



The Advocates' Society La Société des plaideurs

March 9, 2020

VIA EMAIL

The Honourable Doug Downey, M.P.P.
Attorney General of Ontario
Ministry of the Attorney General
720 Bay St., 11th Floor
Toronto, ON M7A 2S9

Dear Attorney General:

RE: Proposed Changes – Appointment of Judges and Justices of the Peace

I write in response to your February 27, 2020 announcement of the changes you intend to make to the process for appointing provincial judges and justices of the peace. This letter will focus on the proposed changes to the appointment of judges.

We have been advised that you intend to introduce legislation reflecting the proposed changes at the first possible opportunity. We are also advised by your office that we will not be given a copy of the proposed legislation for our review, nor will we be provided with more detailed written information. Therefore, in making these submissions, we have relied on the general description of the changes as set out in your press materials and as summarized by your staff at the stakeholder briefing.

As you know, The Advocates' Society, established in 1963, is a not-for-profit association of more than 6,000 members throughout Canada. The mandate of The Advocates' Society includes, among other things, making submissions to governments and other entities on matters that affect access to justice, the administration of justice and the practice of law by advocates. A significant majority of our members practise law in Ontario.

First, thank you for giving The Advocates' Society the opportunity earlier this year to make written submissions on this issue and to speak with you regarding your ideas for reform. The proposal your staff described in the February 27, 2020 stakeholder meeting, further summarized in a press release of the same date, is different from the proposal contained in the government's discussion paper dated January 10, 2020. The changes demonstrate your openness to consulting with stakeholders, and your willingness to alter your views in response to the feedback you have heard. We commend you for being receptive to the suggestions of stakeholders in the justice system.

For example, we are encouraged that you have elected not to provide the Attorney General with the power to see the list of candidates classified by the Judicial Appointments Advisory Committee ("JAAC") as "not qualified". We similarly support the decision not to grant the Attorney General the ability to require the JAAC to reconsider its classification of a candidate as "not qualified". We also support the publication of aggregate statistics regarding the diversity of candidates at various stages of the JAAC's



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screening process, as well as the move to an online application system and electronic meetings and interviews. Finally, we endorse your decision to provide the JAAC with authority to determine whether it will adopt any additional selection criteria that might be proposed by the Attorney General.

Regrettably, little has been done to address our overriding concerns with your reform proposals, which we have expressed to you from the outset. Our concerns remain that your reforms would open the door to politicization of the appointment process, would diminish the ability of the independent JAAC to assist the Attorney General in appointing the highest-quality judges for Ontario, and would undermine public confidence in Ontario's judiciary.

Specifically, the JAAC would be required to classify all candidates for judicial office as "highly recommended", "recommended", or "not recommended". The JAAC would also be required to rank every single candidate who is in the "highly recommended" or "recommended" category, and to provide that ranked "long list" to the Attorney General together with a "short list" composed of a minimum of six candidates. The Attorney General would then be permitted to select one of the candidates from the short list of six, or to reject the list and ask the JAAC for another short list of a minimum of a further six candidates. There is no limit on the number of times the Attorney General can request additional short lists.

We strenuously object to the requirement that the JAAC provide the Attorney General with a ranked long list of all candidates the JAAC has determined to be "highly recommended" or "recommended". The Attorney General's power to see every candidate on the long list, coupled with the Attorney General's unlimited power to repeatedly request fresh short lists from the JAAC, effectively gives the Attorney General the power to appoint any candidate on the long list of "highly recommended" or "recommended" candidates. The Attorney General could simply identify a specific candidate on the long list and request repeated short lists until the candidate was included in the short list. The requirement that the Attorney General select candidates from the "short list", which is intended to be a constraint upon political patronage, is thereby rendered illusory.

There appears to us to be no sound reason to take this approach in reforming the appointment process. There are two important reasons that we object to it.

First, it effectively deprives Ontario of an established appointment process that has improved public confidence in the judiciary. The established process has achieved this by discouraging political patronage appointments to the bench and encouraging the appointment of high-quality candidates selected by an expert committee. Under the established process, political patronage appointments are not only discouraged, but the public knows they are discouraged. This inspires public confidence in both the quality and independence of the judiciary appointed under that process. By contrast, your proposal would increase the power of the Attorney General to select and appoint "like-minded" judges, or judges who have demonstrated an adherence to a particular view or political orientation favoured by the government of the day. It will create a risk of appointments tainted, or seen to be tainted, by political patronage, with negative implications for public confidence in the quality and independence of Ontario's judiciary. As you know, under the federal judicial appointment process, the federal Judicial Advisory Committees ("JACs")



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assess candidates as "highly recommended", "recommended", or "unable to recommend" for appointment, and the JACs then provide the Minister of Justice with a list of all "highly recommended" and "recommended" candidates. This federal process has recently been criticized in the media for partisan political involvement after the JACs have made their recommendations. We consider it regrettable that your government appears intent upon opening Ontario's judicial appointments to the very same public criticism.

Second, requiring the JAAC to categorize all applicants, and rank all those in the "recommended" or "highly recommended" categories, would be tremendously resource-intensive and time-consuming. Without a significant expenditure of new resources, we believe that this would slow down the process significantly – precisely the opposite of what the government is hoping to achieve. Moreover, the time commitment involved in ranking the entire list could result in the JAAC having to curtail the rigorous vetting it currently undertakes with regard to each recommended candidate, which could impact the quality of judges ultimately appointed to Ontario's courts.

Subject to a review of the proposed legislation, which may reveal additional areas of concern, The Advocates' Society believes it could support the government's legislation if the government were to make all of the following changes:

- remove the requirement that the JAAC rank the entire list of "highly recommended" and "recommended" candidates;
- remove the Attorney General's power to review the entire list of "highly recommended" and "recommended" candidates;
- require the JAAC to provide the Attorney General with a ranked short list of a minimum of six candidates, which the Attorney General could reject; and
- require the JAAC or the Attorney General to report annually, in a meaningful way, on the number of times the Attorney General rejected the JAAC's short list and requested an additional list.

These changes would safeguard the public interest in maintaining a high-quality and independent judiciary in Ontario. They would also serve to maintain public confidence in the independent judiciary. Moreover, we believe they would be welcomed by other legal organizations and members of the legal community.

We would welcome the opportunity to further discuss this issue with you.

The Advocates' Society would also like to work constructively with the government on what we believe are more pressing issues facing the Ontario justice system that we know are of mutual concern. Those include the reforms proposed by Bill 161, the *Smarter and Stronger Justice Act, 2019*, harmonizing Ontario's family law with the amendments to federal family legislation, creating an effective and sustainable Legal Aid system for Ontario's most disadvantaged residents, and proper measures to address the current underfunding of Ontario's justice system.



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Yours sincerely,

Scott Maidment
President

CC: Vicki White, Chief Executive Officer, The Advocates' Society