



March 11, 2021

Standing Committee on the Legislative Assembly
99 Wellesley Street West
Room 1405, Whitney Block
Queen's Park
Toronto, ON
M7A 1A2

Dear Committee,

We welcome this opportunity to respond to the proposed amendments to the judicial appointments process as set out in Schedule 3 of Bill 245, the *Accelerating Access to Justice Act, 2021*.

Ontario's judicial appointments process is regarded throughout the world as a model for ensuring an independent, highly qualified judiciary and it is crucial to the OBA that the Judicial Appointments Advisory Committee ("JAAC") maintain its independence and ability to give meaningful advice.

With this context, we provide the following with respect to the proposed amendments:

- The OBA is a home for diversity in the legal profession, and as such we are a proponent of efforts to make sure Ontario has a diverse judiciary that reflects who Ontarians are. We welcome the Attorney General's stated objectives of improving the diversity of the Bench. We particularly welcome amendments in the proposed Subsection 43(9)(a) that will require the JAAC to publish diversity statistics about judicial candidates in its Annual Reports. This information will demonstrate where advances are being made and where work still needs to be done. We recommended to the Attorney General that accountability on diversity and inclusion be explicitly included in the legislation and are pleased to see this reflected in Bill 245.
- Currently, the OBA names one candidate for appointment to the JAAC. Bill 245 proposes that we name three potential candidates, and the Attorney General chooses one of the three for appointment to the committee. There have been questions about whether this introduces partisanship into the JAAC appointment process. With a diverse membership of 16,000, we are confident that we can name three members from a diverse cross-section of the bar, all of whom are qualified and none of whom would rely on partisan factors for their appointment. We understand that in building a committee reflective of the province, flexibility is required in order to ensure any gaps in perspectives are covered. For many years, the OBA has been asked to provide a list of three candidates for appointments to each federal Judicial Advisory Committee for Ontario and we have seen the appointments of highly qualified candidates, none of whom were appointed for partisan reasons.

- To fill judicial vacancies, the JAAC is currently required to provide a list to the Attorney General with a minimum of two candidates recommended for appointment to the bench. The revised legislation proposes that for every judicial vacancy the JAAC provide a list of a minimum of six recommended candidates to the Attorney General for appointment. When changes to the judicial appointment process were first proposed, the OBA expressed concerns about proposals that would require the committee to provide a list of all qualified candidates to the Attorney General. This had the potential to introduce partisan considerations into the appointments process and undermine confidence in the quality of the judiciary. The elimination of this proposed approach is a positive development and the requirement to provide the Attorney General with a longer list of candidates instead represents a workable compromise. In Ontario it is unlikely that there would not typically be at least six applicants who are qualified for the position and do not rely on partisan factors for their appointment. What is more, in a province with hundreds of cultures and ethnicities, a list of six provides the committee with three times the opportunity to represent different perspectives and lived experience. This is a welcome new level of accountability.
- In both the current and proposed legislation, the Attorney General has the ability to ask the JAAC for a new list of candidates rather than appointing any candidates from the list provided. “List shopping” has always had the potential to introduce partisan considerations into the appointments process, but such concerns have not come to fruition. Increasing the length of the list does not materially increase the likelihood that it will. However, in that it remains a possibility, the OBA recommends that the legislation be amended to add another layer of protection against “list shopping”. In order to increase transparency and ensure that lists are not sent back to the committee routinely (undermining the meaningfulness of the JAAC’s advice) or for partisan reasons, the OBA recommends an amendment to the proposed Subsection 43(9) to require that the JAAC publish in its Annual Report how many times the Attorney General has rejected a list pursuant to the proposed Subsection 43.1(7). We have set out our proposal below.

As a result of the pandemic, there is a backlog of matters before the Ontario Court of Justice, and addressing this will require a full complement of Ontario judges. We ask that the amendment above be adopted, and that the JAAC and the Attorney General work to ensure that we have a full complement of highly qualified Ontario judges immediately.

Sincerely,



Charlene Theodore
President, Ontario Bar Association

We recommend that the proposed Subsection 43(9) be amended as follows:

(9) The annual report must include,

(a) statistics about the sex, gender, gender identity, sexual orientation, race, ethnicity, cultural identity, disability status and ability to speak French of candidates who volunteer that information, including whether the candidates identify as Indigenous or as a member of a Francophone community, at each stage of the process, as specified by the Attorney General; ~~and~~

(b) for each appointment, the number of times that the Attorney General has rejected a list pursuant to Subsection 43.1(7); and

~~(c)~~ such other content as the Attorney General may require.