

Judicial Appointments

Ontario lawyers' groups monitoring judge selection process as new law looms, leaders say

By **John Schofield**

(March 3, 2021, 9:44 AM EST) -- Ontario's two largest lawyers' associations will be watching carefully to assess what impact new legislation from Queen's Park will have on the impartiality of the province's judicial appointments process, their leaders say.

Bill 245, the *Accelerating Access to Justice Act, 2021*, is currently before the legislature and is expected to pass later this month.



Charlene Theodore, president of the Ontario Bar Association

"Ontario's judicial appointments process is regarded throughout the world as a model for ensuring an independent and highly qualified judiciary," Charlene Theodore, president of the 16,000-member Ontario Bar Association and in-house counsel for the Ontario English Catholic Teachers' Association told *The Lawyer's Daily*.

"We're going to continue to work to ensure that there's a transparent and efficient process," she added, "that judicial vacancies can be filled quickly and that the courts reflect the diversity of the province and the country."

The wide-ranging bill 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 typical slate of anywhere from two to four. If the attorney general disapproves of the initial six candidates, the legislation would permit the government to request another list of six candidates.

William Woodward, chair of the Federation of Ontario Law Associations and a London, Ont.-based partner with Dyer Brown LLP, said the measure has raised concerns among many of the 12,000 members of FOLA's 47 district law associations.



William Woodward, chair of the Federation of Ontario Law Associations

"The fear is that this or perhaps a future government, the attorney general, could just keep asking for another list until the candidate that they prefer theoretically is on that list," he told *The Lawyer's Daily*. "Obviously the government has certain objectives in trying to achieve a greater level of diversity and so on, which I'm quite confident the JAAC is well aware of, so I'm not sure what the purpose of that was."

Woodward and Theodore said the Ministry of the Attorney General consulted with both of their organizations in planning the legislation. Theodore said OBA members are continuing to review all 10 schedules of the legislation and will be providing feedback as necessary.

Among other suggestions, said Woodward, FOLA recommended a public reporting mechanism to make it more transparent if the attorney general rejects a slate of candidates. But such a mechanism was not included in the legislation.

A Feb. 16 government news release announcing the legislation said the modified appointments process will help fill judicial vacancies faster "so people will be able to have their matters heard by a judge more quickly and with fewer delays." Moving the application process online will also encourage more lawyers to apply for judicial vacancies, it added.

"Justice accelerated is justice delivered," Attorney General Doug Downey said in the news release. "The advancements we are proposing to adopt in this bill will benefit people across Ontario by saving them money and reducing the time they spend waiting for their day in court."

Woodward said the province already appears to be filling judicial vacancies quite quickly, but requiring a larger slate of candidates from the JAAC may allow for more flexibility.

The rationale for another measure in the proposed legislation is less clear, he added. Under Bill 245, the Law Society of Ontario, the OBA and FOLA, which currently have one representative each on the JAAC, would be compelled to provide the government with a list of three potential candidates when their respective seat is vacated, instead of the one nominee they currently put forward.

"It's not entirely clear why the government feels that it's necessary to have a group of three individuals that they can select one of," said Woodward. "And the optics may be that the politics is interfering with the independence of the committee."

"There doesn't appear to have been any problem or issue with the representatives being selected and put forward by any of these organizations," he added. "It's a significant commitment. We receive hundreds of applications that have to be scrutinized and then references have to be interviewed and collateral references have to be interviewed. It's a

huge amount of work for these people.”



Trevor Farrow, Osgoode Hall law school professor

Trevor Farrow, a law professor at Osgoode Hall Law School at York University and chair of the Canadian Forum on Civil Justice, a non-profit dedicated to advancing civil justice reform through research and advocacy, said it's too early to tell if the Ontario government is attempting to dilute the independence and expertise of the JACC, but members of the bar and the judicial system need to be cautious in guarding against that risk.

“Put simply, we need the best, most diverse bench we can get and I think there is real merit in having expertise grounded in judicial appointments committees,” he told *The Lawyer's Daily*. “I want to make sure that whatever the government is seeking to do that it doesn't push further political motives into what needs to be as independent a process as possible. But it's probably too early and maybe unfair at this stage to claim that that is happening.”

Along with changes to the judicial appointments process, the sweeping legislation, if passed, would permanently allow the virtual witnessing of wills and powers of attorney. The province will still not allow electronic wills, however.

The government news release says that the bill is also designed to promote the interests of children by giving them a greater voice in the court process and by “better focusing resources of the Office of the Children's Lawyer.”

The new law would also expand and guarantee the ability of francophones to file documents in French at all Ontario courthouses and for all matters, including civil and family law. It would also consolidate Ontario's land tribunals by merging the Local Planning Appeal Tribunal, Environmental Review Tribunal, Board of Negotiation, Conservation Review Board and the Mining and Lands Tribunal into a new single tribunal called the Ontario Land Tribunal.

“The new Ontario Land Tribunal would make the land dispute resolution process more efficient by creating a single forum to resolve disputes faster by eliminating unnecessary overlap between cases,” according to the government news release.

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.