HOUSE OF COMMONS
CANADA

PRESERVING INDEPENDENCE IN THE JUDICIAL APPOINTMENT SYSTEM

Report of the Standing Committee on Justice and Human Rights

Art Hanger, MP
Chair

39th PARLIAMENT, 1st SESSION

Also available on the Parliamentary Internet Parlementaire: http://www.parl.gc.ca

Available from Communication Canada — Publishing, Ottawa, Canada K1A 0S9

PRESERVING INDEPENDENCE IN THE JUDICIAL APPOINTMENT SYSTEM

Report of the Standing Committee on Justice and Human Rights

Art Hanger, MP
Chair

39th PARLIAMENT, 1st SESSION

STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS

CHAIR

Art Hanger

VICE-CHAIRS

Derek Lee

Réal Ménard

MEMBERS

Hon. Larry Bagnell

Joe Comartin

Rick Dykstra

Carole Freeman

Hon. Marlene Jennings

Brian Murphy

Rob Moore

Daniel Petit

Myron Thompson

OTHER MEMBER WHO PARTICIPATED

Patrick Brown

CLERK OF THE COMMITTEE

Diane Diotte

LIBRARY OF PARLIAMENT

Parliamentary Information and Research Service

Robin MacKay, Analyst

Dominique Valiquet, Analyst

THE STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS

has the honour to present its

FOURTEENTH REPORT

Pursuant to its mandate under Standing Order 108(2), the Committee has studied the Judicial Appointment Process. After hearing evidence, the Committee agreed to report to the House as follows:

TABLE OF CONTENTS

INTRODUCTION	1
THE LEGAL BACKGROUND TO FEDERAL JUDICIAL APPOINTMENTS	2
THE FEDERAL JUDICIAL APPOINTMENT PROCESS	3
CHANGES TO THE JUDICIAL NOMINATIONS PROCESS	6
WHAT THE COMMITTEE HAS DONE	9
REACTION TO CHANGES TO THE JUDICIAL NOMINATIONS SYSTEM	9
APPENDIX A – LIST OF WITNESSES	15
APPENDIX B – LIST OF BRIEFS	17
MINUTES OF PROCEEDINGS	19
BLOC QUÉBÉCOIS DISSENTING OPINION	21
CONSERVATIVE PARTY OF CANADA DISSENTING OPINION	23

PRESERVING INDEPENDENCE IN THE JUDICIAL APPOINTMENT SYSTEM

INTRODUCTION

Many excellent appointments have been made to the provincial and territorial superior courts, the courts of appeal and the federal courts in the last several decades. The work of Canada's courts is, in general, widely respected both at home and abroad. The House of Commons Standing Committee on Justice and Human Rights does not wish to interfere with or disparage in any way the high regard in which Canadian courts are held.

Recently, however, changes have been made to the composition of the judicial advisory committees that help to choose judges and the method by which those judges are selected. In the view of the majority of the Committee, a number of problems with these changes can be noted. One difficulty is that undue preference has been given to the law enforcement community when the vast majority of cases heard by the superior courts do not involve the police. A second difficulty is that one of the actors in the criminal judicial process, whose actions are often being scrutinised by those selected as judges, should not have, or be perceived to have, a role in choosing the arbiter. A third difficulty with the changes made is that the "highly recommended" category has been eliminated, thereby allowing the Minister of Justice greater scope to select judges who may be perceived as partisan choices. The recent changes have prompted an examination by the Committee of the federal judicial nominations process.

The challenge to the Committee has been to suggest changes to the federal judicial appointments process, while at the same time being respectful of the judicial independence so essential to the continued high esteem in which the courts are held. The Committee has also been required to operate within the confines of section 96 of the *Constitution Act, 1867*, which vests the power to appoint superior court judges in the Governor General. This report is based on the premise that the appointment of superior court judges will still be made by the Governor General, but the decision to appoint can be made in a different context than exists today. All members of the Committee agree that the overriding principle in any appointment decision should be that of merit. In addition, all members agreed that a key objective of any changes to the appointments procedure should be increased transparency and accountability.

The witnesses (Appendix A) appearing before us and the Briefs we received (Appendix B) provided the Committee with many optional approaches to the issues dealt with in this report – each of them was given serious consideration.

THE LEGAL BACKGROUND TO FEDERAL JUDICIAL APPOINTMENTS

Section 96 of the *Constitution Act, 1867* provides that the Governor General shall appoint the judges of the Superior, District, and County Courts in each province. Section 101 of the *Constitution Act, 1867* provides that the Parliament of Canada may provide for the establishment of any additional courts for the better administration of the laws of Canada. Under the authority of section 101, the Federal Court was created in 1971 as a successor to the Exchequer Court of Canada, which was established in 1875. With amendments to the *Federal Courts Act* [1] coming into force in 2003, there are now two separate courts – the Federal Court of Appeal and the Federal Court. In addition, the Tax Court of Canada was established in 1983 by the *Tax Court of Canada Act*[2], which replaced an administrative tribunal known as the Tax Review Board with a court of law. As a result of amendments made to the *Tax Court of Canada Act* in 2003, the Court now has the status of a superior court of record.

By section 99(1) of the *Constitution Act, 1867*, section 8 of the *Federal Courts Act* and section 7 of the *Tax Court of Canada Act*, the judges appointed by Parliament hold office during good behaviour, but are removable by the Governor General on Address of the Senate and House of Commons. No federally-appointed judge has been removed from office in this fashion. All federally-appointed judges are now obliged to retire when they reach the age of 75. The salaries, allowances and pensions of these judges are provided for in the *Judges Act*.[3]

Federal judicial appointments are made by the Governor General acting on the advice of the federal Cabinet. A recommendation for appointment is made to the Cabinet by the Minister of Justice with respect to the appointment of *puisne* judges, and by the Prime Minister with respect to the appointment of Chief Justices and Associate Chief Justices. The recommendation to Cabinet is made from amongst the names that have been previously reported by the judicial advisory committees (see below) to the Minister of Justice by the Commissioner for Federal Judicial Affairs or his or her delegate, the Executive Director, Judicial Appointments. The federal judicial appointments process does not include the nomination process for the Supreme Court of Canada, for superior court judges seeking appointment to a Court of Appeal, or for Chief Justices, which fall under the prerogative of the Prime Minister. The process does, however, include lawyer candidates and Provincial Court Judge candidates seeking appointment directly to a Court of Appeal.

[1] The *Federal Courts Act*, R.S.C. 1985, c. F-7
[2] R.S.C. 1985, c. T-2
[3] R.S.C. 1985, c. J-1

THE FEDERAL JUDICIAL APPOINTMENTS PROCESS

Professional competence and overall merit are the primary qualifications for appointment to the Bench. The current federal judicial appointments process was implemented in 1989 when the advisory committees created under the process became operational. The judicial advisory committees have the responsibility of assessing the qualifications for appointment of the lawyers who apply. Each province and territory has at least one committee, while, because of their larger population, Ontario has three regionally based committees and Québec has two. Candidates are assessed by the regional committee established for the judicial district of their practice or occupation, or by the committee judged most appropriate by the Commissioner for Federal Judicial Affairs.

Prior to the recent changes, each judicial advisory committee consisted of seven members representing the bench, the bar and the public as follows:

- a nominee of the provincial or territorial law society;
- a nominee of the provincial or territorial branch of the Canadian Bar Association;
- a judge nominated by the Chief Justice or senior judge of the province or territory;
- a nominee of the provincial Attorney General or territorial Minister of Justice; and
- three nominees of the federal Minister of Justice.

In addition to those members listed above, each committee had an *ex officio* non-voting member - the Commissioner for Federal Judicial Affairs or the Executive Director, Judicial Appointments. The Minister of Justice, with the assistance of the Commissioner for Federal Judicial Affairs, selects persons to serve on each committee who reflect factors appropriate to the jurisdiction, including geography, gender, language, and multiculturalism. Committee members are appointed by the Minister of Justice to serve either two or three-year terms, with the possibility of a single renewal. They are guided by a Code of Ethics,[4] which stipulates that no questions concerning a candidate's political views or political affiliation are to be raised. The Minister meets periodically with the Chairs of all the committees, for an exchange of views concerning the operation of the process. There are publicly-available guidelines for advisory committee members.[5] Lawyer members of the committees can not themselves be candidates for judicial appointment for one year following the end of their term of office on the committee.

[4] Available online at: http://www.fja.gc.ca/jud_app/judAdvComCodeEthics_e.html
[5] Available online at: http://www.fja.gc.ca/jud_app/judAdvComGuideLines_e.html

Qualified lawyers and persons holding provincial or territorial judicial office who wish to be considered for appointment as a judge of a superior court in a province or territory or of the Federal Court, Federal Court of Appeal or Tax Court of Canada must apply to the Commissioner for Federal Judicial Affairs. To assist the applicants, the Office of the Commissioner for Federal Judicial Affairs provides a Guide for Candidates.[6] In addition to candidates themselves, members of the legal community and all other interested persons and organizations are invited to nominate persons they consider qualified for judicial office. Nominees are contacted by the Commissioner to ascertain whether they wish to be considered for a judicial appointment.

Candidates are asked to complete a Personal History Form[7] which includes, in addition to the usual information found in a *curriculum vitae,* information on the candidate's non-legal work history, other professional responsibilities, community and civic activities, a description of the qualifications for appointment, personal matters such as the candidate's health and financial situation, and competence to hear and conduct a trial in both official languages.

The statutory qualifications for appointment are set out in the *Judges Act*, the *Federal Courts Act* and the *Tax Court of Canada Act*. Generally, they require ten years at the bar of a province or territory, or an aggregate of ten years at the bar and in the subsequent exercise of powers and duties of a judicial nature on a full time basis in a position held pursuant to a law of Canada or of a province or territory. Appointments to a provincial superior court are made only from members of the bar of that province, as required by the *Constitution Act, 1867*. Appointments to the superior courts of the three territories are open to all persons who meet the qualifications for appointment within their own province or territory.

Upon determining that a candidate meets the threshold constitutional and statutory criteria for a federal judicial appointment, the Commissioner or the Executive Director, Judicial Appointments will forward the candidate's file to the appropriate committee for assessment (lawyers) or for comment only (provincial or territorial court judges). Lawyer candidates only are assessed by the committees. Extensive consultations in both the legal and non-legal communities are undertaken by the committee in respect of each applicant.

Professional competence and overall merit are the primary qualifications for judicial office. Committee members are provided with Assessment Criteria[8] for evaluating fitness for the bench. These criteria include:

[6] Available online at: http://www.fja.gc.ca/jud_app/index_e.html#process
[7] Available online at: http://www.fja.gc.ca/jud_app/pers_e.html
[8] Available online at: http://www.fja.gc.ca/jud_app/assess_e.html

- general proficiency in the law;
- intellectual ability;
- analytical skills;
- ability to listen;
- ability to maintain an open mind while hearing all sides of an argument;
- ability to make decisions;
- capacity to exercise sound judgement;
- reputation among professional peers and in the general community;
- area(s) of professional specialization, specialized experience or special skills;
- capacity to handle heavy workloads;
- capacity to handle stress and pressures of the isolation of the judicial role;
- awareness of racial and gender issues;
- bilingual ability; and
- personal characteristics such as a sense of ethics, patience, courtesy, honesty, common sense, tact, integrity, humility, fairness, reliability, tolerance, a sense of responsibility, and consideration for others.

Committees are encouraged to respect diversity and to give due consideration to all legal experience, including that outside a mainstream legal practice.

There are certain potential impediments to appointment to the Bench. These include:

- any debilitating physical or mental medical condition, including drug or alcohol dependency, that would be likely to impair the candidate's ability to perform the duties of a judge;
- any past or current disciplinary actions or matters against the candidate;
- any current or past civil or criminal actions involving the candidate; and
- financial difficulties including bankruptcy, tax arrears or arrears of child support payments.

The committees used to be asked to assess candidates on the basis of three categories: "recommended", "highly recommended" or "unable to recommend" for appointment. These categories reflect the advisory nature of the committee process. Once the assessment has been completed, candidates are notified of the date they were assessed by the committee but are not provided with the results of the assessment. The results are kept strictly confidential and are solely for the Minister's use. The Minister may seek further information from the committee on any candidate. On those occasions when a committee's advice may be contrary to the information received from other sources by the Minister, the Minister may ask the committee for a reassessment of the candidate.

Assessments are valid for a period of two years, during which time "recommended" or "highly recommended" candidates (now only "recommended" candidates) remain on the list of those available for judicial appointment by the Minister of Justice. A new Personal History Form must be submitted prior to the expiry date if a candidate continues to be interested in a judicial appointment after the expiry date, in which case a new assessment is undertaken by the committee.

Provincial or territorial judges who wish to be candidates must also notify the Commissioner in writing of their interest in a federal judicial appointment and complete a Personal History Form for judges. These candidates are not assessed by the advisory committees, but their files are submitted to the appropriate committee for comments which are then provided to the Minister of Justice, including the results of any confidential consultations undertaken by the committee. These comments are strictly confidential and are provided to the Minister of Justice only. They are not binding on the Minister, and the names of these candidates are automatically placed on the list of those available for appointment. They must, however, renew their expression of interest every five years failing which, their names will be withdrawn from the list.

The Commissioner for Federal Judicial Affairs has overall responsibility for the administration of the appointments process on behalf of the Minister of Justice. The Commissioner's responsibility is exercised directly or by his or her delegate, the Executive Director, Judicial Appointments. The Commissioner or the Executive Director, Judicial Appointments must attend every committee meeting as an *ex officio* member and serves as the link between the Minister of Justice and the committees. To provide assurance of its authenticity, each candidate's assessment is certified by the Commissioner or Executive Director, Judicial Appointments prior to submission to the Minister of Justice.

CHANGES TO THE JUDICIAL NOMINATIONS PROCESS

A number of changes have recently been made to the judicial nominations process. The changes are as follows:

<u>Composition of the Judicial Advisory Committees</u>

The first change is to the composition of the judicial advisory committees. Now there are eight members on the committees, consisting of the following individuals:

- a nominee of the provincial or territorial law society;

- a nominee of the provincial or territorial branch of the Canadian Bar Association;
- a judge nominated by the Chief Justice or senior judge of the province or territory;
- a nominee of the provincial Attorney General or territorial Minister of Justice;
- a nominee of the law enforcement community; and
- three nominees of the federal Minister of Justice representing the general public.

Each committee also has an *ex officio* non-voting member - the Commissioner for Federal Judicial Affairs or the Executive Director, Judicial Appointments. The revised list of committee members indicates that the additional member is to be from the law enforcement community and is to be selected by the Minister of Justice.

Assessment Categories

A second change has been made to the manner in which candidates for judicial office are assessed. Previously, judicial advisory committees were asked to assess candidates on the basis of three categories – "recommended", "highly recommended" or "unable to recommend" for appointment. Now the committees are asked to assess lawyer candidates on the basis of only two categories – "recommended" or "unable to recommend" for appointment.

Role of Judicial Advisory Committee Chairs

A third change has been made to the selection and role of judicial advisory committee chairs. Previously, committee chairs were elected by committee members from among their number, usually for the duration of the committee's mandate. The chairs also voted on candidates as a matter of course. Now the judicial appointees of the committees act as chairs for the duration of the committee's mandate. In addition, the judges chairing the committees will only vote when required to break a tie vote among the other committee members.

Staggering Terms

The terms of half of the judicial advisory committees will expire in 2008, while the terms of the other half will expire in 2009. The intent of this change is to ensure that the terms of the committees do not all expire at the same time. This is designed to help maintain a certain continuity in the judicial nominations process.

Tax Court of Canada Committee

A new five-member judicial advisory committee has been created as a one-year pilot project to assess all candidates for appointment to the Tax Court of Canada. The Committee will be comprised of one nominee who is a judge of the Tax Court of Canada and four nominees of the Minister of Justice, selected in consultation with the Chief Justice of the Tax Court.

In his testimony before the Committee on 5 February 2007, the Minister of Justice noted that changes have been made to the judicial appointments committees in 1991, 1994, and 1999. In 1991, for example, the two "qualified" and "not qualified" designations were replaced by the three designations of "highly recommended", "recommended", or "unable to recommend", while in 1994 two other representatives of the Minister of Justice were added to the committees to increase the representation of non-lawyers. The Minister described the addition of a member from the law enforcement community to the judicial advisory committees as one from a community no less implicated in the administration of justice than are judges and lawyers. He said the change in the composition of the advisory committees would broaden the basis for examination of potential candidates and contribute a fresh perspective on candidates for the Bench.

The Minister of Justice also commented on the change in the role of the judicial nominee on the advisory committees. The fact the judicial nominee will be made chair of the committee means that he or she will have significant oversight of the flow of discussions and will manage the assessments of candidates. Given that most assessments of candidates result in a consensus and voting is rare, the loss of a vote by the judicial nominee, except in cases of a tie, will not have a great impact. The Minister said that the judicial nominee will have as much impact on the "new" judicial advisory committees as he or she did on the "old" ones.

Finally, the Minister of Justice stated that there were no criteria upon which the judicial advisory committees could objectively base an assessment that a candidate was "highly recommended". The Minister also said that experience showed that the use of the term "highly recommended" was losing its significance as percentage rates for candidates receiving this designation varied significantly across the country. There was also a greater prevalence for the "highly recommended" designation for lawyers coming from larger firms than for those lawyers from smaller firms and cities. In addition, the comment sheet provided by the advisory committees for each candidate is more explicit with respect to strengths and weaknesses than any label of "recommended" or "highly recommended".

WHAT THE COMMITTEE HAS DONE

In response to the changes made to the federal judicial nominations process, the House of Commons Standing Committee on Justice and Human Rights adopted the following motion on 27 February 2007:

Whereas the Conservative government has decided to revise the procedure for selecting judges without consultation;

Whereas this modified review procedure bears flagrant signs of partisanship and ideological influence;

It is moved:

1. *That the Government postpone the reform made to the composition of the judge selection committees and that it restore the previous procedure for these committees.*
2. *That, as soon as the study of Bill C-18 is completed, the Committee devote a minimum of three sessions, beginning in the week of March 19th at the latest, which would be added to the two regular weekly sessions.*
3. *That these additional sessions be dedicated to hearing witnesses who will inform the Committee of the consequences the government's proposed changes will have on the integrity of the legal system.*
4. *That the Chair report the Committee's conclusions to the House.*

Pursuant to this motion, the Committee heard from witnesses concerning changes to the federal judicial nominations process on 20 March, 28 March, and 18 April 2007.

REACTION TO CHANGES TO THE JUDICIAL NOMINATIONS SYSTEM

Part I

The following four recommendations have been adopted by the majority of the Committee:

<u>Composition of the Judicial Advisory Committees</u>

Witnesses who came before the Committee did not question the integrity of individual police officers who may be called to sit on judicial advisory committees, nor did they say that the police have nothing of value to add to the discussion of the merits of candidates for the Bench. The problem with adding the police to the advisory committees, however, is one of perception.

The Committee was told that the appointment process must be designed to ensure public confidence in judicial impartiality. The public, however, will not perceive judges as impartial if their appointment process gives preference to the voice of one particular group over all others. The fact that a police representative sits on an advisory committee, therefore, without being counter-balanced by someone representing defence counsel, for example, strengthens the apprehension that judges have been selected from among candidates who support police interests. This apprehension is increased when the Prime Minister stated in the House of Commons on 14 February 2007: "We want to make sure that we are bringing forward laws to make sure we crack down on crime and make our streets and communities safer. We want to make sure that our selection of judges is in correspondence with those objectives."

Another problem of perception with the new composition of the judicial advisory committees is the fact that the four selections made by the Minister of Justice compose the majority of voting members. This may be perceived as introducing more, not less, partiality to the judicial appointments system. If judges come to believe that their chances for promotion are enhanced if they apply the criminal law in the "tough" way they perceive the majority of advisory committee members desire, then judicial independence can be threatened.

Beyond the concern with ideology is one that the emphasis on judicial attitudes towards criminal law is misplaced when it comes to the selection of superior court judges. Most of the work of the superior courts involves civil trials requiring high levels of competence in such matters as torts, contracts, intellectual property, taxation, and administrative law. Statistics provided to the Committee indicate that less than 5% of criminal cases are tried in the superior courts. It is not clear what expertise in non-criminal matters the police bring to the judicial advisory committees.

While everyone who came before the Committee has the greatest of respect for the hard and difficult work performed by police officers, the majority of witnesses did not support the addition of the police as an institution to the judicial advisory committees. It was pointed out that the police are often one of the parties whose conduct is assessed during criminal trials. It is not only the accused whose conduct is being assessed, but also the police who, while they may have the best of intentions in trying to discover the truth, may inadvertently breach a suspect's *Charter* rights. Having those who are parties to a criminal trial choosing the arbiter of that trial is antithetical to the rule of law and should be discouraged. Judges who act independently and impartially stand between a potentially innocent accused and a police officer or force who may overstep their bounds in the belief that the accused is guilty. Judges are to be a protection against such misguided conduct and not a vehicle to promote it. Finally, it was noted that, prior to the recent changes,

the Minister of Justice had the power to appoint a police officer to the judicial advisory committees as one of his or her selections to represent the community.

RECOMMENDATION 1

The Committee recommends that the Government of Canada restore the composition of the judicial advisory committees to that which existed prior to the changes made in November 2006.

Assessment Categories

The discussion of categories of assessment for candidates became one of what the role of judicial advisory committees should be. If their role is simply to screen out candidates who are not qualified or should be excluded from consideration for other reasons, then the elimination of the "highly recommended" category should not be particularly troubling. If, however, the committees have been set up to find the best candidates for a particular position on the Bench, then some designation that reflects superior qualities is needed. Some witnesses urged the federal government to follow the lead of provincial governments and have the judicial advisory committees draw up a short list of candidates who are the best qualified to fill a particular judicial posting. The Minister of Justice would then be required to select a candidate from this short list, unless exceptional circumstances applied. This would not only improve the quality of the judiciary but also serve to reduce the influence that political considerations may play in the selection of judges.

RECOMMENDATION 2

The Committee recommends that the Government of Canada restore the three categories of assessments made by the judicial advisory committees – "highly recommended", "recommended" and "unable to recommend".

Role of Judicial Advisory Committee Chairs

Although it was acknowledged that the judicial advisory committees attempt to reach a consensus in their evaluations of candidates for the Bench, a number of witnesses were of the opinion that the right to vote of the judicial member of the committees is essential and should be restored. The judicial member of the advisory committees will be best informed about the needs of the courts in his or her jurisdiction, the skills and knowledge that are required to meet those needs, as well as the professional skills of the candidates.

Input from the judicial member of the committees in terms of voting on candidates should be encouraged and not eliminated.

The removal of the right to vote from the judicial representative would, according to certain witnesses, be counter-productive to the objective of the committees, which should be to recommend the best candidates for a judicial posting on the basis of professional abilities and general merit. The taking away of the right to vote from the judicial member of the committees, combined with the addition of a fourth member selected by the Government of Canada raises a fear of increased politicisation of the judicial nominations process.

RECOMMENDATION 3

The Committee recommends that the Government of Canada restore the right to vote of the members of the judiciary who sit on the federal judicial advisory committees.

Staggering Terms

In their briefs, witnesses had no objection to the decision to stagger the terms of the judicial advisory committees. There was a suggestion, however, that consideration be given to staggering the terms of appointments within the committees themselves. This would serve to ensure greater continuity of deliberations within the committees on an ongoing basis.

RECOMMENDATION 4

The Committee recommends that the appointment terms of the members of each judicial advisory committee be staggered to ensure that the appointments do not all expire at the same time.

Part II

Several informed witnesses made a number of suggestions, which have not been fully considered by the Committee. These suggestions are listed below, followed by the rationale for them provided by witnesses. The majority of the Committee urges the Government of Canada to undertake consultation with stakeholders on the following points:

- **the creation of an advisory committee whose mandate is to evaluate candidates for the Tax Court of Canada.**

The witnesses who addressed the change to the process of selecting judges for the Tax Court of Canada were generally favourable to the creation of a special advisory committee to recommend judges for appointment to this court. A suggestion was made that government appointees not form the majority of the advisory committee to remove any perception of a lack of independence.

- **that consideration be given to changing the current advisory committees from screening committees to nominating committees.**

The recent changes to the federal judicial nominations process are not solely responsible for the basic problems in the judicial nominations process. One problem is that judicial advisory committees function only as screening committees whose role is to screen out bad candidates. It is not sufficient, however, for advisory committees to perform only the negative task of weeding out those who are not suitable for judicial office. It is essential that they also perform the positive task of assisting the Minister of Justice and the federal government in selecting the very best candidates available for a given position. This is the role played by a nominating committee. A true nominating committee would help to combat the perception that political patronage and favouritism plays an important role in determining who is appointed to the bench.

- **that consideration be given to having nominating committees propose a short list of 3-5 names for each judicial posting, as it becomes available. Should the federal government appoint a person not named by a committee, it should give a public explanation for doing so.**

The functioning of the judicial appointments system as a true merit system will depend upon the length of the list of recommended candidates. If the lists are too long, then the system is vulnerable to improper considerations of a political nature influencing the selection. A merit system is best secured if the government of the day is required to choose from short lists of the most outstanding candidates submitted by nominating committees. This is the best way of preventing truly excellent candidates from being passed over in order to appoint less qualified candidates who happen to have political ties with the government of the day.

The government of the day may still decide to appoint a person not named by a committee. This may be for any number of reasons, such as a language requirement that no one on the short list meets. To ensure the accountability

of the appointing process, the government should give a public explanation for not adhering to the short list. There should also be an annual report of all the recommendations that were not accepted by the government.

- **that consideration be given to having Canada create an Institute for the Study of Justice Questions to study issues important to the effective, fair and efficient administration of justice.**

Lost in the debate over the system of appointing judges are many other important justice issues. Some examples of these are the desirability of a system of probationary or part-time appointments for future judges as is used in the United Kingdom, tracking the performance of judges after their appointment, the merits of specialisation of judges, and ensuring access to the justice system for the majority of citizens who could not otherwise afford it.

- that consideration be given to having applicants for judicial appointments informed of the results of their assessments
- that the judicial advisory committees publish an annual report of their activities
- that this annual report maintain the privacy of those who have applied for a judicial appointment.

The Committee has learned that applicants for appointments are not advised of the results of their application. As a result, applicants have no recourse if the advisory committee reviewing the application did not find the candidate to be of acceptable quality. In addition, the lack of information on where a candidate ranks prevents that candidate from making concrete plans for their future. This secrecy, combined with a lack of any annual report on the work of the judicial advisory committees, means that there is no more transparency and accountability in the operation of advisory committees than there is in the actual appointments made by the federal government.

APPENDIX A
LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
Department of Justice	2007/02/05	45
Judith Bellis, General Counsel, Judicial Affairs, Courts and Tribunal Policy		
Donald Buckingham, Judicial Affairs Advisor, Minister's Office		
Rob Nicholson, Minister of Justice		
Department of Justice	2007/03/20	54
Judith Bellis, General Counsel, Judicial Affairs, Courts and Tribunal Policy		
Canadian Bar Association		
J. Parker MacCarthy, President Kerri Froc, Legal Policy Analyst		
Office of the Commissioner for Federal Judicial Affairs		
Marc Giroux, Acting Commissioner		
As Individuals		
Sébastien Grammond, Professor, Faculty of Law, Civil Law Section, University of Ottawa		
Peter Russell, Professor, Department of Political Science, University of Toronto		
Canadian Police Association	2007/03/28	58
Tony Cannavino, President David Griffin, Executive Officer		
As Individuals		
Wallace Craig, Retired Judge		
Edward Ratushny, Professor, Common Law Section, Faculty of Law, University of Ottawa		
Canadian Council of Criminal Defence Lawyers		
William Trudell, Chair		
As Individuals	2007/04/18	61
Antonio Lamer, Former Chief Justice, Supreme Court of Canada		
Jacob Ziegel, Professor Emeritus of Law, University of Toronto		

APPENDIX B
LIST OF BRIEFS

Organisations and individuals

Canadian Bar Association

Federation of Law Societies of Canada

Grammond, **Sébastien**

Russell, **Peter**

Ziegel, **Jacob**

MINUTES OF PROCEEDINGS

A copy of the relevant *Minutes of Proceedings* of the Standing Committee on Justice and Human Rights (Meetings *Nos.45, 54, 58, 61, 64*, 67, 68 and 70) is tabled.

Respectfully submitted,

Art Hanger, MP
Chair

DISSENTING OPINION

The Bloc Québécois supports the four recommendations proposed by the opposition parties. However, the Bloc Québécois members believe that the best way of ensuring that there is no political interference in the process for selecting and appointing superior court judges is to enact legislation setting out the system for appointing judges so that it will be transparent and clear and cannot be altered without a debate in Parliament and the approval of Parliament. Such legislation should clearly state what the composition and role of the advisory committees will be.

Report on the Federal Judicial Appointments Process
House of Commons Standing Committee on Justice and Human Rights

Dissenting Opinion

1. This Dissenting Opinion is presented to address certain inadequacies of the Report on the Federal Judicial Appointments Process of the House of Commons Standing Committee on Justice and Human Rights (Report).

1.1 The Report is meant to address the concerns raised in an opposition motion of 27 February 2007. One of those concerns raised involved alleged "signs of partisanship and ideological influence" perpetrated by the Conservative government in the way in which it relies on Judicial Advisory Committees (JACs) to provide advice to the Minister of Justice.

2. The Report is flawed at the most fundamental level because it is based on partisanship and the myth of a perception rather than on tangible evidence that modifications to the JAC process now produce different and less meritorious candidates.

2.1 Unfortunately, the Report itself is compromised by what its authors claimed they wanted to avoid: a partisan and ideological influence. This influence was asserted by the majority of committee members who wished to raise partisan concerns rather than to acknowledge that the new process has in fact improved, not impaired, the process for judicial appointments. Moreover, the very structure of the Report is suspect. It is normal Parliamentary procedure to produce only substantive recommendations in a committee report. However, this report allowed the unusual practice of including "suggestions", thus blurring the lines between intent and conclusion. It is apparent from this that the majority recommendations were based on championing a "perception" that could safely be used for short term partisan gains. Conversely, the majority "suggestions" clearly lacked the moral fortitude to draw any other firm conclusions. Essentially what happened was an acknowledgement by the majority that a process based on flawed assumptions would never produce any concrete conclusions.

2.2 The Report advances no credible evidence that changes to the JAC process have in any way affected the quality of judicial appointments made since this government took office, or that any of the post-2006 JACs are functioning in a manner that would suggest any actual threat to judicial independence or to the assessment of candidate competence. To suggest as much would be an unsubstantiated attack on the quality and legal excellence of the 98 persons appointed to superior courts by this government since it took office.

2.3 The Minister of Justice continues to be guided by the principles of merit and legal excellence in the selection and appointment of judges to Canada's

provincial superior and federal courts. Furthermore, the Minister continues to receive advice from the JACs so that he can propose meritorious individuals who best represent for a receiving court the appropriate gender balance, bilingual capacity and cultural diversity.

2.4 Moreover, factors highlighted in the comments provided by the JACs to the Minister, such as community involvement and service to the profession, also complement the overall assessment of candidates for the Canadian judiciary.

2.5 Each of the 98 judicial appointments to the Canadian judiciary made by this government reflects the tangible embodiment of the principles of judicial appointments based on merit and legal excellence.

2.6 With respect to balance and diversity, the Conservative government has now made judicial appointments in nine of the 10 provinces (PEI has had no vacancies), in one of the three territories (Nunavut and Yukon have had no vacancies), and to each of the Supreme Court, the Federal Court of Appeal, the Federal Court and the Tax Court of Canada.

2.7 More than one-third of the appointments have been women and more than one-third have been bilingual men and women, who at the time of their appointment were capable of hearing a trial in either of Canada's official languages. A further portion of those appointed (approximate 5 - 15%) have expressed a willingness to achieve a level of proficiency in the other official language that will enable them to carry out their judicial role in both official languages.

2.8 As well, there have been a number of Canadian cultural diversity firsts facilitated by this government's judicial appointments: the first black woman named to the Quebec Superior Court, the first black woman named to the Tax Court of Canada, and the first, First Nations man to sit as a judge of the Federal Court.

2.9 Finally, this government recognizes that the required combination of merit and legal excellence is also found among judges of the provincial and territorial courts. Among the provincial and territorial court judges that have expressed an interest in becoming provincial superior court or federal court judges, seven have been selected to fill these positions since January 2006. Two of these seven provincial court judges (both bilingual) have been elevated directly to their provincial Court of Appeal. In contrast, only 10 provincial court judges were elevated in the entire period 2000-2005.

2.10 The 2006 JACs have been in operation for almost six months now, and the advice offered to the Minister as to which individuals demonstrate legal excellence and merit has not changed. Decisions on which candidates are qualified continue to be made by consensus in almost every case. The chair of

each of the JACs continues to fulfill an active role in determining what his or her committee considers the best qualities of a new judge.

3. The Report is further flawed at a general level because its findings and recommendations are either incomplete, contradictory, or simply unsupported when the whole body of evidence received by the Committee is considered.

3.1 At a general level, the Report is flawed in several ways:

(1) It fails to acknowledge the nature of the Judicial Advisory Committee process.

The Report fails to acknowledge that the Judicial Advisory Committee process came into being and continues to exist to assist, not to override, the Minister of Justice in his or her preparation of advice to the Governor-in-Council, who in turn advises the Governor-General, who under s. 96 of *Constitution Act, 1867* has the power and responsibility to appoint superior court judges in Canada.

(2) It fails to acknowledge that the JAC process has been modified numerous times since the inception of JACs in 1988.

Deliberations of, and changes to, the JAC process have occurred several times, particularly in 1988, 1991, 1994, 1999, 2005 and 2006. There was no evidence presented to the Committee that all or even most of the earlier changes were preceded by extensive consultation outside of government and departments. Some seem to have involved public consultation while others did not. While no evidence was presented, the public record demonstrates that some of the changes made in 2006, such as the return to only two categories of assessment, actually re-establish procedures that prior JACs have employed. While the Report's Second Recommendation proposes to restore a three category assessment process, it fails to acknowledge that the two category process has been successfully employed in the past. It further fails to recognize that certain witnesses, whose testimony was otherwise valued by the majority, expressed indifference at best towards the idea of restoring three assessment categories.

(3) It ignores testimony presented by some witnesses.

Members of Canada's law enforcement community, a retired judge and others presented evidence to the Committee that the JAC process, while not perfect, was working well and with broader representation would continue to provide the Minister with sound advice towards the identification of individuals who possess the legal merit and distinction needed to undertake the role of judge in Canadian courts.

3.2 In its second paragraph, the Report states that "Recently, however, changes have been made to the composition of the judicial advisory committees that help choose judges and the method by which those judges are selected". This

statement wrongly suggests that the JACs have a direct role in the s. 96 power assigned exclusively to the Governor General. No legislation, primary or secondary, exists to substantiate this claim.

3.3 The Report presents contradictory reasoning as to why the presence of a law enforcement representative is supposedly inappropriate on a JAC. In the first paragraph under Part I, entitled, “Composition of the Judicial Advisory Committees”, the Report states that the “problem with adding the police to the advisory committees, however, is one of perception”. In the second paragraph, the Report continues, “The fact that a police representative sits on an advisory committee, therefore, without being counter-balanced by someone representing defence counsel, for example, strengthens the apprehension that judges have been selected from among candidates who support police interest”. Finally, in the final sentence of the section, just prior to the presentation of the Report’s first recommendation, the Report states that “the Minister of Justice had the power to appoint a police officer to the Judicial Advisory Committees as one of his or her selections to represent the community”.

3.4 These statements appear to contradict one another. On the one hand, the argument in the Report appears to be that even one law enforcement officer on a committee will cause a perception of unfairness in the assessment of a candidate’s suitability for the Bench. On the other hand, the Minister, since 1988, has always had the ability to appoint a police officer as a member of the legal community who can provide insight as to how to assess an individual’s legal ability and merit. Would not the membership by one defence counsel on a particular JAC cause a similar problem of perception? Clearly, if one wanted to, one could create an enormous list of perceived disqualifications that would prevent anyone from being appointed to a Judicial Advisory Committee. It is therefore unclear why opposition members have singled out police officers as the one group that lacks the professionalism to operate with integrity in a JAC setting. It must be noted that this prejudice bubbled out numerous times over the course of the JAC hearings, and is most evident in paragraph 86 of the Report, which intimates that law enforcement representatives would use their newfound influence on JACs to appoint judges who would act as a vehicle to promote police misconduct.

3.5 Judicial appointments by the Governor General will continue to be based on merit and legal excellence, with input from a broad range of stakeholders.

3.6 Since their inception in 1988, the underlying objective of the JAC process has been the provision of a forum for a broad range of stakeholders. The changes to the new JACs implemented in November of last year broaden the base of stakeholders who will contribute to the discussion and assessment of competence and excellence required for judicial appointment.

3.7 A voice of the law enforcement community, a community no less implicated in the administration of justice than lawyers and judges, will broaden the basis of examination of potential candidates and contribute a fresh perspective of the competent and qualified individuals recommended for appointment to the bench.

4. The conclusion of this Dissenting Opinion is that the Report is fundamentally flawed and that its recommendations and suggestions should not be implemented.

4.1 The Report's recommendations are not supported by an objective assessment of the constitutional, historical, or even current evidentiary basis of the existing JAC process. With the exception of Recommendation 4 which is a purely administrative matter, there are neither evidentiary facts, nor convincing intellectual reasons offered in the Report for any changes to a process now almost 20 years old which is working well, which elicits broad-based assessment of candidates' skills and legal merit and continues to produce excellent new judges for Canadian courts.