to justice, particularly given that the COVID-19 pandemic has rapidly exacerbated this already urgent problem.

A. Introduction

It is obvious to anyone examining our social fabric that Canadians deeply value the principles of fairness and equality. Evidence of our egalitarian philosophy can be found in all facets of our day-to-day lives, from publicly funded healthcare to expansive individual rights and freedoms enshrined in both our federal and provincial laws. It should come as no surprise, then, that so many of us are concerned about the state of Canada's civil justice system.

The issue of access to justice was brought into sharp relief in the 2013 report released by the Action Committee on Access to Justice in Civil and Family Matters (the "Committee"), entitled "Access to Civil & Family Justice: A roadmap for Change" (the "ACFJ Report"). In its report, the Committee concludes, among other things, that there is a "serious access to justice problem in Canada" and that a "new way of thinking…is required to move away from old patterns and approaches."[1] In support of its findings, the Committee cites some damning statistics that highlight the extent to which our civil justice system is failing to provide meaningful assistance to a large proportion of the Canadian population. For example, the Committee found that approximately 50% of Canadians attempt to solve their legal problems on their own due to the high cost of legal services

[1] Action Committee on Access to Justice in Civil and Family Matters, "Access to Justice & Family Justice: A Roadmap for Change", Ottawa, Canada, October 2013, online: <http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf> at 1 – 5.

and complexity of legal procedures.[2] Furthermore, the Committee found that the cost of a five-day civil trial in Canada ranges from $23,083 to $79,750[3], which is startling when you consider that the median after-tax income of Canadian families and unattached individuals is only $61,400.[4]

As the ACFJ Report explains, the access to justice problem in Canada is severe and involves a litany of complex socioeconomic and systemic issues. A detailed analysis of these issues is beyond the scope of this submission. Rather, in this paper I argue for increased access to justice through widespread implementation of single-judge proceedings and the contemporaneous creation of more specialized courts and tribunals, which are, in my submission, necessary to harness the full potential of the single-judge model.

However, I will first begin with a brief examination of the history of access to justice in North America because I believe it provides crucial context for the discussion that follows. As the late American jurist William Brennan put it, "we remain imprisoned to the past so as long as we deny its influence on the present."[5]

B. An abridged history of access to justice in North America

There is no universally accepted definition of "access to justice", although most people agree, at a general level, that it means equal access to legal services and to all forums in which legal rights are determined.[6] Practically speaking, access to justice is a chameleonic concept that has and will continue to be moulded largely by the narrative of human experience, and by the ever-changing attitudes of society.

Its history, on the other hand, is fairly well settled. In that regard, former Chief Justice of Canada Beverley McLachlin was quite right when she noted in her foreword to the ACFJ Report that the problem of access to justice is hardly a new one.[7] Indeed, concerns over access to justice date as far back as the Bible.[8] For example, the story of Susanna and the elders, found in the Book of Daniel, has been cited numerous times by courts as highlighting the importance of sequestering witnesses.[9] After Susanna is

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2 *Ibid*. at 4.
3 *Supra* note 1 at 4.
4 Statistics Canada: https://www150.statcan.gc.ca/n1/daily-quotidien/200224/dq200224a-eng.htm
5 "Court, 5-4, rejects racial challenge to death penalty", New York Times, April 23, 1987, online: https://www.nytimes.com/1987/04/23/us/court-5-4-rejects-racial-challenge-to-death-penalty.html
6 Law Society of Upper Canada. *Report to Convocation – Access to Justice Committee* (June 28, 2002), online: <http://www.lsuc.on.ca/media/convjune02_accjust.pdf> at 3 – 4.
7 *Supra* note 1, Foreword.
8 Alan M. Dershowitz, *America on Trial: Inside the legal battles that transformed our nation* (New York: Time Warner Book Group, 2004) at 2.
9 Ralph Slovenko, "Sequestration of Lay Witnesses and Experts" (2004) J Am Acad Psychiatry Law 32:447–50 at 447, citing the Book of Susanna (verses 48–64), Apocrypha of the Old Testament, Revised Standard Version. See also *James v. Heintz* (1991), 165 Wis.2d 572 (Wis. Ct. App.) at 582.

accused of adultery by two elders with whom she refused to have sex, the people of Israel, acting as both judge and jury, hear the testimony of the elders together and based on that evidence, sentence Susanna to death. Susanna then cries out to God, who rouses the spirit of Daniel to defend her. Daniel intervenes and cross-examines the elders separately. This time, the elders tell differing accounts of where Susanna's alleged adultery took place (one says under a mastic tree, the other says under an oak tree). As a result, Susanna is acquitted and the elders are sentenced to death for bearing false witness.

During the embryonic years of the North American justice system laws were made and enforced largely along religious, racial and gender lines. In colonial America local governments viewed the enforcement of "moral law" as a primary obligation, and although colonial codes implied a right to some kind of legal representation, they were actually rather hostile toward the legal profession.[10] Any notions of "justice" took a back seat to pious zealotry, misogyny and brewing racial tension attributable to colonial expansionism.[11] Hence, during the Salem witchcraft trials of 1692, for instance, "the judges allowed into evidence every accusation of participation in witchcraft, no matter how unfounded."[12] Things would not get much better over the following two centuries, which saw the enactment of Black Codes and Jim Crow laws throughout the United States. Similar racist practices occurred in Canada, including the infamous Chinese head tax.[13]

However, the North American landscape began to change dramatically after the Second World War. In Canada, the nascent "Rights Revolution" proved to be the spark in a prairie fire of pioneering legislation, including the federal Bill of Rights, enacted in 1960, and the Ontario Human Rights Code, although these laws were understandably weaker than their modern-day counterparts.[14] Meanwhile, south of the border, the United States Supreme Court, under the stewardship of legendary former chief justice Earl Warren, undammed a stream of landmark rulings during the 1950s and 1960s that significantly altered the meaning and scope of American constitutional law. Starting with *Brown v. Board of Education*, the Warren Court moved to end race discrimination in the United States, establish a right of sexual privacy, and to expand the rights of the poor, of criminal

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10 *Supra* note 8 at 30 – 31.

11 *Supra* note 8 at 29 – 34.

12 *Supra* note 8 at 32, citing Peter Charles Hoffer, *Law and People in Colonial America* (Baltimore: John Hopkins University Press, 1998) at 41. See also Mary Beth Norton, "They Called It Witchcraft", *New York Times*, Oct. 31, 2002, online: <http://www.nytimes.com/2002/10/31/opinion/they-called-it-witchcraft.html>.

13 Debra Black, "Canada's immigration history one of discrimination and exclusion", *Toronto Star*, February 15, 2013, online: <http://www.thestar.com/news/immigration/2013/02/15/canadas_immigration_history_one_of_discrimination_and_exclusion.html>.

14 Dominique Clement et al., "The Evolution of Human Rights in Canada" (Ottawa: Canadian Human Rights Commission, 2012), online: <http://www.chrc-ccdp.ca/sites/default/files/ehrc_edpc-eng.pdf> at 7 – 20.

defendants and of religious minorities.[15] The court also withdrew its support of McCarthyism and other forms of Cold War propaganda intended to suppress free speech and deter political criticism.[16]

But after many years of wide-reaching liberal reforms, a counterrevolution was inevitable and the economically depressed 1970s and early 1980s proved to be the ideal breeding ground for a neoconservative backlash. This shift was especially pronounced in the United States, where the administration of then president Ronald Reagan, following in the footsteps of former British prime minister Margaret Thatcher, implemented laissez-faire economic policies that resulted in large cuts in social spending and a general diminution of the welfare state.[17] The Reagan administration was also determined to use its judicial appointment power to create a more conservative federal court system and "undo what they considered to be the Warren Court's unwarranted expansion of civil rights and liberties."[18] True to his cause, Reagan appointed several staunchly conservative judges to the federal bench – most notably, William Rehnquist and Antonin Scalia. Within this general mood of "pragmatic conservatism", the future of access to justice, in the sense of granting equal access to objective courts of law, appeared grim.[19]

Yet, the 1980s was also a decade in which the use of alternative dispute resolution flourished. What began as a social movement to resolve community-wide civil rights disputes through mediation flowered into a widely embraced alternative to litigating in an expensive and overtaxed court system.[20] In Canada, several provinces took steps during the 1980s and 1990s to try and improve the speed and accessibility of our civil courts, such as enacting legislation providing for summary adjudication, simplified trial procedures, class action lawsuits and mandatory mediation.[21] Further reforms have

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15 Edward Lazarus, *Closed Chambers: The Rise, Fall and Future of the Modern Supreme Court* (New York: Penguin Books, 2005) at 7.

16 See, for e.g., *Yates v. United States*, 354 U.S. 298 (1957), where the Court held that a person's right to freedom of speech under the First Amendment to the United States Constitution includes radical and reactionary speech. See also *Watkins v. United States*, 354 U.S. 178 (1957), where the Court held that "[t]here is no general authority to expose the private affairs of individuals without justification."

17 Ugo Mattei, "Access to Justice. A Renewed Global Issue?", Electronic Journal of Comparative Law, vol. 11.3 (December, 2007), online: <http://www.ejcl.org/113/article113-14.pdf> at 2 – 3.

18 *Supra* note 15 at 191.

19 *Supra* note 17 at 3.

20 Lucy V. Katz, "Compulsory Alternative Dispute Resolution and Voluntarism: Two-headed monster or two sides of the same coin?" Journal of Dispute Resolution, Vol. 1993, Iss. 1 [1993], Art. 4, online: <http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1022&context=jdr> at 3 – 6; "History of Alternative Dispute Resolution (ADR) in the Superior Court of Delaware", The Official Website of the Delaware State Courts, online: <http://courts.delaware.gov/Superior/ADR/adr_history.stm> (Accessed March 5, 2014).

21 Paul M. Perell & John W. Morden, *The Law of Civil Procedure in Ontario,* 1st ed. (Markham: Lexis Nexis, 2010) at 30 – 31; Janet Walker, "Summary Judgment Has its Day in Court" (2012) 37 Queens L.J. 693 at 705; Catherine Piche, "Quebec: The Canadian jurisdiction of choice for class actions?", *Class Action Reports* 26:5 (September – October 2005); The Honorable Coulter A. Osborne, "Civil Justice Reform Project: Summary of Findings & Recommendations" (November 2007), online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf >.

followed, including in Ontario and British Columbia, where significant changes were made to their respective rules of civil procedure in 2010, including the express codification of the principle of proportionality.[22]

Unfortunately, lasting progress has proven elusive. The current global trend toward privatization, along with rampant systemic delays and significant increases in the cost of legal services, have combined to undercut well-intentioned reforms and all but close the courthouse doors to a large number of Canadians.[23]

The history of our justice system is therefore an indubitably checkered one with the common thread being that economically and socially disadvantaged citizens have rarely been able to fully avail themselves of its mechanisms. Our current state of affairs suggests that we have learned little from our past, or at least not enough. Moreover, if it is true that laws always reflect the culture from which they emerge, then Supreme Court of Canada Justice Andromache Karakatsanis was accurate when she said in 2013 that a "culture shift" is required if we are to "create an environment promoting timely and affordable access to [our] civil justice system."[24]

It is against the backdrop of this muddied mosaic that I respectfully make the following proposals.

C. Recommendations

1. Establish more specialized courts and tribunals

In the latter half of the 20th century administrative governance became increasingly common in Canada as the traditional rule of law gave way to more complex statutory regimes commanding specialized oversight.[25] Now, there are literally thousands of administrative tribunals occupying the legal landscape. These bodies cover "all the important areas of endeavour and social concern, from labour to human rights, from worker's compensation to mental health".[26]

In 1991, then chief justice of Canada, Antonio Lamer, acknowledged the importance of specialized tribunals in Canada when he said that "the impact of administrative agencies on the lives of individual Canadians is great and likely surpasses the direct

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[22] News Release, British Columbia Ministry of the Attorney General (July 7, 2009), online: <http://www2.news.gov.bc.ca/news_releases_2009-2013/2009AG0004-000082.htm>.
[23] *Supra* note 1 at 1.
[24] *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII) at para. 2
[25] Remarks of the Right Honourable Beverley McLachlin, 6th Annual Conference of the Council of Canadian Administrative Tribunals, May 27, 2013, Toronto, Ontario, online: <http://www.scc-csc.gc.ca/court-cour/judges-juges/spe-dis/bm-2013-05-27-eng.aspx>.
[26] *Ibid*.

impact of the judiciary."[27] And according to former chief justice Beverley McLachlin, "[t]he shift to regulatory governance has been wildly successful…The complex modern state could not function without the many and varied administrative tribunals that people the landscape."[28] Much of that success is attributable to the fact that administrative tribunals are subject matter experts. This enables them to dispose of cases with greater speed and consistency. The benefits of specialization have also been realized within our civil courts, where dedicated branches have been established for commercial, family, estates and class action proceedings.

This begs the question: Why, in this era of ever-increasing specialization across all sectors of the economy, and given the exponential increase in the volume and complexity of information and evidence that adjudicators are required to analyze, aren't there more specialized tribunals and courts across a broader spectrum of practice areas?

Clearly, expert tribunals are not a new phenomenon, but they have garnered heightened relevance in recent years as traditional courts toil under the weight of their own caseloads. For example, in 2013 the state of South Australia established a new "super-tribunal" called the South Australian Civil and Administrative Tribunal in order to take pressure off of its civil courts.[29] The Tribunal is charged with providing a venue for reviewing many of the decisions made by state ministers, commissioners and other specialist boards and tribunals. The aim, according to Australian lawyer Anita King, is "to provide a one-stop-shop where disputes can be resolved quickly and cost effectively."[30]

In my respectful submission, we must establish even more specialized courts and tribunals throughout the province. History shows that these entities are crucial relief valves for the justice system. In addition to alleviating backlogs in our civil courts, specialized tribunals enhance access to justice by funnelling cases through adjudicators who, by dint of their expertise, are able dispose of disputes more expeditiously.

Dramatic increases in the complexity of the law caused by the emergence of the information superhighway, and the increasingly virtual global economy it has spawned, have, in my respectful submission, rendered our common law courts "jacks of all trades, masters of none". Expecting our judges to unpack a labyrinthine bundle of constantly evolving legal rights while at the same time presiding over a seemingly endless stream of protracted civil disputes within an already overtaxed court system is unrealistic; it is simply too heavy a burden for them to reasonably bear. An overwhelmed judiciary inevitably, but understandably, surrenders to a culture of reactive justice; an environment in which

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27 *Supra* note 25, citing Antonio Lamer, "Administrative Tribunals: Future Prospects and Possibilities" (1991-2) 5 Can. J. of Admin. L. at 107.

28 *Supra* note 25.

29 Anita King, "New South Australian Civil and Administrative Tribunal a step closer", Andersons Solicitors LawTalk Blog (February 5, 2014), online: <http://www.andersons.com.au/lawtalk/posts/2014/february/new-south-australian-civil-and-administrative-tribunal-a-step-closer.aspx>.

30 Ibid.

clearing the docket takes primacy over justice actually being done, and being seen to be done.

There are numerous areas of litigation in Ontario that are ripe for specialized oversight, such as wrongful dismissal actions, personal injury suits[31], debt collection proceedings, including mortgage enforcement actions, and basic contract disputes (e.g., involving disputed sums of less than $100,000). These matters usually involve a narrow set of disputed issues and are often tailor-made for summary disposition, whether by motion or by way of summary trial. Assigning exclusive jurisdiction over these types of cases to specialized courts staffed by subject matters experts, akin to, say, the commercial list court, can take an extraordinary load off of our provincial courts.

2. Implement single-judge proceedings in conjunction with the creation of more specialized courts

It is my respectful submission that single-judge proceedings can create tremendous efficiencies **if combined with** the creation of more specialized tribunals. Introducing single-judge proceedings into an already overburdened court system amounts to a shell game: judges would simply be saddled with an unmanageable number of widely varying individual assignments. We would be extinguishing one fire only to light another.

On the other hand, if tightly woven into a robust tapestry of specialized agencies that are adequately funded, the single-judge format can drive badly needed economies of scale. A system in which subject matter experts are appointed to exclusively adjudicate disputes that are solely within their realm of specialization inescapably lends itself to the single-judge model. By virtue of their expertise, specialized adjudicators are able to identify and resolve issues quickly. They are therefore in the best position to singlehandedly supervise litigants, generate coherent case records and assemble properly structured evidentiary records.

Second, because they have vast reserves of specialized institutional knowledge, expert tribunals possess tremendous flexibility, which is necessary in order for a single-judge model to thrive. More specifically, in circumstances where the single-judge format is disrupted (e.g., illness, unexpected death, retirement, etc.), the redistribution of lives cases within a specialized environment is far less likely to result in duplication of work and intolerable systemic delays. Specialized institutional knowledge also produces more consistent jurisprudence, which, in turn, lessens the attractiveness of appeals, thereby promoting finality.

In addition, specialized adjudicative bodies have the unique ability to construct their rules of procedure to respond to the specific exigencies of their own caseloads with the predominant themes typically being expediency and ease of access. The hallmarks of

[31] See Elizabeth G. Thornburg, “Contracting with tortfeasors: Mandatory arbitration clauses and personal injury claims” (Winter/Spring 2004), 67 Law and Contemporary Problems 253 at 261 – 273.

administrative procedure are user-friendly rules, such as e-filing portals, relaxed filing requirements, less onerous rules regarding pre-hearing discovery and more streamlined case management mechanisms, all of which operate to enhance access to justice.

Lastly, in respect of any single-judge model, it would be advisable, if not necessary, to ensure that a judge other than the judge seized of a matter from the point of inception preside over the trial of that case (since the judge of first instance will inevitably be privy to pre-trial settlement discussions). However, any disruption caused by this requirement is easily overcome in a specialized environment, for the reasons set out above.

In summary, I respectfully submit that the creation of more specialized courts is the necessary corollary to an efficacious single-judge model. This brings me to my final point: increased funding for our civil justice system.

3. <u>The need for greater investment in our courts is beyond dispute</u>

It is trite to say that access to justice is impossible without robust support from the state. In order for our courts and administrative tribunals to dispense justice effectively and expeditiously, they must have a sufficient number of judges and adjudicators, along with a properly funded and adequately staffed administrative infrastructure. This is not happening.

According to recently retired British Columbia Supreme Court justice Mark McEwen:

> Support for the civil courts is not seen as a cost of good government but as a discretionary expense to be minimized, amateurized (no legal aid), or privatized, wherever possible…courts are, by definition – that is, constitutionally – a common good. They are a first charge on government, not a "service" that competes for what is left over after government organizes its other priorities. It undermines the fundamental values of democracy, federalism and the rule of law informing the Constitution, elaborated in the case law, and evident in our history, to put a "price on justice" or to purport to re-imagine the courts as "services".[32]

Professor Wolfgang Ewer, past president of the German Bar Association, strikes a similar chord:

> In a society governed by the rule of law, it is the foremost duty of the state to guarantee access to justice everywhere and for everyone. The administration of justice is not a business: it is a genuine task of the state…Access to justice requires foremost **that there are enough courts. It also requires that courts be**

[32] *Vilardell v. Dunham*, 2012 BCSC 748 (CanLII) at paras. 315, 429.

> **properly funded**…It means that the state must provide effective mechanisms to resolve conflicts among citizens and between citizen and state**. Consequently, one of the state's most basic tasks is to finance the justice system**. Government spending on the court system, however, is constantly being cut back.[33] [emphasis added]

The present reality is that our courts remain overwhelmed while funding for legal aid continues to decrease. Consequently, our courts are growing ever more out of touch with the needs and perspectives of the poor and middle class – that is, with those who need them the most. Rampant delays, crushing caseloads, excessive procedural formalisms and administrative complexities all operate to block the resolution of even relatively straightforward cases by shepherding litigants into a battle of pre-trial attrition that self-represented parties will rarely win.[34] As American law professor William H. Simon puts it:

> The advantaged can make far better use of their procedural discretion than the disadvantaged. They can engage in far more elaborate and sophisticated procedural strategies. They can use the procedural rules to increase the expenses of the disadvantaged asserting their claims so that the latter must give up or compromise before their claims have been determined.[35]

Reforms have been debated and attempted. For example, 2010 saw the codification of the proportionality principle in Ontario's *Rules of Civil Procedure*. And in 2013, in the case of *Hryniak v. Mauldin*, the Supreme Court of Canada called out our civil justice system as a whole and implored it to undergo a "culture shift" towards a paradigm that promotes "timely and affordable access to the civil justice system" and that "reflect[s] modern reality and recognize[s] that new models of adjudication can be fair and just."[36]

But as laudable as these developments may be, mere pedagogy cannot overcome years of stubborn insistence on the preservation of traditions that have failed to adapt to the explosive social, economic and technological advancements occurring outside our courthouse walls. The time has come for palpable change. Bona fide reform requires, at a minimum, substantial financial and intellectual investments from the state not only in

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[33] Wolfgang Ewer, "Access to justice: The view from Germany", National 23:1 (January/February 2014) at 25 – 26.

[34] Edgardo Buscaglia, "Investigating the Links Between Access to Justice and Governance Factors: An Objective Indicators' Approach" (2001), Global Programme Against Corruption: Research and scientific series, United Nations Centre for International Crime Prevention, online: <https://www.unodc.org/pdf/crime/gpacpublications/cicp13.pdf> at 4.

[35] Garry D. Watson et al., *The Civil Litigation Process: Cases and Materials*, 5th ed. (Toronto: Emond Montgomery, 1999) at 79, citing William Simon, "The Ideology of Advocacy" (1978), Wisconsin Law Review 29 at 39 - 52.

[36] *Supra* note 23 at para. 2.

our adjudicative resources, but also in transformative methodologies for disposing of civil disputes.

I respectfully submit that an increase in the number of specialized courts utilizing a single-judge or single-adjudicator format, properly structured and properly funded, will greatly enhance access to justice. The proliferation of properly funded specialized tribunals would also make the prospect of judging more attractive to highly qualified practitioners who are currently reluctant to apply for judgeships because they have no desire to preside over cases that are outside of their realm of expertise.

D. Conclusion

That the Supreme Court of Canada chose the term "culture shift" to describe what is required to remedy the access to justice problem in Canada is significant because it implies that it is not enough to simply reform the practice of law; we must also improve as a society. In this vein, Mark McEwan reminds us that:

> [C]ases [must be] determined without regard to the distributions of power or wealth and influence that otherwise prevail in society. For this reason, each case must be given the attention it requires, however small it may appear to be. The law is replete with examples of apparently inconsequential disputes which led to major changes or developments in the law, the most famous of which is arguably *Donoghue v. Stevenson*...[37]

I believe very strongly that the intellectual capital supplied by lawyers, judges and adjudicators is much more than a mere fungible commodity, and that the glory of the adversarial system lies not in its tradition per se, but rather, in its relentless insistence on the fairness of the fight, and in its expectation that regardless of which party to a lawsuit succeeds on the merits, due process will be the ultimate victor.

I remain confident that the province will zealously preserve and act upon these values to enhance access to justice for all Ontarians.

Sincerely yours,

Ryan Wozniak

Ryan Wozniak

[digital signature]

[37] *Supra* note 32 at para. 346.