

Submission to the Standing Committee on the Legislative Assembly

Re: Bill 245, *Accelerating Access to Justice Act*, 2021

Submitted by former Chief Justice Brian W. Lennox on behalf of himself, former Chief Justice Sidney B. Linden and former Chief Justice Annemarie Bonkalo.

We are three former Chief Justices of the Ontario Court of Justice who have collectively had the privilege of presiding over the Court from its creation on September 1, 1990 until May 4, 2015. Brian W. Lennox (Chief Justice from 1999 to 2007) was appointed to the Court in 1986, before the Judicial Appointments Advisory Committee (JAAC) process was put in place. Sidney B. Linden (Chief Justice from 1990 to 1999) and Annemarie Bonkalo (Chief Justice from 2007 to 2015) were both appointed through the JAAC process in 1990. In addition, Annemarie Bonkalo was a member of JAAC for several years as a Chief Justice's representative.

The work of the Ontario Court of Justice includes the provision of criminal and family justice in more than 200 locations throughout the province of Ontario. The judges of the Court deal with well over 200,000 cases each year, including the overwhelming majority of serious criminal cases (with the exception of charges of murder). In areas of the province without a Superior Court Family Court, our judges have jurisdiction over thousands of extremely sensitive and important family matters, including cases under the *Child, Youth and Family Services Act*. It is obvious that it is in the public interest that all such matters be dealt with by an independent judiciary of the highest quality. Since 1988, it is in large part the Judicial Appointments Advisory Committee which has ensured that high quality. From its beginning, the Committee has been, and remains an independent, fair, impartial and merit-based appointments body, and a benchmark for other

jurisdictions. The Judicial Appointments Advisory Committee has also, and not incidentally, been largely successful in limiting the opportunity for the kinds of political influence and partisanship that have plagued other appointment processes.

We three have witnessed the evolution and the professionalization of our Court following the creation of the Judicial Appointments Advisory Committee. It has been a source of constant pride to us and to the Court that its judges are appointed by the Attorney General from among the finest candidates to sit on any trial Court in Canada.

There are several factors which we believe have contributed to the success of the judicial appointments process. They include the independence of the Judicial Appointments Advisory Committee and the confidentiality of its work, a relative equilibrium in its membership, and the statutory requirement that the Attorney General appoint only from a limited list of candidates recommended by the Committee.

Since the Committee and its process were formally created by statute in 1995, there have been minor amendments to the legislation, but the current Bill is the first to suggest major changes in the composition of the Committee and its functioning. We recognize the necessity and value of periodic review of institutions for the purpose of improvement. In this regard, bringing the administrative processes and procedures of the Committee into the computer age is welcome and long overdue. Similarly, the provision allowing for virtual meetings is a necessary change.

With respect to judicial appointments, we believe that the appointment process for judges of the Ontario Court of Justice should remain independent, impartial and merit-based, which requires that the Committee itself be independent, operating confidentially and at arm's length from the

Office of the Attorney General. It would be unfortunate if the cumulative effect of the changes proposed in Bill 245 were to reduce the independence of the Committee and of its process by giving a future Attorney General increased control over the membership of the Committee, its practices, its recommendations and, ultimately, the appointments to the Court.

We have reviewed the provisions of Bill 245 and would like to make the following comments:

Confidentiality:

Confidentiality is at the heart of the judicial appointments process. It has been commonly assumed that the records of the Committee are not subject to freedom of information legislation. This assumption is based on a decision of the Court of Appeal which dealt with the Committee as it existed prior to its creation by statute and that assumption may now well be wrong. The Committee in successive Annual Reports has repeatedly asked that the Government pass legislation exempting it from the *Freedom of Information and Protection of Privacy Act*. The proposed amendments to the *Courts of Justice Act* grant the Minister this exemption. **We suggest that the Bill also specifically exempt the Judicial Appointments Advisory Committee from the provisions of the *Freedom of Information and Protection of Privacy Act*.**

Section 43(11) of the proposed legislation recognizes the necessity of confidentiality, but then provides that the chair of the Committee may disclose otherwise confidential information at the chair's discretion. This discretion appears to lack a rationale and may be an oversight. The discretion is in no way limited or circumscribed and is inconsistent with the emphasis on confidentiality in the other provisions of the statute; in particular the "discrete inquiry", which is

defined in s. 43.1 (5) as a “confidential inquiry”, and the strict limitations on the information that the Minister is entitled to receive from the Committee. It is also inconsistent with the operations of the Committee, which otherwise functions by consensus. **We suggest that s. 43(11) be amended to remove the discretion of the chair to disclose otherwise confidential information.**

Composition:

Currently, the Minister appoints seven of the 13 Committee members, three are appointed directly by three separate law associations, two by the Chief Justice and one by the Judicial Council. This structure provides a relative equilibrium among the membership, even though the Minister appoints the majority of members, as well as the chair. The new s. 43(2)(b) would now empower the Minister to also appoint the law association members, choosing from a list of names submitted by each association. In effect, this would mean that the Minister would appoint 10 of the 13 Committee members and create at the least the risk of an apparent lack of independence.

We know of no difficulties during our periods in office arising from the independent appointment of law association representatives to the Committee. On the contrary, their presence and their independent status proved to be a significant benefit. It is difficult for us to think of a rationale for the proposed change and **we suggest that each of the law association Committee members continue to be directly appointed by their respective law associations.**

Functions and Operations:

The addition of s. 43.1(1) of the Bill which identifies one of the functions of the Committee as providing advice to the Minister on the process of appointment is a positive addition to the existing legislation.

Section 43.1 (2) (7) of the Bill proposes that the Committee provide the Minister with a ranked list of at least six candidates for each judicial vacancy, with brief supporting reasons. The current legislation requires at least two names, also with brief supporting reasons. (In practice, where the nature of the competition and the quality of the candidates permits, the list provided to the Minister will contain more than the minimum two names required by statute). In a process intended to identify highly qualified candidates, we believe that six may prove to be too large a number, especially for remote court locations. However, we do recognize that s. 43.1 (8) of the Bill does allow the Committee to submit a shorter ranked list with an explanation as to why six candidates cannot be recommended. If the Bill is passed in its present form, experience will show whether six is the appropriate number.

From our perspective, there is an issue with respect to the rejection of a complete list (a possibility which is also available under the current legislation). The Minister under the proposed s.43.1(7) may reject the Committee's ranked list and require it to produce a new ranked list, again of at least six candidates, this time, apparently to be chosen from those who were not on the original list. The occasions where a Minister rejects an entire list recommended by the Committee, especially where it contains up to six names, should be extremely rare and exceptional. By virtue of the process itself, these will necessarily be candidates considered by the

Committee to be less qualified than the original six. We consider it problematic in these circumstances that there is no requirement that the Minister provide reasons for his rejection of the entire ranked list. The work of the Committee is set out in each of its Annual Reports. It involves a solicitation of applications, application review by individual Committee members, meetings to select potential interviewees, discrete inquiries, interviews, assessments and recommendations. Typically, about 60 applicants are initially considered for interviews, 16 are actually interviewed. The process requires extensive effort by Committee members and, collectively, hundreds of hours of work. The result is a short list of the most highly qualified candidates who are then recommended to the Minister. Over its history, the Committee has developed and repeatedly demonstrated its expertise in candidate selection.

While we recognize that the Committee is advisory, that it simply recommends and that it is the Minister who has the responsibility of making the appointment, we believe that the work of the Committee is entitled to some deference. We do not suggest that the Minister should not be able to reject a ranked list. However, **we suggest that the legislation require the Minister to give reasons to the Committee when and if the Minister chooses to reject the Committee's ranked list of candidates.** The Minister's reasons would serve the Committee in its future deliberations and would also add transparency to the process. Such communications would of course remain confidential.

Appointments:

On occasion, there has been a significant delay between the Committee's providing its recommendations to the Minister and the appointment to fill a vacancy. While the Court is able to deal with any vacancy without an interruption of service through the use of its *per diem* judges (experienced part-time judges), the system is obviously better served when there is no delay in appointment. **We would suggest that the Minister be required to respond to the Committee's recommendations within a specified reasonable period of time, either by making an appointment to fill the vacancy, or by providing reasons why the ranked list is being rejected in its entirety.**

Politics:

This is an awkward topic for judges to raise, but politics or the suspicion of politics has often been the proverbial "elephant in the room" when it comes to judicial appointments. We start from what we believe to be a widely held proposition, that partisan politics should play no part in judicial appointments. Despite this belief, proposals for change to any judicial appointment process to any Court in Canada are frequently met with the criticism that the proponent of change is attempting to introduce politics into the process. In order to avoid such criticism, **we suggest the inclusion in the Bill of a provision prohibiting the consideration of political affiliation in the appointment process.** An example of such a provision can be found in Quebec Regulation T-16, r. 4.1 under the Quebec *Courts of Justice Act*. That regulation deals with the appointment of provincial judges and provides:

S.26 No political affiliation may be considered by the committee when assessing the applications and making proposals to the Minister or by the Minister when choosing a candidate to be recommended to the Cabinet.

All of which is respectfully submitted.

Sidney B. Linden
Chief Justice, Ontario Court of Justice, 1990 to 1999

Brian W. Lennox
Chief Justice, Ontario Court of Justice, 1999 to 2007

Annemarie Bonkalo
Chief Justice, Ontario Court of Justice, 2007 to 2015