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Submission on how Bill 245 will make Ontario's Judicial Appointments System Unconstitutionally Political (to Standing Committee on the Legislative Assembly: March 11, 2021)

To become a provincial judge in Ontario, a person must either be a lawyer for 10 years in a jurisdiction in Canada, or a lawyer and judge or judicial official for a combined total of 10 years (See [ss. 42\(2\)](#) and of Ontario's *Courts of Justice Act* (*CofJ Act*)).

The [Judicial Appointments Advisory Committee \(JAAC\)](#), which was created in 1988 and then enacted into law in 1995, is currently made up of 13 people, seven of which are appointed by the Attorney General ([ss. 43\(2\)](#) of the *CofJ Act*). All the members serve three-year terms and may be reappointed ([ss. 43\(4\)](#)).

The JAAC:

1. advertises judge positions;
2. reviews applications, and;
3. recommends "at least two" qualified candidates to the Attorney General ([ss. 43\(9\)](#)).

The Attorney General may reject JAAC's recommended candidates and request a new set of candidates ([ss. 43\(12\)](#)).

The JAAC may recommend candidates who were interviewed by the JAAC in the preceding year if there is "not enough time for a fresh advertising and review process" ([clause 43\(9\)\(4\)](#)).

While not ideal, Ontario's current judicial appointment system is considered to be one of the leading systems in the world because of its substantial structural and operational independence from, and restriction on, political influence.

Schedule 3 of Bill 245 will repeal s. 43 of the *CofJ Act* and enacts a new section 43 that:

1. increases the number of members of Ontario's Judicial Appointments Advisory Committee (JAAC) that the Attorney General appoints from 7 to 10 (of 13 total), and;
2. increases the number of candidates the JAAC sends to the Attorney General for each judge position from two or more to 6 or more (with the Attorney General allowed to reject all 6 recommended candidates and ask for a new list of 6 candidates as many times as s/he wants).

These two changes will politicize the appointment of judges in Ontario, opening it up to patronage and cronyism that will undermine the public's confidence in the independence and impartiality of the courts.

Democracy Watch's position is that the changes will make Ontario's system for appointing judges unconstitutional, as it will violate the constitutional principle that guarantees the independence of courts, and will also violate the public's *Charter* right to impartial courts.

The constitutional guarantee of the independence of the courts has been upheld in several rulings on the measures in [Part VII of the Constitution](#), and those rulings have emphasized the importance of ensuring the public has reason to have confidence in the independence and impartiality of the judiciary.

Sections [7](#) and [11\(d\)](#) (and, indirectly, [24\(1\)](#)) of the *Charter* have been applied in several court rulings to ensure impartial court hearings.

Last November, Democracy Watch [filed a court case in Federal Court](#) challenging the federal government's system for appointing judges because it is also open to political interference that violates the constitutional principle that guarantees the independence of courts, and the public's *Charter* right to impartial courts.

If Bill 245 is enacted in its current form, Democracy Watch will also file a court case challenging the constitutionality of Ontario's new appointments system.

The proposed changes in Bill 245 must be reversed to maintain the independence and impartiality of judges in Ontario, and to enhance the public's confidence in their independence and impartiality.

The current system is not ideal, as it still allows the Attorney General to control the appointment of a majority of JAAC appointees, and to reject JAAC-recommended candidates repeatedly for any reason, including political reasons. To be a fully best-practice system, the JAAC and the judicial appointment/promotion system should be changed as follows:

1. The Attorney General/Cabinet should not be choosing any of the members of the JAAC. Instead, the JAAC should be made up of two provincial judges chosen as they are now by the Chief Justice; three lawyers (selected as now by the Law Society of Ontario, the Ontario Bar Association, and the Federation of Ontario Law Associations), a member of the Judicial Council (selected as now by the Council), and; seven people who are neither lawyers nor judges, selected by either a multi-partisan committee made up of MPPs from all parties, or by a fully independent Public Appointments Commission (which should have a similar structure as the JAAC, and operate in similar ways as the JAAC, and should also handle the search and review process for qualified candidates for appointments to all administrative tribunals in Ontario);
2. Even if the Attorney General's power to appoint any members of the JAAC is removed (as recommended above in #1), the terms of JAAC members should not be renewable, to ensure regular turnover of JAAC members;
3. The JAAC should submit only 1-2 candidates for each open judge position (as in [Quebec](#) and the [UK](#));
4. As in the UK, where the appointment advisory committee only submits one candidate, the Attorney General should be required to explain in writing to the JAAC if s/he rejects the JAAC's recommended candidate(s). Ideally, the recommendations should go to a multi-party committee of MPPs to make the final choice;
5. The Attorney General/committee should only be allowed to reject a JAAC recommended candidate once during each appointment process (currently the Attorney General can reject the JAAC recommended candidates an unlimited number of times), and;
6. The Attorney General should not have the sole power to promote judges to positions such as Chief Justice, Associate Chief Justice and regional senior judge in each region. Instead, a fully independent JAAC should be recommending a short list of 1-2 sitting judges as candidates for these positions, with the Attorney General only allowed to reject JAAC-recommended candidates once.