

**Keeping Independent Officers of Legislatures Independent: The Institutional Design of the Appointment Process under the Condition of Majority Government**

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Independent legislative officers are supposed to provide the entire legislature with non-partisan, evidence-based assessments of government activities and their impact on the public. To get quality independent legislative officers, a well-designed appointment process is critical, as they are legislative, not governmental appointments. However, when there is majority government in a Westminster parliamentary system, how can the appointment process ensure that the will of the entire legislature is separated from the will of the government? We can easily understand how a government would be concerned with a zealous investigator with a flair for vigorous public communication. For that reason consensus on the appointment from all recognized political parties is preferred.

Over the last 10-20 years, the Legislative Assembly of Ontario has changed the appointment process for independent officers. This change was from a formal, structured appointment through a Standing Committee of the Legislature, to an informal, ad-hoc committee with all-party representation. The proposed research question therefore is: which process is better equipped to prevent the governing party from making the appointment decision without the consent of the opposition parties? The paper will approach the issue by comparing two cases from Ontario's recent history: the 1999 appointment of Gord Miller as Environmental Commissioner, and the 2010 reappointment of André Marin as Ombudsman. Using interviews from those involved, this paper will argue that the informal process offers the opposition parties more avenues to obstruct the will of the government and force compromise.

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One of the more interesting developments in Canada's recent history of responsible government has been the rise to prominence of Independent Officers of Parliament. The work done by these investigators, in terms of exposing public sector misconduct, means that they can now be just as vital in holding a government accountable as the opposition political parties. In Ontario, some of the McGuinty government's greatest challenges have come from the reports of these officers, such as Auditor-General Jim McCarter's revelations of waste at the organization responsible for implementing electronic health records (Leslie, 7 October 2009), and Ombudsman André Marin's look at insider cheating at the Ontario Lottery and Gaming Commission (Richmond, 27 March 2007). Federally, the numerous reports released by Auditor-General Sheila Fraser have turned her into a household name. One report, on the sponsorship scandal, must be considered a large part of the reason the Paul Martin Liberals were defeated in 2006.

As Paul Thomas notes, how they fit into Canada's constitutional apparatus has been difficult to pin down. He references their dual role: "In general terms, officers of Parliament are independent, accountable agencies created first to assist Parliament in holding Ministers and the bureaucracy accountable and, second, to protect various kinds

of rights for individual Canadians” (Thomas 2003, p. 288). As such, they have a direct connection with the general public, but also are tied into the political dynamics of the legislature they serve. Their existence challenges traditional notions of political accountability, as these watchdogs are bureaucrats, not Members of Parliament. But the legitimacy they receive as agents of Parliament means that they can bring facts to challenge the government’s narrative. Opposition parties have significantly fewer resources than the government, and can have difficulty performing the research necessary to fulfil their accountability function. Independent officers can serve as a source of information for these parties while avoiding having their work accused of partisanship. They are truly independent and represent an evolution of political accountability that ensures facts and research are not lost in the rhetoric of political contestation.

In order to attain that legitimacy, an independent agency must be structured in such a way that it can both perform its role effectively and be beyond reproach when it comes to accusations of favouritism or being termed a government “lapdog.” When former federal Integrity Commissioner Christiane Ouimet was accused of failing in her role and not following up on complaints (in a report by Sheila Fraser) earlier this year, the reliability and very future of the office were called into question (Stone, 9 December 2010). On top of the officer’s personal attitude towards his or her duties, Thomas notes five factors that determine whether or not an Independent officer will be able to fulfil his or her role:

- The nature of the mandate of the agency, including how it is defined initially and how it is updated periodically.
- The provisions respecting the appointment, tenure, and removal of the leadership of the agency.
- The processes for deciding budgets and staffing for the agency.
- Whether the agency is free to identify issues for study and whether it can compel the production of information.
- The reporting requirements for the agency and whether its performance is monitored (Thomas 2003, p. 297)

Arguably, the most important of these is the second criterion: the need for an appointment process that ensures the officer has the requisite independence from the government of the day so that it can retain its legitimacy as an agent of Parliament. While Parliament makes the appointment, it has to be put in the context of the current era of party discipline and power centralization. If a political party has a majority in the legislature, it is easy to imagine a First Minister using that majority to install someone who will not bring the full weight of the office to scrutinize the government. The rest of the criteria will not matter if the initial appointment is not made in a spirit of independence.

In that vein, this paper looks at the evolution of the appointment process at the Legislative Assembly of Ontario. Around the beginning of the new millennium, the legislature transitioned from using a Standing Committee of the Assembly to handle the appointment, to a more ad-hoc, informal committee featuring one representative from

each recognized party. Eliminating executive control over the process was one of the main reasons for the transition (Deborah Deller<sup>1</sup>, 8 February 2011). The goal, therefore, is to determine if this institutional reform has proven successful in securing a viable, legitimate appointment process, and whether or not any improvements should be made.

After looking at principles and practicalities that should guide an appointment, this paper achieves that goal by comparing and contrasting the two most contentious appointments done under each process: the 1999 appointment of Gord Miller as Environmental Commissioner, and the 2010 reappointment of André Marin as Ombudsman. Using Hansard transcripts, interviews with the players in each case, and media reports from the time in question, this paper concludes that the ad-hoc process does make it more difficult for the executive to control the appointment. This is because the process depends on consensus, and it is very difficult for the government to bring about closure without it. However, it is not a complete guarantee that the opposition parties can resist a government appointee, as public opinion and media coverage are also important factors. The paper concludes by recommending an institutional reform that, when combined with the ad-hoc appointment process, ensures that Independent Officers are appointed in such a way that the process is consistent with the officers' mandate to serve the Assembly.

### **What principles should guide the appointment?**

The starting point for determining what an appointment process should include is to recognize that these are legislative (not governmental) appointments. It is not the sole prerogative of Cabinet or the governing political party; the entire legislature must be included in the process. The legal responsibility for the inclusion of the legislature is expressed through the pieces of legislation that establish each of the offices, which say that the officer “shall be appointed by the Lieutenant Governor in Council, on the address of the Assembly” (*Ombudsman Act* s. 3, or a similar variation in other Acts). All that is required for an appointment is the Assembly to pass a motion advising the Lieutenant-Governor in Council on its choice, with only a simple majority being needed to pass such a motion. This institutional structure poses a problem for reconciling the appointment with the Officer's responsibility to be independent of the government and the servant of the entire Assembly.

We cannot be blind to the political realities of institutional structure. Appointment by majority motion implies that all Members of the Assembly are individual deliberators, and through debate and recorded vote, they can express the collective will of the House despite their internal divisions. An Independent Officer can have the confidence of the Assembly in the same way a government does. However, we know that legislators are not simply individuals but members of political parties. These parties are highly centralized and exercise perhaps the strongest party discipline of any Westminster system (Savoie 1999, p. 72). If one political party has a majority in the legislature, there is no longer any requirement for that party to consult with the members of the opposition. We cannot pretend that the legislature is a separate institution from the executive, and that its

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<sup>1</sup> Deborah Deller is the Clerk of the Legislative Assembly of Ontario

purpose is to keep the government accountable. It is very likely the government caucus will support a candidate that is preferred by the Premier, therefore removing the Assembly from all but the formalities of the process. There would not be much real difference between a legislative and a governmental appointment.

This is the scenario that historically played out in these appointments. The Premier and Cabinet would make a choice. They may have forwarded the name to the opposition parties in advance but rarely in a way that signalled meaningful consultation, and would simply introduce the motion and make the appointment (Deborah Deller, 8 February 2011). This is not to say that all these appointees did not serve independently from the government, or that they were political appointees charged with the task of showing favouritism to the administration. It is that they were appointed in a way that we today would not accept as legitimate for a position that is part of the constitutional apparatus of political accountability. Douglas Ruck, a former Ombudsman of Nova Scotia, summed this history up well: “In years gone by...a former member of the House, or friend of a political individual, would receive a call and would be asked ... would you be interested in serving as Ombudsman? That does not mean that the selection was poor. It does not mean the person did not possess the particular attributes required to do the job. But it does mean that the perception was there that this person was beholden to the government of the day. And that becomes a weakness for the office” (quoted by Frances Lankin, *Ontario Hansard*, 22 December 1999).

What does this mean for the principles on which an appointment process should be based? To quote from the hiring manual of the Legislative Assembly, “Every attempt should be made during the interview process to ensure that prospective employees of the Office of the Assembly are not active members or visible supporters of any political party. The rationale for that, it should be stressed during the interview, is that perception is paramount... The Office of the Assembly serves all three political parties. It is therefore very important that all its employees perform their duties in a strictly non-partisan and neutral manner so as to have the trust of all members” (quoted by Frances Lankin, *Ontario Hansard*, 22 December 1999). When interviewed for this paper, Commissioner Miller stated his belief that past political experience should not be a black mark on someone’s record; running for public office should be admired and encouraged, and no one should have their career limited by choosing to do so (Gord Miller, 22 March 2011). While he is certainly correct that we should be encouraging public participation in politics, the mandates of these specific offices raise some concerns about political partisanship. Serving the legislature means serving all political parties equally. While a partisan history does not mean a candidate is incapable of fulfilling the duties of the role (Miller is an excellent example of this), if some parties take issue with a candidate’s background and question his or her ability to serve independent of the government, a political party should have the opportunity to make that case and block that type of appointment if necessary.

When we recognize that these appointments should not be fully controlled by the executive of the governing party, and that a vote by a simple majority of the Legislature does not necessarily mean that the officer enjoys broad support, then we must conclude

that an appointment process that respects the independent nature of the positions is one that puts power in parliamentary caucuses of recognized political parties more than it does Members as individuals. This paper recognizes the important role political parties play in representing the various parts of society and serving as the vehicles that shape the direction of public policy. Therefore, this paper uses the ability of a political party in the Assembly to block undesired candidates and influence the final result as a benchmark for a normatively high-quality appointment process. This ensures that the final appointee is the consensual choice of the major political forces in society, and does not have his or her legitimacy called into question as it would if he or she were the choice of the Premier.

Indeed, both Mr. Miller and Mr. Marin, when interviewed, stressed their preference for consensus on their appointments for similar reasons. They both made the point of stressing that it is a consensus, however, and that the governing party should not be excluded from having any influence. This is a valid point. The government caucus is still a part of Parliament, and an Officer of Parliament should be just as independent of the opposition parties as of the governing party. No government should be unfairly subjected to an opposition-appointed officer who could abuse the position and put a desire to embarrass the government ahead of his or her responsibility to be fair and objective.

It was the insistence of various opposition parties that they have more influence on the process, as well as the realization that in a minority parliament a government could lose all control over an appointment-by-motion and see the opposition parties make the appointment, that led to the process being reformed in the 1990s (Deborah Deller, 8 February 2011). It transitioned from the backroom decision to a hiring process run by a Standing Committee of the Assembly. The Human Resources division of the Legislative Assembly would collect applications, evaluate them, and make recommendations to the Committee on who should be interviewed. The all-party Committee itself would have the final decision on who should be interviewed, and then would recommend an appointee to the whole Assembly, which would then fulfil the formal obligation and ratify the appointment by voting on a motion. But within 15 years, the process was changed again, as it did not accomplish the intended goal of achieving consensus and limiting executive influence. It is time now to determine where the potential breakdown in the process lies by examining the contentious appointment of Gord Miller as Environmental Commissioner.

### **Gord Miller: Appointed despite opposition resistance**

The position of Environmental Commissioner is a relatively new Independent Office. It was established by the NDP government of Premier Bob Rae in the early 1990s and was charged with the task of reviewing whether government ministries and agencies were complying with the new Environmental Bill of Rights legislation. The first Environmental Commissioner, Eva Ligeti, was appointed to a 5 year term late in Rae's mandate by a Standing Committee that reached all-party consensus on her appointment (Journals and Procedural Research Branch, 1 June 2009). She continued to serve through the first term of Mike Harris' PC government. During that time, she was very critical of

the Harris government's environmental track record. In August 1999, Ligeti was informed she would not be reappointed, and the PCs used their majority in the legislature to appoint an interim Commissioner without any opposition involvement.

Ligeti went public with her criticism of this appointment, "The hallmarks for the position of the Commissioner must be independence and impartiality. The appointment of the Commissioner should be through an all-party committee because it's an open and transparent process that guarantees the position will be non-partisan" (St. Catherine's Standard, 21 August 1999). The Tories were criticized for not giving the entire Assembly the chance to decide whether or not Ligeti would be reappointed. Nevertheless, the government did commit to having an all-party committee meet to recommend a permanent Commissioner, and the Standing Committee on General Government met to accomplish this task in the fall of 1999. It was later implied that the PCs had offered an ad-hoc committee of equal party representation to review the appointment, but that this offer was subsequently withdrawn (Marilyn Churley, *Ontario Hansard*, 21 December 1999). The defining dynamic of a Standing Committee, of course, is that its membership is reflective of the party standings in the Assembly. A governing party that has a majority in the Assembly also has a majority of members on the committee. While it does allow for opposition review of candidates, it does not prevent a governing majority from recommending a candidate to the Assembly. This would be the source of the conflict surrounding this appointment.

The human resource professionals at the Legislative Assembly reviewed all 71 applications for the position, ranked them based on set criteria, and recommended 11 individuals for the Standing Committee to interview (Raminder Gill, *Ontario Hansard*, 21 December 1999). Gord Miller was part of this group, and it is important to note that the non-partisan staff of the Assembly considered Mr. Miller qualified for the position based on his credentials. According to MPPs involved, the interviews were conducted with professionalism. During the selection process, however, NDP environment critic and committee member Marilyn Churley grew concerned. She believed that "the fix was in," (Marilyn Churley, *Ontario Hansard*, 21 December 1999) and got the impression that the PC Members were pushing for Miller's appointment. When interviewed, Ms. Churley indicated that she believed Miller was a high-quality candidate, but that in her opinion there were at least two superior candidates in the applicant pool (Marilyn Churley, 29 April 2011). At the time, Churley was accused of politicizing the process because her preferred candidate did not make the shortlist.

Upon further investigation, Churley found out that Miller (who is from North Bay, hometown of then-Premier Mike Harris) had been a Progressive Conservative Party of Ontario candidate in the riding of Cochrane South during the 1995 election, and was a PC Party of Canada candidate in Nipissing (the same riding Harris represented provincially) in the 1997 federal election (McCarten, 22 December 1999). He lost both elections to powerful incumbents and was seen as a "sacrificial lamb" candidate. At the time he applied for the Environmental Commissioner position, he was the president of the federal PC Party's Nipissing riding association (Marilyn Churley, *Ontario Hansard*, 21 December 1999).

It is important to note that 12 years later, Gord Miller has been praised for performing exceptionally well in the position, and has been reappointed twice under the Liberal McGuinty government. Many of the opposition members who called into question his ability to serve the Assembly after this revelation have since gone on to make public apologies (Steve Peters, *Ontario Hansard*, 19 May 2010). But this paper is evaluating the ability of opposition parties to block undesired candidates, after already establishing that an appointment process should be governed by the principle of party consensus, and that the hiring guide for the Legislative Assembly points out that the appearance of non-partisanship is essential. Despite Miller's future success, an appointment process that recognized the right of opposition parties to have meaningful input on the decision should have given the opposition parties a chance to deny his appointment based on his perceived close ties to both the PC Party and the Premier himself. In fact, the Environmental Commissioner of Ontario Policies and Procedures manual states that "ECO employees must not participate in activities that might identify themselves as supporters of a political party" and directly stipulates "party riding association director or member" as a prohibited activity for an employee of the ECO (quoted by Marilyn Churley, *Ontario Hansard*, 21 December 1999).

When interviewed for this paper, Commissioner Miller stated that he believed his past political connections were public and well known, and that in no way was he attempting to conceal this information, a charge that MPP Churley levelled (Gord Miller, 22 March 2011). She objected to the fact that this information was nowhere in Miller's application, but that the PC Members of the Committee seemed to know of it during the process. While she was able to get the Committee to agree to stage a follow-up interview with Miller and three other shortlisted candidates and ask if they had all run for political office, she was prevented from asking follow-up questions on political connections. In her words, she said she never had the opportunity to say, "Look, there's a concern here, Mr. Miller. Try to prove to us that you can be non-partisan" (Marilyn Churley, *Ontario Hansard*, 21 December 1999). She stated in her interview for this paper that she does not believe a partisan past automatically disqualifies an individual to serve as a Legislative Officer. What dismayed her were the unrevealed connections to the Premier, and the refusal of the PC Party to let her follow up on her concerns (Marilyn Churley, 29 April 2011). In her opinion, the desire to have the ability to appoint Miller is the reason the government backtracked on its original offer to have an ad-hoc committee of equal party representation handle the issue (Marilyn Churley, *Ontario Hansard*, 21 December 1999). The government's defence was that this was the same process used by the NDP in 1994 to appoint Commissioner Ligeti (Ernie Eves, *Ontario Hansard*, 22 December 1999). Nevertheless, the Committee approved Miller's candidacy and recommended his appointment to the Assembly.

At this point, MPP Churley went public with her displeasure of the process. She raised the matter in the House and with the media, accusing Harris of controlling the appointment of a Legislative Officer, securing the appointment of a political friend who will not hold the government accountable for environmental mismanagement. The media picked up on the issue, including one scathing Toronto Star editorial that said, referring to

Miller's former political campaigns, "Those are the kind of campaigns run by a candidate who knows there is a political reward coming in return for the sacrifice" (McAndrew, 22 December 1999). Premier Harris went on the defensive, arguing that Miller was highly qualified, his past political connections should not preclude him from being eligible for the Office, and that, "Mr. Miller's name was not put forward by the PC caucus, by me, or the party" (Mallan, 26 December 1999).

This is true in the sense that Miller applied to the Legislative Assembly for the position and their non-partisan staff ranked him highly. However, in an interview for this paper, PC MPP Ted Chudleigh, a member of the hiring committee, stated that he was instructed by "one of the minions" (meaning a staffer of Premier Harris) to ensure Miller's appointment. MPP Chudleigh admitted that during interviews of other candidates, he kept a list of their poor qualities so he would have talking points against any candidate a Member of the opposition supported. (Chudleigh also stated that he believed Miller was the most qualified candidate, regardless of his political past or orders from the Premier's Office) (Ted Chudleigh, 13 April 2011). With this information, it must be concluded that the actual hiring of the Environmental Commissioner was done by the Premier's Office, and the effort of the Legislative Committee was a formality, leaving little difference between this process and the early appointments that had no consultation. It is important to state that there is no evidence that Commissioner Miller knew that he was the Premier's preferred choice, no evidence to doubt his claim that he did not intentionally hide his political past, and no evidence to support The Toronto Star's suggestion that his appointment was payment for serving the party in "lost cause" elections.

Another line of defence used by the government was to use its record of appointing members of other political parties to government positions (Ernie Eves, *Ontario Hansard*, 22 December 1999). While this does suggest that the Harris government was not completely partisan in its handling of public offices, the NDP and the Liberals made the same point that this paper has made: a legislative appointment is not the same as a government appointment. To quote NDP MPP Frances Lankin from the debate on the appointment motion,

Please understand that there is nothing of similar quality or nature in these appointments. The office of the Legislative Assembly, and the Environmental Commissioner, being one of those offices, has, different than any other appointment that could be made in the province of Ontario, a relationship that relates to the members of this assembly, to all three political parties. Not just the reality of independence, but the perception of independence is paramount. (*Ontario Hansard*, 22 December 1999).

An officer must have, at the time of appointment, the trust and support of the Legislature, and given the realities of the party system, a simple majority of Members is not enough. Agreement from all political parties is the preferred method of appointment, and was not obtained in this case. Just before Christmas 1999, after days of having the opposition use procedural tactics to delay the vote and further debate, the Tories appointed Miller to the



role, with the Liberal and NDP members of the House voting against. The government's attitude to the appointment was that, while they had engaged the opposition parties in consultation, as the party with a legislative majority, they had the prerogative to make the final decision.

Ms. Churley said in her interview that during the process, she felt she had absolutely no power to influence the outcome. Outside the formal process, she felt her experience gave her the knowledge to raise the issue with the public in an attempt to force the government to back down. While the issue did receive media attention, it was not enough to make the government rethink its decision (especially just six months after the PCs had won re-election), and in MPP Churley's opinion, the issue of who is the Environmental Commissioner is not one that the general public puts at the top of the list of their concerns (Marilyn Churley, 29 April 2011). Nevertheless, there was no institutional mechanism to prevent the government from invoking closure on the Committee's proceedings, to prevent the recommendation being made to the Assembly, or to prevent the Assembly voting and approving the selection by simple majority.

Has Commissioner Miller defied his critics and adhered to the non-partisan nature of the Office? Yes. His very first report was critical of the PC government's handling of the environment file. But that is not the point. The opposition parties had, at the time, legitimate concerns about Miller's partisanship, and the process did not respect the principle that the opposition parties should be able to veto candidates that do not enjoy the confidence of all political parties represented in the legislature. It was a formal consultation, but one that happened with the decision already made. The possibility was there that an individual of lesser character than Commissioner Miller could have shown favouritism to the government. The controversy surrounding the appointment was the reason this was the final time this method was used. Since then, Officers have been appointed by the way that was originally proposed for Miller's appointment, and then subsequently withdrawn: the ad-hoc, informal committee, made up of one representative of each recognized party. It was hoped that this transition would avoid the politicization of the appointment. But in at least once case, the government did try to push a preferred candidate through this process. To evaluate whether or not this method has provided more opportunities to opposition parties, we have to evaluate the most contentious appointment made in this manner: the reappointment of André Marin as Ombudsman.

### **André Marin: Appointed despite government resistance**

Mr. Marin was first appointed Ombudsman in 2005 by an ad-hoc committee and revolutionized the office. With the introduction of the Special Ombudsman Response Team (SORT), and with his own personal style and relationship with the media, he increased the office's activism and public profile. As mentioned, he released numerous reports that criticized government and public service policies for not having the public's interest at heart. Many of these would be used by the opposition parties to attack the McGuinty government's record. At the beginning of 2010, the terms of Mr. Marin, Environmental Commissioner Miller, and Integrity Commissioner Lynn Morrison were set to expire. Premier McGuinty indicated that none of them would be automatically

reappointed, and that the positions would be opened to a competitive process. However, eventually Miller and Morrison were recommended for reappointment, leaving only Marin to compete for his job (Canadian Press, 25 May 2010).

Marin told the press that when McGuinty told him he would have to reapply, the Premier promised the competition would be unbiased. Marin was given a temporary six month extension from his March 31 term expiry date, the position was advertised in *The Globe and Mail*, and an ad-hoc committee of the legislature was set-up to review the submitted applications (Howlett, 19 May 2010). The committee, which met in May 2010, was made up of Liberal MPP Wayne Arthurs, PC MPP Sylvia Jones, and NDP MPP Peter Kormos. In interviews obtained with MPPs Arthurs (7 April 2011) and Jones (24 March 2011), both indicated that while officially they were there as representatives of their caucuses, the request to serve came from their respective Leader's Office. The committee was chaired by Steve Peters, Speaker of the Legislative Assembly, and was assisted by the legislature's human resources division. MPP Jones said that while it was never formally discussed, it was understood that the goal of the committee was to reach consensus.

Over 50 applications were received, but only four were interviewed. Included in these four were Mr. Marin, as well as Susan Whelan, a former federal Liberal MP (Ferguson, 2 June 2010). While the PCs and the NDP went public with their support for Marin's reappointment, MPP Arthurs would not sign off. In our interview he indicated to me that there were other candidates who were just as, if not more, qualified for the position than Marin. MPP Jones disagreed, and said that none came close to Marin's calibre. The opposition parties accused the Liberals of trying to resist his reappointment, and accused them of trying to install Ms. Whelan as a "lapdog" (Tim Hudak, *Ontario Hansard*, 2 June 2010). What added credibility to their claims was a series of leaks from Liberal strategists to the media accusing Mr. Marin of abusing his position. They called attention to his expensing personal items for his home, and released accusations from ex-employees testifying to Mr. Marin running an oppressive work environment (Bruser & Ferguson, 29 May 2010). This led the opposition parties to claim the Premier was running a smear campaign to rid himself of one of his more vocal critics.

In his interview for this paper, Ombudsman Marin pointed out there were two distinctive arguments being made by the Liberals, which he termed the "high road" and the "low road." The "high road" was about openness and transparency. The government made the case that he should not be automatically reappointed because it was important to be thorough and look to see if there were better candidates, thereby making sure the position served the public interest. Marin said he was fine with this, because if the process was respected, he was confident he would emerge as the top candidate. But, he said, the process was not respected because of the "low road" approach. By this he meant the deliberate attempt to discredit his reputation and turn public opinion against him so that the opposition parties would not support his reappointment. He noted that the rumours began during the Liberal caucus retreat in Collingwood in May and insinuated that this was approved Liberal strategy (André Marin, 7 April 2011).

Once it became clear that the committee was at an impasse, Government House Leader Monique Smith announced that she was informing the Speaker that the government wished to restart the process and increase the advertising of the position to bring in more applications (Howlett, 18 May 2010). This went on while rumours regarding Mr. Marin continued to surface; the opposition kept portraying this as the Liberals running from accountability. The media focused on this aspect of the events, triggering a public relations backlash against the government, and both opposition parties refused to restart the process. This led Smith to suggest to the Speaker that the committee meet once more and interview two more candidates from the original 50 applicants. In her interview for this paper, MPP Jones said she believed this to be just a “show”, and that the government was trying to hide its intentions to replace Marin by claiming to be advocating for a thorough, competitive process (Sylvia Jones, 24 March 2011). An unnamed government insider told *The Toronto Star* that none of the applicants were better than Marin, and that the government was trying to deflect attention away from its resistance to his reappointment (Howlett, 27 May 2010). But internally, the Liberals were becoming divided due to the poor coverage they were receiving. The *Star* reported that members of the Liberal caucus were complaining that the issue had gotten out of hand. Eventually it was reported that Premier McGuinty, who had already gone public and said that the attack on Mr. Marin’s character had gone too far, signalled that he wanted the issue buried and that there should be no more resistance to his reappointment (Ferguson, 2 June 2010).

During the first week of June, the last week the Assembly was scheduled to sit until the fall, the committee met again. This time, Arthurs was replaced with a different Liberal MPP, David Zimmer. While Smith said publicly that Arthurs was replaced due to “a scheduling issue,” (Ferguson, 2 June 2010), the opposition characterized it as a government attempt to blame the impasse on one MPP. When interviewed, MPP Arthurs said that he was replaced because the goal of the committee was to come to consensus, and when that became impossible, his place on the committee became “redundant” (Wayne Arthurs, 7 April 2011). The committee did not interview the additional two candidates, but re-interviewed Mr. Marin only. Immediately afterwards, the committee agreed to recommend his reappointment to the Assembly, which ratified the selection later that week.

What facts can we conclude about this case? Despite the opposition’s insistence, it is difficult to say definitively that Ms. Whelan was the preferred candidate and that the Liberals wished to install her into the role, although it certainly is probable. A safer claim is that the Liberals were intent on resisting Marin’s reappointment. When asked if he had received instructions to do so, MPP Arthurs said that he was entrusted to represent his caucus’ position on the matter, and he was allowed to evaluate the process as he saw fit (Wayne Arthurs, 7 April 2011). But knowing that Arthurs represented only one vote, the Liberals attempted a public relations campaign that they hoped would make the opposition parties turn away from Marin. When this failed, there were not many options remaining for the government. By using the “low road,” the Liberals had made it difficult to revert to the “high road” and make the case for a restarted process. They were spending too much political capital on this issue, and had to relent.

### Evaluating the processes

In stark contrast to what Marilyn Churley said about her experience, MPP Sylvia Jones said that she felt she had more influence serving on this committee than she ever did serving on any Standing Committee. It is clear that there are considerably more opportunities to resist the government's will on a legislative appointment in the ad-hoc process than with a formal Standing Committee. In a Standing Committee, the government can use its majority to decide who is interviewed, decide on the questions to be asked, force a vote on a candidate, and make an official recommendation to the Assembly. But in the ad-hoc process, there is an implicit recognition that the committee's purpose is to find consensus among all political parties, thus respecting the principle identified earlier in this paper. It becomes very difficult for the government to bring the process to a close without that consensus, as there is no formal mechanism for doing so and the government representative would be voted down by the opposition majority even if there was. This difficulty, and the political repercussions that could come if it attempted to simply disband the process, gives the government an incentive to find consensus.

This paper has already established that the process also should not allow the opposition parties to install a candidate against the wishes of the governing party. It was their political mistakes that forced the Liberals to agree to Marin's reappointment, but as the Ombudsman himself acknowledged, the government does have the right to refuse the reappointment and open a competitive process. If the Liberals had not received such a public backlash, they would have been within their rights to veto Mr. Marin's reappointment. The obligation to find consensus rests on the opposition parties just as much as it does the governing party. However, they would have been under pressure to find another candidate that would have been acceptable to the other parties (a difficult task given Marin's public image and opposition support), and they most assuredly would have still failed to appoint Susan Whelan if she had been their preferred candidate.

The ad-hoc process does not guarantee the end of government control, however. Much of the end result depends on the mobilization of public opinion. Marin had a highly visible public profile and a track record of issuing critical reports. This is why it was easy for the opposition parties to take the Liberal effort to discredit Marin and turn it into accusations that the government was trying to silence a critic. But we can imagine a scenario where the resistance to Marin's appointment does not generate much media attention (for instance, if this had been Marin's first appointment and he was not already a media figure). Marilyn Churley noted that it was the public's disinterest in the office of Environmental Commissioner that made it easier for the PCs to appoint Gord Miller (Marilyn Churley, 29 April 2011). In that event, the Liberals could counter and say that the opposition parties were being obstructionist, were refusing to give all candidates consideration, then walk away from the committee structure and pass a motion appointing a preferred candidate. As long as the candidate had qualifications that could be defended (as Miller did), the opposition parties lose their ability to block the appointment.

While this scenario is unlikely, it reflects the reality that the only requirement is for the Assembly to pass a vote by majority motion. The ad-hoc committee makes it more difficult for the governing party to get around opposition involvement, but it is not impossible. For that reason, this paper recommends one change to the institutional structure of appointing Independent Officers: the Standing Orders of the Legislative Assembly should be amended so that a motion to appoint an officer cannot be tabled unless it is co-sponsored by the House Leaders of all recognized parties. With this amendment, a governing party could not force a vote unless the opposition parties agreed. Even if the public did not put pressure on the government to drop a preferred candidate, the government could not abandon the ad-hoc process and proceed with the nomination anyway. It would reflect the principle that an officer should have the support of all political parties, and not just the Members who happen belong to the governing party, even if they make up a majority. Consensus across party lines would not be an informal principle governing the candidate search, but an institutionally mandated necessity to make an appointment, removing the ability of the Premier's Office to make the selection on its own.

### **Conclusion**

The role and public profile of Independent Officers of the Legislature has grown considerably over the last twenty years. As the public comes to rely on their ability to investigate the increasingly complex structure of public bureaucracy, it should continue to do so. Given this important position in the machinery of political accountability, it is vital that the method used to appoint them be consistent with their mandate to be independent of the political forces of the day, particularly the government. While making these offices responsible to the legislature does provide them with legitimacy, it would be a mistake to take the support of a simple majority of Members as a guarantee of independence. The reality of our system is that when a governing party holds a majority of the seats in the legislature, party discipline means that the two branches of government are fused rather than separated.

Taking this reality into regard, an appointment process that truly respects the independent nature of the office should look for consensus across political parties and take the final decision-making power out of the Premier's Office. Entrusting the appointment to a Standing Committee of the Legislature fails in this regard. As seen with Gord Miller's appointment as Environmental Commissioner, the governing party's majority on the Committee is enough to overcome any opposition objection, especially if the media and the public do not protest the governing party's decision. The Premier can pick a candidate and go through the formality of all-party consultation while knowing that the preferred appointment will be made in the end.

The ad-hoc informal committee is better suited to this responsibility. By providing for equal party representation, it implicitly recognizes that consensus across party lines is the preferred method of appointment. A government will have more difficulty ignoring opposition input than it would if it had a majority on the committee and cannot easily bring the process to a close. Such was the case with André Marin, as the government

eventually had to concede to the opposition's insistence on his reappointment. However, public reaction is still an important factor; if there are no other political considerations at play, a government could conceivably argue opposition obstructionism and use its majority to appoint a candidate even if the committee does not come to a conclusion. This paper recommends changing the Standing Orders so that the formal motion to appoint can only be tabled if it is sponsored by all the parties. It would institutionally mandate the consensus on which these appointments should be based.

Those interviewed for this paper offered their own suggestions for reforming the process. Ombudsman Marin is on record as supporting an extended term of office, but no reappointment, as he believes if reappointment is not automatically coming, the process will undoubtedly be politicized. Commissioner Miller disagreed and countered that a government that knows an officer's term is coming to an end could ignore his or her recommendations, putting that person in a "lame duck" situation. Miller also made an interesting point of suggesting the ad-hoc structure should be reformed so that while it would still reflect equal party representation, it should include more than one representative of each party, because with one representative, individual personalities can make a difference (Gord Miller, 22 March 2011). The fact that these officers have opinions on the matter is proof that the issue of the appointment process is one that deserves consideration. The public is becoming more and more dependent on these officers to expose public sector failures and will expect their appointments be made in a way that ensures their independence is not in name only.

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