

Legal Innovation

Attorney general says Ontario moving forward with modernization agenda for justice system

By John Schofield

(March 24, 2021, 7:59 AM EDT) -- Ontario Attorney General Doug Downey says increasing the number of judicial candidates the attorney general can choose from will help modernize the province's judicial selection process and is the reason why the government is legislating that change.

Bill 245, the *Accelerating Access to Justice Act, 2021*, which was scheduled for third reading in the legislature March 23, includes provisions that, if passed, would require the independent Judicial Appointments Advisory Committee (JAAC) to provide the attorney general with a minimum of six candidates when judicial vacancies arise, up from a minimum of two. If the attorney general disapproves of the initial six candidates, the legislation would permit the government to request another list of six candidates.



Ontario Attorney General Doug Downey

The legislation, if passed, would also see the government appoint 10 of the JAAC's 13 members, instead of the traditional seven. The bill was introduced last month after more than a year of consultations with lawyers and others in the justice system by the Ministry of the Attorney General.

"We have an excellent system, but we need to update it for 2021," Downey said in wide-ranging interview with *The Lawyer's Daily*. "Only people who are recommended by the independent committee are to be considered, so that maintains the integrity of the system. The question becomes, if I'm to make a selection, then I have to have individuals to select from, and I think six is a modest number.

"I had one occasion where there were two judicial vacancies, and I got two names for one of the vacancies, and I'm going to say John Smith and Jane Doe," he recalled. "And the second appointment I got two names and it was Jane Doe and John Smith. And I didn't feel that really gave me an ability to weigh the candidates and make a decision. And I felt that I needed more recommendations."

Some observers have expressed concern that mandating the JAAC to provide a significantly larger pool of candidates could compromise its independence and lead to the creeping politicization of Ontario's judicial appointments process. In a recent written submission to the legislative committee studying the proposed legislation, three retired Ontario chief justices, Annemarie Bonkalo, Brian Lennox and Sidney Linden, asked the government to protect the advisory committee's independence

by following Quebec's lead and including a provision in Bill 245 barring the consideration of political affiliation in the judicial selection process. If the attorney general rejects all the shortlisted candidates, they added, he or she should be required to provide written reasons.

William Woodward, a London, Ont.-based partner with Dyer Brown LLP and chair of the Federation of Ontario Law Associations (FOLA), which represents about 12,000 lawyers through its 47 district law associations, has also expressed concern about a provision in the bill that would require FOLA, the Ontario Bar Association and the Law Society of Ontario to provide the attorney general with more candidates for the single seats they hold on the JAAC. Currently, they put forward one nominee when vacancies arise, but the proposed legislation would require them to provide three candidates.

Downey said that proposal is geared to increasing diversity on the JAAC.

"The different groups would think that they were doing a helpful thing by recommending or putting forward a diverse candidate, and we may end up with three diverse candidates all with the same diversity," he said. "And so by giving me their top three, that allows us to have the committee more reflective of a broader diversity."

Earlier this month, Ontario introduced its Justice Accelerated Strategy, which includes a \$28.5-million expenditure for a digital case management system the government said will help reduce delays and backlogs at tribunals.

"The Justice Accelerated Strategy is the next chapter in our work to break down barriers in the justice system and speed up access to services," Downey said in a March 11 news release.

In a news conference last fall, legal aid lawyers from across the province said that the Landlord and Tenant Board's remote hearing process was not working because, in part, a lack of technology has been a barrier for some tenants, who risk losing their homes as a result.

But Downey said one goal of the government's Justice Accelerated Strategy is to build a judicial system that's responsive to the people using it.

"Having things digital and transforming systems is the right way to go, but we do have to make sure that we're accommodating other users," he said. "So we're taking steps to do that. We have taken steps to do that. There is a physical location that some users can go to if they don't have the technology. And so it's that kind of accessibility that we have to keep our eye on."

While the government will continue building on the technological platforms that have helped Ontario's justice system get through the COVID-19 pandemic, Downey said bricks and mortar courthouses will continue to play a role.

"But I think we can do a much better job," he said. "It needs to be more for the client experience."

The government stirred some controversy in May 2020 when it announced the cancellation of a proposed, state-of-the-art courthouse in Oakville. The seven-storey, 25-courtroom Halton Region Consolidated Courthouse, which was estimated to cost between \$200 million and \$499 million, would have replaced the aging courthouses in both Milton and Burlington.

Downey said the government is still moving forward with plans to refurbish the Milton courthouse, which was closed last fall due to a recurrence of mould in the building.

"There is going to be some really good stuff coming forward as it relates to Burlington and Milton," he said. "I'm very excited about what we're going to be doing in Milton as a bit of showcase for the courthouse of the future, with some of the tools in it that you don't see in courthouses now. And I think when we finish this process people will of course understand better what we're talking about."

Ken Kelertas, president of the Halton County Law Association and the director of legal services for the Halton Regional Police Service, said the Milton courthouse remains closed and is not expected to be operational until at least the fall of 2021. Details on a possible temporary courthouse have yet to be announced and, meanwhile, the government has seemingly done "nothing to advance any plan to build or develop a 'courthouse of the future' in Halton," he said in an e-mail.

Downey said improving access to justice in Ontario also means reducing systemic racism in the judicial system, and he is working to do that, in part, by making more of an effort to measure the progress of identifiable groups in, for example, judicial appointments.

"That's part of what's in my *Accelerating Access to Justice Act*," he noted. "I want to know who's applying, who's getting interviews, who's getting recommended, and then we'll be able to see who's getting picked. And we'll see if in fact we have a challenge there or not.

"But right now," he added, "we don't know because nobody's doing that. It's that kind of baseline work that's been neglected by previous governments for reasons I don't understand. But we're putting it right in the legislation."

A recently released report from the Canadian Association of Black Lawyers (CABL), Ryerson University and the University of Toronto found that perceptions of racial discrimination in Ontario's courts have actually increased over the past 25 years, despite programs geared to stamping out systemic racism.

The *Accelerating Access to Justice Act*, if passed, will also permanently allow for the virtual witnessing of wills and powers of attorney to make it easier for people to get their affairs in order. But Downey said that going to completely digital wills is not in the cards for Ontario in the near future. British Columbia passed legislation to permit digital wills last year.

"During COVID we did this as an emergency measure to allow the virtual witnessing of wills and powers of attorney," he noted. "We consulted widely with a lot of people, and we always get a range, where somebody wants us to go further, somebody doesn't want us to go as far. But I'm quite comfortable that we've maintained the integrity of what is hundreds of years of practice, but in a modern way. So I'm comfortable where we are."

Starting April 1, Ontario is also setting the limit for a small estate at \$150,000 and removing the requirement to post a bond in most small estate probate applications. The move under the government's *Smarter and Stronger Justice Act, 2020*, which received royal assent last July, is designed to simplify small estate procedures and make it easier to file a probate application for a small estate that may otherwise go unclaimed.

"I was in practice for 20 years, and so you saw some small estates that, quite frankly, cost as much to get the money moving to the beneficiaries as the money that was moving," said Downey. "It just didn't seem right that a small estate for \$50,000 had to go through the exact same process as an estate for \$5 million. And so we've created a simplified small estate exemption and again I think it works really well."

Downey said Ontario's justice system has done "remarkably well" during the pandemic and has "moved ahead decades in months."

He said COVID-19 liability protections that were introduced as part of the *Smarter and Stronger Justice Act* will not necessarily prevent families of long-term care residents who have perished during the pandemic from seeking justice through class actions.

"There are lots of different heads of damage or claims that this doesn't affect at all," he said. "This is simply to say if you're making an honest effort, in good faith, in following the public health advice, that you'll receive a level of protection.

"We heard from soccer coaches to everybody else saying I don't know if I should be out there with my kid's soccer team, coaching them — I don't want to get sued for something happening to one of the kids getting COVID from another kid," he added. "And then the soccer team just didn't happen. That was the target, was the front-line people."

If you have any information, story ideas or news tips for The Lawyer's Daily please contact John Schofield at john.schofield@lexisnexis.ca or call 905-415-5891.

