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January 24, 2020

RE Reference No.: M-2020-338 Re Proposed Amendments to the Appointments of Justices in the Province of Ontario

Dear Mr. Downey,

Thank you for engaging the County of Carleton Law Association (“CCLA”) in meaningful consultations regarding the proposed reforms to Ontario’s judicial appointment process. As the second largest law association in Ontario, the CCLA is committed to ensuring the continued confidence of Ontarians in our judicial system. The Government of Ontario’s continued commitment to non-partisan, merit-based judicial appointments is a crucial determinant of the rule of law.

Whatever the merits of the judges as individuals, if the process itself can be improved, public confidence in the judiciary as a whole will be enhanced. Within the sphere of appointments, we recognize that there are debates about how the selection process can be made more transparent and better able to identify talent in a diverse pool of candidates. The appointment process itself should be designed to function in a way that strengthens the independence of the judiciary, public confidence in the administration of justice and the rule of law. The challenge of meeting these expectations falls to independent judicial appointment bodies and the guidance given to them – for example, on conflicts of interest, process for interviewing, diversity, and so on.



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There is no doubt that, in principle, some of the changes proposed have the potential to strengthen the rule of law and the legitimacy of the courts; however, in our view the principled focus must always be on transparency and the perceived independence of appointments. Much depends on how the judicial advisory committees are structured, who sets the criteria of merit, the transparency of what constitutes merit, and how the recommendations to the Attorney General operate in practice. The CCLA hopes that its submissions, informed by lessons learned from 2016 Federal judicial appointment reforms and a critical review of public criticism of comparable processes, can assist the Government in grappling with the challenge of how to make Ontario's appointment process better.

In the interests of efficiency, we have organized our submissions as follows:

Part I – Background

Part II – Reforms Which May Increase Public Confidence;

Part III – Reforms Which May Decrease Public Confidence; and

The proposed reforms are referred to by Issue Number, as described in Schedule A of your January 10, 2020 materials enclosed hereto.

PART I – Background

The Supreme Court of Canada's decision in *Roncarelli v. Duplessis*¹ articulated Canada's defining constitutional principle: that no executive authority in Canada is unlimited. In so doing, it reinforced the notion that judicial independence is the condition precedent of the rule of law. Judges must not only be insulated from improper government or partisan influence; they must be seen to be so insulated. The hallmarks of juridical independence - security of

¹ *Roncarelli v. Duplessis* [1959] S.C.R. 121

tenure and administrative/financial independence² - are moot if the public perceives the members of the judiciary as being beholden to the government because of how they are selected. As stated by Canadian scholar Lorne Sossin,³ “*if currying partisan favour is understood as a prerequisite for judicial appointment, then the independence of judges is tainted irrespective of what protections might be afforded*”. The merit of any individual judge becomes meaningless as the entire process is called into question.

Herein lies the critical role of our judicial appointment process. The process cannot leave any room for perceived or actual political interference – a popular narrative used by the media regardless of the government in power.⁴ If the process does leave room for political interference, whether perceived or actual, by removing independent assessments and rankings of merit the government of the day is courting a public relations battle with the media and civil society. Specifically, the government of the day opens itself to attack regardless of the merit of

² As stated by the Supreme Court in *Valente v R*, [1985] 2 S.C.R. 673 and the *Provincial Judges Remuneration Reference*, 1 S.C.R. 3; 1998 CanLII 833 (S.C.C.).

³ Lorne Sossin “Judicial Appointment, Democratic Aspirations, and Culture of Accountability”, (2008) *University of New Brunswick Law Journal* 58.

⁴ See, for example, the hundreds of articles published during both the Conservative and Liberal Government’s criticizing the Federal Judicial Process which the proposed reforms seek to emulate: (24 July 2015) Sean Fine, “Stephen Harper’s Court: How the Judiciary has been remade”, *Globe and Mail* online at <https://www.theglobeandmail.com/news/politics/stephen-harpers-courts-how-the-judiciary-has-been-remade/article25661306/>; (26 July 2015) Chris Watt, “Legal observers urge Ottawa to revamp judicial appointment process”, *Globe and Mail*, online at <https://www.theglobeandmail.com/news/national/legal-observers-urge-ottawa-to-revamp-judicial-appointment-process/article25716050/>; (25 July 2015) Charlie Smith, “Stephen Harper stealthily lays his imprint over the Canadian judiciary”, *Straight*, online at: <https://www.straight.com/news/496166/stephen-harper-stealthily-lays-his-imprint-over-canadian-judiciary>; (8 April 2017), Sean Fine “Liberals overhaul judicial appointment process to boost diversity”, *Globe and Mail*, online at: <https://www.theglobeandmail.com/news/national/liberals-to-unveil-new-judicial-appointment-process-undo-changes-made-by-harper/article32454733/>; (28 July 2015) F. L. Morton and Dave Snow, “Thursday Thinkpiece: Morton and Snow on the Harper Conservatives and the Canadian Judiciary”, *Slaw: Canada’s online legal magazine*, online at <http://www.slaw.ca/2018/09/27/thursday-thinkpiece-morton-snow-on-the-harper-conservatives-and-the-canadian-judiciary/>; (29 April 2019) Andre Marin, “MARIN: Trudeau’s Liberals judge judicial appointments based on party affiliation online at: <https://edmontonjournal.com/opinion/columnists/marin-trudeaus-liberals-judge-judicial-appointments-based-on-party-affiliation/wcm/08ccaeaa-18ec-4164-9ab0-49c2fcbc2cd3>”.

any one appointment and, more importantly, public confidence in our judiciary as a whole is undermined.

PART II - Excellent Reforms: Transparency, Efficiency and Diversity

Transparency is a critical component of ensuring public confidence in the judicial appointment process. Currently, the provincial process is more transparent than the federal process in that it:

- a. Legislated the judicial appointment process so as to ensure clear procedural rules and expectations;
- b. Advertises individual appointments within the region;
- c. Interviews for individual appointments within the region;
- d. Publicly states that, under s.43(9)(3), the Committee shall assess “*professional excellence, community awareness and personal characteristics of candidates and recognition of the desirability of reflecting the diversity of Ontario society in judicial appointments*”; and
- e. Requires the Committee to rank candidates vs. the federal recommended, highly recommended and not recommended systems.

Because of this transparency and arms-length assessment and ranking of merit, the provincial appointment process has been historically sheltered from public criticism.⁵

The CCLA was pleased to see the Government of Ontario’s restated commitment to transparency, efficiency, and diversity. Several of the proposed reforms meet these objectives, such as online applications and the inclusion of diversity statistics in the annual report. Specifically:

⁵ *Supra*, footnote 4.



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- a. **Issue 1 – Online Process** - the introduction of the Online Process in Issue No.1 is excellent and long overdue;
- b. **Issue 2 – Establishment of the Committee** – The maintenance of a legislated process is far superior than a purely discretionary process. It ensures procedural and substantive clarity.
- c. **Issue 3 – Committee Composition** – Having the Attorney General be able to select from three lawyers proposed by each legal organization (Law Society of Ontario (“LSO”), Ontario Bar Association (“OBA”), Federation of Ontario Law Associations (“FOLA”)) will facilitate better Committee balance in terms of gender, linguistic representation, race, sexual orientation and identity, practice area etc.
 - a. **Potential improvement** – The government should consider opening the political appointments on the committee to a public application process. This will serve to further legitimize the independence of the Committee itself and may lead to a more diverse pool from which to select Committee members.
- d. **Issue 5 - Chair** – Limiting the length of time that a person may serve as Chair to a maximum of three (3) years will ensure that no one individual is able to exert undue influence on the Committee.
 - a. **Potential Improvement** - The Government may wish to consider allowing the Committee to vote for its Chair to ensure the democratic legitimacy of the position.
- e. **Issue 6 – Remuneration of Members** – The CCLA believes that the Government’s offer of remuneration reasonable. The work is considerable. Individuals may refuse to sit on the Committee due to the financial burden imposed by the time commitment.



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- f. **Issue 7 – Function** – Excellence is an iterative process. Having the Committee advise the Attorney General on the judicial appointment process will help improve the process.
- g. **Issue 8 – s. 43(9)(1) – Having each judicial region advertise a vacancy and review all applications for the vacancy** – The CCLA strongly supports the government for continuing its process of ‘hiring’ judges on a vacancy by vacancy basis. Depending on the nature and extent of retirements on any given court, imbalances may arise between:
 - a. Former Crown to former defence counsel appointments;
 - b. Criminal to family law expertise;
 - c. Gender;
 - d. The diversity of minority groups; and
 - e. Need for specialty expertise

The CCLA commends the maintenance of an individualized, per Court, advertisement and hiring process as it allows the needs of the individual Court to be considered, in addition to considerations of merit and competence.

- h. **Issue 8 – s. 43(9)(1) – Having the Committee conduct the advertising and review process in accordance with criteria established by the Committee, including assessment of the professional excellence, community awareness and personal characteristics of candidates and recognition of the desirability of reflecting the diversity of Ontario society in judicial appointments** – The CCLA strongly supports the government’s continued legislation of these criteria.
 - a. **Potential Improvement** – The Government may wish to work with the National Judicial Institute to create material on what constitutes a good judge

and on the importance of diversity on the bench. By way of example, the CCLA has enclosed a copy of the training given by the former Chief Justice of Canada to Federal Judicial Advisory Committees. The publication of such training material, once drafted, would further increase public confidence and transparency within the process.

- i. **Issue No. 8 – The Attorney General would be authorized to require the Committee to provide him with any additional information about the recruitment process, including but not limited to information about applicants who were deemed “not qualified”** – The CCLA agrees that the Attorney General should be able to request anonymized reports on why applicants were not shortlisted; although it has serious concerns, as set out below, regarding introducing a binary qualified / not qualified system.

- a. **Potential Improvement** – The Attorney General should consider employing a reporting system similar to that employed by Federal Minister of Justice. The Federal Judicial Affairs Committees (“**JAC**”) produce a short confidential report for each applicant that is shared with the Federal Minister of Justice. The report is from “the Committee” and does not attribute comment to individual committee members.

The Federal JAC reports contain a short assessment of competence and merit, the year of call, and whether complaints have been filed against the applicant with the LSO. The nature of the complaints and outcome are described. Helpfully, the confidential report also contains anonymized commentary on the applicant received during the vetting process. Consultations and vetting play a critical role in determining whether the candidate has a judicial temperament.

This information will allow the Attorney General not only to better assess the two (2) to three (3) short-listed candidates, but it will also give him or her insight as to why the remaining applicants were not short-listed. While this process does not increase transparency as between the judicial appointment process and the Public; it creates transparency between the Committee and the Attorney General. Just as the public must have confidence in the judicial appointment process, the Attorney General must also have confidence in his or her Committee.

- j. **Issue 8 – s. 43(12)** – This power has been the subject of criticism under the former Liberal Government. Media, academics and civil society argue that it can be used by the government in power to exercise undue control on the Committee process which is supposed to be independent of government interference, actual or perceived. However, the CCLA supports the Attorney General’s maintenance of discretion to reject the Committee’s recommendations because it provides a democratic counter-balance to an appointed independent Committee.
- a. **Potential Improvement** – The exercise of this discretionary power could be improved by requiring the Attorney General to publish when he or she has rejected the Committee’s recommendations. This public disclosure increases public transparency and accountability. It also provides the Attorney General with an opportunity to voice why, specifically, he or she did not believe that the interests of justice were being served by the proposed short-list.
- k. **Issue 9 – Selection Criteria** – The CCLA supports the Government’s ability to set additional “considerations” for the Committee to consider so long as they are publicized; however, the CCLA believes that such additional considerations cannot be mandatory. From a constitutional and public policy perspective, any mandatory



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selection criteria for judicial appointment should be the subject of democratic debate in the Legislature. To do otherwise, would make the proposed amendments subject to constitutional challenge, as seen in the contentious debate around French language capacity for judges appointed to the Supreme Court of Canada.

- l. **Issue 11 – Annual Report** – The CCLA commends the Government for requiring the JAAC to publish diversity statistics regarding all applicants, in addition to their annual reporting requirements.
 - a. **Potential Improvement** – The Government should consider publishing all judicial applications for applicants appointed to the bench. This change in the federal reports was received with resounding support from the public, media and legal community. There is no greater form of transparency as the public can judge for itself that each appointment was qualified and merit-based. For example, a brief review of the Judicial Application of David Paciocco appointed to the Ontario Court of Appeal demonstrates his merit.⁶
- m. **Issue 12 – Personal Liability** – The CCLA supports this change
- n. **Issue 13 – Confidentiality** – This CCLA is very supportive of this change. Confidentiality is the pre-requisite to obtaining the most talented applicants.
- o. **Issue 14 – Electronic meetings** – The CCLA is supportive of this change.

⁶ Judicial Application of David M. Paciocco, a Provincial Court Judge appointed to the Ontario Court of Appeal in 2017, https://www.canada.ca/en/departement-justice/news/2017/04/the_honourable_justicedavidmpacioccosquestionnaire.html. His application was published pursuant to the federal reforms to the judicial appointment process.

- p. **Additional Considerations - French Language Testing** – The CCLA recommends that the Government engage in spot and randomized French language testing among self-declared ‘bilingual’ applicants. Proficiency in oral and written French is a critical aspect of our courts in the East and Northern regions. An oral French language interview cannot assess bilingual writing ability. If applicants are told that they may be subject to randomized French testing, they may be more accurate in their self-assessment of French language proficiency.

As will be discussed during our meeting of January 29, 2020, the CCLA would be pleased to assist the government in championing the necessity of such measures as the inclusion of diversity statistics and a more transparent application process, such as the publication of applications of those appointed to the Bench.

PART III – Amendments that May Undermine Public Confidence

a. Ontario’s Current System

In order to better understand the practical and substantive concerns of the CCLA regarding **Issues 8 and 9**, a holistic review of Ontario’s judicial appointment system is required. Ontario’s judicial appointment process is lauded as one of the most non-partisan and balanced processes in the commonwealth. The electorate’s democratic will is reflected in three critical ways:

1. The government appoints the majority of members of the Judicial Appointment Advisory Committees (“JAAC” or “Committee”). By comparison, the Federal Government does not appoint the majority of members on its Judicial Advisory Committees;



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2. The Attorney General maintains discretion to select the judicial appointment from the short-list candidates provided by the JAAC; and
3. The Attorney General can reject the list provided by the JAAC and request a new list.

Many of the proposed reforms set out in Part I – such as Issue 9 (selection criteria) - will further enhance the role of a democratically elected government in the appointment process. However, this enhanced government involvement necessarily must maintain counterweights to avoid allegations of actual or perceived political interference.

The current judicial appointment process has effective, salutary counterweights to the government's involvement. They are:

1. The selection of the remaining committee members by our justice system's key stakeholders (judiciary, LSO, OBA, and FOLA);
2. The advertisement of judicial vacancies;
3. The review of all applications on a per-vacancy basis;
4. The interview of each selected candidate by the Committee;
5. The shortlisting of candidates by the Committee for the Attorney General's consideration, on the basis of the published consideration set out in section 43(9)(3) of the Act and as determined by the Committee so as to ensure that the needs of the Court are met.

In addition to creating one of the Commonwealth's strongest benches, the elegance of Ontario's current process allows the government to retain control of the appointment process

while not vetting specific candidates. This 'structural independence' has largely insulated the current process from collateral or direct attack by the media, academics and civil society.

After all, commentators cannot criticize an appointment as being 'political' when an independent body has assessed and ranked the candidate as being within the top two (2) or three (3) applicants. Practically, this insulates from criticism the judicial appointment of a lawyer who also happens to be a significant party donor from criticism. He or she has been assessed by an independent body as being among the top two (2) to three (3) applicants. In short, it allows the public to know that when the Attorney General is selecting only from the most qualified candidates when he or she sits down to make the decision. The assessment of merit was not and could not have been based on partisan favour.

b. Issue by Issue Analysis:

- a. **Issue 10 – Minimum Qualifications** – The CCLA believes that Ontario judges must have at least 10 years of experience as a lawyer in Ontario or performing a quasi-judicial role in Ontario.
- b. **Issue 8 – s.43(9)(2) – The Committee would be required to provide the Attorney General with a complete list of applicants who applied for the advertised vacancy, classified as “qualified” or “not qualified”** – The CCLA has serious concerns with this proposed amendment:
 - a. **Perceived quality of our judiciary** - Simply put, should our judges be the best among the legal profession, or should they merely be qualified? On its face this proposed amendment expressly removes the apolitical identification and ranking of the best candidates for our Courts. It will necessarily and expressly

lower the perceived quality of our judiciary, thereby undermining public confidence.

- b. Perceived independence of our judiciary** - Further, by removing the Committee short lists, it would render this Government subject to identical attacks to those made against the Harper Government reforms. The media, judiciary, academia, and civil society persistently and effectively criticized the Harper government when it amended the Federal judicial appointment process. The Harper Government amended the process to ensure that the government held the majority of seats on the JACs, that the majority of JAC members were non-lawyers/judges, that candidates were only subject to a green light/red light system, and that the Government could select from any greenlit candidate and appoint such candidate to any position.

The Harper Government changes provoked a unified avalanche of criticism from the judiciary and the legal community.⁷ In Rainer Knopff's words,

⁷ See, for example, the hundreds of articles published during both the Conservative and Liberal Government's criticizing the Federal Judicial Process which the proposed reforms seek to emulate: (24 July 2015) Sean Fine, "Stephen Harper's Court: How the Judiciary has been remade", *Globe and Mail* online at <https://www.theglobeandmail.com/news/politics/stephen-harpers-courts-how-the-judiciary-has-been-remade/article25661306/>; (26 July 2015) Chris Watt, "Legal observers urge Ottawa to revamp judicial appointment process", *Globe and Mail*, online at <https://www.theglobeandmail.com/news/national/legal-observers-urge-ottawa-to-revamp-judicial-appointment-process/article25716050/>; (25 July 2015) Charlie Smith, "Stephen Harper stealthily lays his imprint over the Canadian judiciary", *Straight*, online at: <https://www.straight.com/news/496166/stephen-harper-stealthily-lays-his-imprint-over-canadian-judiciary>; (8 April 2017), Sean Fine "Liberals overhaul judicial appointment process to boost diversity", *Globe and Mail*, online at: <https://www.theglobeandmail.com/news/national/liberals-to-unveil-new-judicial-appointment-process-undo-changes-made-by-harper/article32454733/>; (28 July 2015) F. L. Morton and Dave Snow, "Thursday Thinkpiece: Morton and Snow on the Harper Conservatives and the Canadian Judiciary", *Slaw: Canada's online legal magazine*, online at <http://www.slaw.ca/2018/09/27/thursday-thinkpiece-morton-snow-on-the-harper-conservatives-and-the-canadian-judiciary/>; (29 April 2019) Andre Marin, "MARIN: Trudeau's Liberals judge judicial appointments based on party affiliation online at: <https://edmontonjournal.com/opinion/columnists/marin-trudeaus-liberals-judge-judicial-appointments-based-on-party-affiliation/wcm/08ccaeaa-18ec-4164-9ab0-49c2fcbc2cd3>;

“critics railed against the Harper changes as “a startling departure from the ‘merit principle’ in judicial selection in favour of a dangerous ideological politicization of the judiciary.”⁸ At the time, such critics included then Chief Justice Beverley McLachlin, former Chief Justice Antonio Lamer and the Canadian Judicial Council.

The force of criticism from the legal community and judiciary focused on the definition of “merit” being defined by politicians or their appointments, who formed the majority of the new Harper Government committees. By removing the judicial vote and adding a law enforcement representative in the Harper reforms, the federal JAC majority shifted from lawyers to non-lawyers, and from legal institutions to political appointments. In the absence of ranking on the basis of merit, as defined by the JAC, this change caused the public, academic writers and the media to characterize the government as *“packing the courts with judges known for their ideologically conservative views, both at the lower courts and with Harper’s final Supreme Court appointment...”*⁹

Meanwhile, many of the judges appointed under Harper were and continue to be exceptional jurists. This reality, however, was lost in the court of public opinion because the process itself introduced space for perceived partisan politics. In short, it turned what should be an apolitical process into a perceived political process by removing the independent ranking of merit. Indeed, this is

⁸ 28 July 2015) F. L. Morton and Dave Snow, “Thursday Thinkpiece: Morton and Snow on the Harper Conservatives and the Canadian Judiciary”, *Slaw: Canada’s online legal magazine*, online at <http://www.slaw.ca/2018/09/27/thursday-thinkpiece-morton-snow-on-the-harper-conservatives-and-the-canadian-judiciary/>.

⁹ *Ibid.*

why the CCLA strongly believes that removing the Committee short lists will negatively impact the perceived independence of our judiciary.

Proposed improvements – If the Government is unwilling to maintain the current language of s. 43(9)(2), the CCLA recommends alternative language that would help avoid the anticipated and legitimate public criticism. Currently section 43(9)(2) requires the Committee to “*give the Attorney General a ranked list of at least two candidates whom it recommends*”. The legislation could be amended to require a minimum, ranked recommendation of five (5) candidates by the Committee. The Attorney General would then select from the five (5) candidates. This would:

- i. Maintain the independence of the ranking process based on merit;
- ii. Give the Attorney General greater choice when selecting candidates;
and
- iii. Ensure that the Committee considered a sufficiently large pool of candidates for any one vacancy.

Issue 8 – s.43(11) – The Attorney General would be authorized, within a two-year period, to appoint any of the “qualified” candidates to another vacancy within the same region, if the candidate has expressed interest in an appointment in that location – The CCLA repeats its concerns immediately above regarding the proposed amendment to s.43(9)(2). In addition, this proposed amendment would remove the current system’s ability to ensure that the needs of the Court are reviewed independently so that they can be filled by a proposed candidate.

- c. **Issue No. 8 – The Attorney General would be authorized to ask the JAAC to reconsider candidates who were “not qualified”** – This proposed amendment necessarily risks government interference, or, in the very least, perceived political



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interference. As such, it will directly undermine public confidence because it allows a politician to not only question but then to even ask for the reconsideration of an independent committee's assessment of merit. The perceived "sting" of this proposed amendment is diminished if the Attorney General must continue to select from a Committee-generated short list. That way, the final assessment of merit remains apolitical.

Thank you for considering the above submissions of the CCLA. We are deeply appreciative of the opportunity to share our concerns and encouragement. We look forward to discussing the CCLA's submissions further, and answering any questions that you may have, on during our meeting on January 29, 2020.

Ted Mann,
CCLA President