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Ontario government's changes to how judges are named opens the door to patronage appointments, legal organizations argue

Jacques Gallant

There is mounting opposition to the Ontario government's proposed changes to the way judges are appointed, which critics argue will open the door to patronage appointments.

The changes to judicial appointments are included in an omnibus justice bill titled the "Accelerating Access to Justice Act," tabled last month and which is being studied by a legislative committee this week at Queen's Park.

The provincial government said the changes reflect feedback received from lawyers and other justice-sector players, and will both speed up access to justice and increase diversity on the bench.

Yet many of the province's legal organizations — including those representing Black, Muslim, Asian, and South Asian lawyers — say they did not ask for these changes, and argue most of them are unnecessary and risk harming the independence of the judicial appointments process in Ontario.

"We're particularly concerned with how future governments may use these changes, because these changes would bring back patronage appointments and would undermine the high quality of judicial candidates being appointed to the

Ontario Attorney-General Doug Downey says changes to judicial appointments will speed up access to justice and increase diversity on the bench.

Ontario Court of Justice," said Daniel Brown, vice-president of the Criminal Lawyers' Association.

Advocacy group Democracy Watch said in a news release Thursday that it will challenge the changes in court should they become law, arguing they violate the independence of the judiciary.

Judicial candidates for the Ontario Court of Justice are vetted and recommended to the attorney general by the independent judicial appointments advisory committee (JAAC), made up of judges, lawyers and members of the public.

The JAAC currently submits a ranked shortlist of at least two candidates for appointment. Under the proposed changes, the committee would now have to provide a shortlist of at least six candidates.

"It allows for a bigger look at what's out there in terms of creating some diversity and creating more choice," Attorney General Doug Downey told the Star when he tabled the bill last month.

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The attorney general could also reject the six-person shortlist and ask to see the names of the next six candidates, as he is currently permitted to do with the two-person shortlist.

Anthony Moustacalis, board director of lawyer advocacy group the Advocates' Society, said adding more names to the shortlist "politicizes the selection process and affects the appearance of justice."

With the current shortlist of at least two candidates, "you're actually selecting from a small pool of extremely qualified candidates," said Moustacalis, "so if you add many more numbers to that, then the risk is that we don't know if you're picking from the most highly qualified or you're picking from people who are not as highly qualified."

He said there may also simply not be six qualified candidates for a judicial vacancy in some smaller jurisdictions.

The Ontario Bar Association said the longer list "allows for more diverse choices than a list of two," while proposing that an amendment be added so that the attorney general has to report on the number of times they have sent back the list rather than choose a candidate, in order to avoid "list shopping." (Others including the Advocates' Society have also proposed such a change.)

"We are underestimating the high-quality bar in this province if we imagine that a short list of six will necessarily introduce political bias," said OBA president Charlene Theodore in an emailed statement.

Concerns have also been raised with a provision that states records maintained by the committee "in relation to the con-

sideration of an individual for appointment as a provincial judge" will be kept confidential and not disclosed "except as authorized by the chair of the committee."

The chair is appointed by the attorney general under the current system for a three-year term, but under the proposed changes the chair would be appointed for "up to" three years, meaning they could potentially be replaced at any time, which critics say points to another example of the government taking further control of what is supposed to be an independent appointment committee.

"It creates the obvious risk of a chair feeling under pressure to give the attorney general or others information as the possible price of remaining in the chair position," argues former judge, deputy Ontario attorney general and deputy attorney general of Canada George Thomson in a submission to the standing committee on the Legislative Assembly, which is holding public hearings on the bill this week.

Brown pointed out that the selection process, in which the committee vets candidates and makes "discrete inquiries" about them, is supposed to be confidential, and that the provisions could discourage people from applying to become a judge.

A spokesperson for Downey said the government is "exploring options to address the concerns that have been raised" before the standing committee this week.

The provision on confidentiality "would formalize the existing framework for confidentiality on the JAAC. This new provision does not entitle the attorney general or anyone else to receive infor-

mation about the JAAC and its processes beyond what is already allowed," said spokesman Nicko Vavassis in an email.

The proposed change to the appointment of the chair "would align with the statutory language used for the chair of the justices of the peace appointments advisory committee's term and other statutory agencies," he said.

Another proposed change would mean the three legal organizations with representatives on the committee — the Law Society of Ontario, the Ontario Bar Association and the Federation of Ontario Law Associations — would no longer pick their own representatives, but would submit a shortlist of three candidates for the attorney general to choose from.

The attorney general already picks the seven public members of the 13-person committee; the other members are judges.

The Federation of Ontario Law Associations has previously stated the change "gives the appearance of allowing the (attorney general) to have even greater control over the composition of the JAAC."

Theodore at the OBA said she sees providing more names for her association's representative "as an opportunity," noting the OBA has a diverse and fair-minded membership. The Law Society has previously stated it supports a system that produces diverse and qualified judges.

"The suggestion that this change politicizes the process undermines the professionalism of the OBA, Law Society and FOLA, who will be putting forth recommended candidates," said Vavas-

sis. “Our government rejects the implication.”

The Ontario Trial Lawyers’ Association — whose statement endorsing a six-person judicial candidate shortlist the government included in a news release announcing the changes last month — told the Star that it “strongly recommends” the three legal associations continue to be able to select their own representative on the JAAC.

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