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Chair

The Honourable Paul DeVillers

Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness

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● (1110)

[*English*]

The Chair (Hon. Paul DeVillers (Simcoe North, Lib.)): I call this session to order.

We have with us the Minister of Justice, the Honourable Irwin Cotler, as we continue with our study of the process by which judges areappointed to the Supreme Court of Canada.

The minister has been here before. There was much work done over the course of the summer on the last two appointments and some continuing consultation.

Without further ado, I'll turn it over to the minister. Perhaps, Mr. Minister, you could introduce your colleagues you have with you.

Hon. Irwin Cotler (Minister of Justice): Thank you, Mr. Chairman.

I just want to say that with me I have two persons who are—as I've said before with regard to members of my department, but in this instance particularly so—repositories of institutional memory and expertise. On my left is Judith Bellis, whose title, general counsel, courts and tribunal policy, perhaps understates both her role in this and her ongoing contribution.

François Giroux is my newly appointed judicial affairs adviser. If he looks like my former judicial affairs adviser aside from the red hair, it's because he's the brother of the former one. But he comes with the same expertise; he's a former member of our federal prosecutorial service, a former senior policy adviser, and the like. We are lucky to be the beneficiaries of having a person who brings not only continuity to the post but experience and expertise.

I'm delighted to have them with me, and I would hope to call upon them where appropriate in the questions and answers.

You were correct, Mr. Chairman, to say we are continuing this study. This is in effect almost a third appearance before this committee, and I'm pleased to be able to be here today to outline our proposal for the reform of the Supreme Court of Canada appointments process.

The proposal fulfills the government's commitment to—and the parliamentary recommendations in that regard—ensuring greater transparency and increased confidence in the exercise of this important power while providing for significant parliamentary and provincial involvement and input.

Before I begin, permit me to thank all of the individuals and groups who've added their voices to this important discussion and debate. I've considered a diversity of views from a broad range of constituencies and perspectives: lawyers, judges, domestic and international academics, and in particular parliamentarians, provincial legislators, and others. The proposal I will outline today is the product of careful consideration of all of these points of view.

[*Translation*]

In particular, I would like to thank the members of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness from the last Parliament. The committee's May 2004 report forms the anchor of the proposed reform I will be sharing with you today.

I would also like to thank the members of the Interim Ad Hoc Committee on Supreme Court Appointments, which reviewed the nominations of justices Abella and Charron last summer. The insights which we have gained from both the justice committee hearings and the ad hoc committee proceedings underpin this reform initiative.

[*English*]

I'm delighted to see members here today who were members of either or both of those previous parliamentary committees before whom I appeared and in respect of whom I have been the beneficiary of those recommendations and discussions.

Throughout the public discussions on this issue there have been two important and recurring themes—and I'm referring also to witness testimony before the committee—that have formed the backdrop of the government's deliberations. First, the review of the appointments process is a task of great importance to our country, given that the Supreme Court is at the pinnacle of our court system and that our court system is a fundamental pillar of our constitutional democracy.

[*Translation*]

It is the cornerstone of our democracy, if you will.

[*English*]

It is the court of last resort for all legal disputes in Canada, most notably those involving questions of federal and provincial jurisdiction under the Constitution as well as those that concern violations under the Charter of Rights.

● (1115)

[*Translation*]

The second theme that I would like to address is the reputation of the Supreme Court of Canada as an example of excellence whose judicial legacy has resonated well beyond Canada's borders.

The Supreme Court of Canada is respected throughout the country —indeed around the world—as a model of what a vital, modern and independent judicial institution should be. Nothing should be done to jeopardize that important legacy.

[*English*]

Just over a year ago I appeared before the justice committee in order to describe the current appointments process. At the time I suggested the development of a revised and reformed process should be guided by a set of framework principles. One year later these principles continue to provide a road map for the government in framing the proposal I'm sharing with you today. May I take a few brief moments to reaffirm these principles?

The first is merit. The overriding objective of the appointments process is to ensure that the best candidates are appointed based on merit. I described the criteria of merit, which are professional qualifications and personal qualities, in my appearances last year before the justice committee and the ad hoc committee. These criteria would continue to be used in assessing candidates for the Supreme Court bench. Within the framework of merit, the Supreme Court of Canada bench should to the extent possible reflect the diversity of Canadian society. A diverse bench ensures different and plural perspectives are brought to bear on the resolution of disputes.

The second principle is the constitutional framework. Any reform of the appointments process must be rooted in the recognition that the appointment of the Supreme Court judges is within the constitutional authority of the Governor in Council. This ensures that the executive branch of government remains responsible and accountable for the exercise of this most important power.

[*Translation*]

Third is judicial independence and the integrity of the courts. The system should protect and promote the reality and perception of judicial independence. The independence of the judiciary ensures that legal claims are adjudicated by fair, impartial and open-minded judges who are not beholden to any group, interest or stated public position.

The system should also preserve the integrity of the Supreme Court of Canada and the court system generally—institutions that are vital for the maintenance of the rule of law and the health of Canada's democracy.

[*English*]

The fourth principle is transparency. Simply put, the Supreme Court appointments process should be more transparent. Where, as in this case, a high degree of confidentiality is required for the process to function properly, as I will point out, transparency is accomplished in two ways: first, ensuring that the process is publicly engaged, known, and understood; second, structuring the process to bolster public confidence that decisions are made for legitimate reasons that are not linked to political favouritism or other improper motives.

[*Translation*]

Fifth, parliamentary input. The government has clearly committed itself to ensuring meaningful parliamentary input. Parliamentarians are the representatives of Canadians and are therefore in a unique position to contribute to the transparency and accountability of the advisory committee process and of the consultative and evaluative dimensions of the process.

[*English*]

So there is an important parliamentary contribution, to which I will refer shortly.

Finally, there's provincial input. The importance of provincial input, which has been recognized in the process used currently, reflects in part the role of the court in determining federal-provincial disputes and in interpreting provincial law.

We appreciate that provincial governments have traditionally sought a more formal role in the appointments process. The government's proposal seeks to respond to provincial concerns in four ways.

First, attorneys general of the region in question would be consulted by the minister in the initial development and identification of the list of candidates to be assessed by the advisory committee.

Second, the provincial attorneys general from the region would nominate a member of the advisory committee.

Third, the advisory committee, with ample provincial representation, would participate in the consultation and evaluative process for the initial list of candidates and for the subsequent determination of the short list of three candidates.

Fourth, there would be input and advice from other nominees from the region or province, including the local law societies, chief justices, and lay people.

These, Mr. Chair, are the principles upon which the government's proposal is based. At the same time, we have had to take into account a number of practical considerations as they have emerged in this process.

● (1120)

[*Translation*]

The first is the fact that appointments to the Supreme Court must be made within a limited time frame. A revised appointments process must be capable of being established, mandated and having completed its considerations and recommendations within a few months, at the outside.

[*English*]

So timing is crucial here.

[*Translation*]

At the same time, members of the advisory committee, whether they be parliamentarians, prominent academics, judges, representatives of legal organizations or other prominent Canadians—will be busy people who must slot in the demands of participating in this process with their other obligations.

In deciding what tasks we are going to ask the advisory committee to perform, we have to keep this in mind.

[*English*]

The second practical consideration is that the advisory committee should be of sufficiently manageable size to facilitate the operations of the committee and promote the goal of achieving a work product in a timely fashion.

Finally, there is the issue of confidentiality. Confidentiality is the most crucial prerequisite to ensuring the effective operation and the public credibility of a reformed process. The prospect of breaches of confidentiality could result in a reluctance on the part of those consulted to provide candid and forthright assessments and thereby undermine the effectiveness of the process. It could also inhibit candidates' willingness to agree to have their names put forward and thereby undermine the principle of excellence.

These general principles and practical considerations are not always easy to reconcile, as members will appreciate. For example, the need to preserve confidentiality must be harmonized with the objective of increased transparency. Demands for a high degree of provincial input must be addressed in the context of the federal cabinet's authority over appointments. Ultimately, the question is one of striking the right balance between all the various principles and considerations.

The government has in that sense engaged in thoughtful study and has spent more than a year considering the wide range of views that have been expressed on this issue. It is satisfied the proposal we are sharing with you today represents a very delicate and careful reconciliation of all of these concerns. We are open to suggestions on how this proposal may be refined, but in our view, after more than a year of debate and discussion on these issues, including the valuable work of the two parliamentary committees, we are now prepared to move forward, using this proposal as a template for a new appointments process.

[*Translation*]

May I turn now to a description of the government's proposal. I will first give you a quick overview of the basic elements of the new process before taking you to the specifics.

[*English*]

Mr. Chairman, we are proposing, in effect, a four-stage process. I will quickly summarize the four stages and then go into them in more appropriate detail.

First, the Minister of Justice would conduct a consultation process, one very similar to the current process, to identify prospective nominees. I have already made public before you the protocol for those to be consulted. This would ordinarily result in a list in the range of five to eight candidates, depending on the region—which is a new element in this process—who would then be assessed by an advisory committee.

At the second stage—and this is a wholly new stage of involvement and participation and consultation—an advisory committee would be established to themselves engage in a consultation and evaluation process and to assess the candidates based on a written mandate from the minister and on established criteria contained in the public protocol. The advisory committee would then provide the minister, pursuant to their consultation and evaluation, with a short list of three candidates along with a commentary on the strengths and weaknesses of each candidate on the short list.

At the third stage the minister and the Prime Minister would complete any further consultations as considered necessary, and the Prime Minister would recommend the candidate to the Governor in Council.

Finally, the minister would appear before the justice committee as soon as possible after the appointment to explain the process and the personal and professional qualities of the candidate selected, as I did before the ad hoc committee last summer. The difference is, however, that this fourth stage would now take place after the advisory committee has had a significant involvement in the earlier three stages of the appointments process.

[*Translation*]

May I now move on to the more specific aspects of this proposal.

It is important to recall that candidates for the Supreme Court come from the region where the vacancy originated—be it the Atlantic, Ontario, Quebec, the Prairies and the North, and British Columbia regions. This is a matter of practice, except for Quebec where the Supreme Court Act establishes a requirement that three of the justices must come from Quebec. And we appreciate—as I have said elsewhere—the juridical specificity of Quebec's civil law tradition which finds expression in this requirement.

As well, as is traditionally the case, consultations would therefore be focused on the region from which the vacancy arose.

At the first stage, when the Minister of Justice is developing the initial list of five to eight names, the minister would consult with the persons who are consulted now—the Chief Justice of Canada, the Provincial Attorney General in the region where the vacancy arose, the chief justices in the region, the local law societies and the Canadian Bar Association.

The minister would also publicly invite the written views of any person or group with respect to meritorious candidates. This is to ensure that there is a broad base of input into the initial list.

● (1125)

[*English*]

Given that some candidates might not wish to have their names considered through this new consultative parliamentary evaluative process, the minister would seek the prior consent of candidates before putting their names forward.

At the second stage of the process an advisory committee would be established each time a vacancy arose. This is appropriate, given the regional nature of appointments, which would be reflected in the advisory committee membership. The advisory committee would be composed of the following: one member of Parliament from each recognized party in the House; one retired judge, nominated by the Canadian Judicial Council; one member nominated by the provincial attorneys general in the region; one member nominated by the provincial law societies in the region; and two eminent lay people of recognized stature in the region, nominated by the minister—and when I say "lay people", I mean people who have never been either judges or lawyers—for further public input.

You may have noticed that I stayed away from describing committee members as "representatives". This was deliberate. We do not intend that the members of the advisory committee be representatives of particular constituencies or points of view. Rather, they would bring a diverse set of experiences and perspectives to a common enterprise, which we all share, of assessing candidates for the Supreme Court on the merit-based principle.

[*Translation*]

The minister would provide a mandate letter to the advisory committee, setting out the objectives of the committee, describing the merit-based criteria, establishing timeframes and providing for general procedure particularly in relation to confidentiality. The minister would also meet with the committee before it begins its work to clarify these issues and to underscore the importance of collegiality and confidentiality in conducting the advisory committee's work.

[*English*]

The advisory committee would be empowered to seek the consent of the minister if they wished to assess additional candidates not on the original list proposed to them. Before consenting, the minister would once again consult with those whose views he had sought in relation to the first list. If the minister agreed that the new candidate should be assessed, the candidate would once again be contacted to ensure he or she was agreeable to having their names stand.

The committee's assessment of the candidates would be based on an appreciation of the relevant experience and expertise of the candidates on a paper review—CVs, judgments, articles, and so on—as well as the consultations with third parties, which we expect would be comprehensive.

This was the approach that was recommended by a majority of the justice committee in its May 2004 report. We agree with the justice committee, and this also represents, I may say, the preponderant view of the many we have consulted, that there should be no in-person examinations or interviews. The view expressed to us was that it was doubtful whether such interviews could elicit relevant information that would not be otherwise available to the committee through other sources, including in particular the comprehensive consultative and evaluative process we are putting into place for the first time.

[*Translation*]

The advisory committee would work on a democratic basis, with key committee decisions requiring a consensus or majority vote. Such decisions would include who should be consulted, whether an additional candidate should be proposed, and who should be on the short list.

[*English*]

I'll turn now to this question of confidentiality. It goes without saying that the task of assessing candidates for the Supreme Court is not only extremely important but extremely sensitive. For the advisory committee process to work effectively—for it to work at all—it is vital that individuals who are consulted by the advisory committee be completely candid in their assessments. For the same reason, as recognized by the justice committee, it is essential there be the widest possible scope for discussion within the advisory committee itself. Candid discussions are only possible when the participants can be assured their views are being held in the strictest confidence. In addition, robust protection for confidentiality will reassure potential candidates who might otherwise be hesitant about having their names put forward for consideration.

● (1130)

[*Translation*]

Confidentiality would be required not only of committee members but also of those who are consulted with respect to individual candidates. Given the intense public interest in these appointments, the latter may present a greater challenge. For these reasons, committee members as well as those who were consulted will be asked to enter into written confidentiality agreements.

[*English*]

It is true there can be no guarantees that these undertakings will never be breached. However, I do believe the collegial nature of this process, the stature and reputation of those who would be members of the advisory committee, and the national importance of the task would discourage individuals from violating these obligations. A person who decided to undermine such an important process, potentially damaging individuals and the institution of the court, would face significant public censure. This would itself act as a strong deterrent to such mischief-making.

Once its deliberations were complete, the advisory committee would provide a confidential short list of three names to the minister, along with a commentary on the strengths and weaknesses of the candidates on the short list as the committee has assessed them. In addition, the committee would provide the minister with the full record of consultations and other material it relied upon. If for any reason the minister felt the record of consultation was incomplete, the minister could request the advisory committee to conduct further consultations.

The third stage of the process involves the selection and appointment of a person from this short list as provided by the advisory committee. The minister would complete consultations concerning the short list and make a recommendation to the Prime Minister. In all but the most exceptional and rare of circumstances, the candidate would be appointed from the short list as recommended by the advisory committee. The proviso for exceptional circumstances is there as a safety valve. It is principally intended as a recognition of the legal reality that the ultimate responsibility to make these appointments lies within cabinet.

But it is really there for a practical reason. In implementing this new process, the government is taking a bold step forward. We simply cannot anticipate every possibility or turn of events in the future. At some point in the future—and we would hope it would never happen—the advisory committee process may be significantly undermined by a major breach of confidentiality. In such a case it would be not only the right of the government but its responsibility to put a stop to the process, and it might have to make the appointment in the manner it has been done to date.

[*Translation*]

It would be exceedingly rare for a government to ever make an appointment from outside of the short list. I say this for three reasons. First, a government would not want to face the significant public criticism that would arise from an exercise of this power. Second, a decision to appoint from outside the list would seriously undermine the credibility of the appointments process. Third, the exercise of such a power would affect the willingness of prominent Canadians to serve on future advisory committees. You only have to ask yourself why an advisory committee member would do all this work if there was a real risk that the government would ignore the committee's recommendations.

[*English*]

For these reasons, it appears to me so extraordinary a remedy that I would hope and expect it would never have to be used.

At the fourth and final stage, after the appointment has been made, the minister would appear before the justice committee to explain the nomination process and the personal and professional qualities of the candidate. This would in one sense be similar to my appearance before the ad hoc committee last summer, though in this proposal it would follow upon three considered stages—consultation, evaluation, and participation—as set forth above. This did not obtain before the ad hoc committee but the ad hoc committee recommended it should take place, and we have made it a constituent and important element of our proposal.

[*Translation*]

While there was some criticism of that process last year, I believe it did provide the public with an introduction to the process and an insight into the candidates. This can only enhance the transparency and public understanding of the process, as well as of the qualities that the new judge will bring to this critically important national institution.

● (1135)

[*English*]

Mr. Chairman, this concludes my detailed presentation and description of the government's proposal.

Mr. Chairman and members of the committee, may I once again express my appreciation to the many people, both within and without my department, who contributed to the valued discussions that inspired this proposal. As well, the hearings before both committees last year were extremely useful in illuminating the various perspectives and options and in underscoring some of the difficulties in having to grapple with this important issue. Although there may be countless different ways of arriving at a resolution of these questions, and I acknowledge them, in my view the government's proposal is the one that best reconciles all of the various relevant considerations and perspectives.

Mr. Chairman, the Supreme Court of Canada, as I mentioned, is a pillar of our constitutional democracy. It deserves, and the Parliament and the public deserve and want, an appointments process that is commensurate with that excellence and would respect it. We believe this proposal, providing as it does for significant parliamentary, provincial, and public input, does exactly that.

Thank you for your consideration. I'm happy to take any questions you may have.

The Chair: Thank you, Mr. Minister.

Now for the first round. Mr. Toews.

Mr. Vic Toews (Provencher, CPC): Thank you very much, Mr. Chair.

Thank you, Mr. Minister, for being here.

I have three major concerns with this process. In terms of identifying prospective nominees, what we have seen in fact is the minister or the government essentially picking out eight individuals, and the committee is then asked to pick from the people who've already been picked. There is really no substantive input by any parliamentary committee, even the committee that's being set up. All this committee is being asked to do is to limit to one person the list of people the Governor in Council has already chosen. In that sense it's not a particularly good process; it is simply a confirmation of who the government or the minister thinks is the appropriate person.

The second point is that with the minister coming to the committee and explaining what he or she has done, essentially the committee is allowed to sit around and look at the post-mortem or examine the autopsy and see what the minister has in fact done. Again, there's no significant input by the committee.

Now, as serious as those two flaws in this proposal are, the third issue is much more troubling, and that is the significant lack of any meaningful public debate and participation in this process. We had the government bring forward a candidate the other day, a Mr. Glen Murray, for a particular environmental position. He came to the committee and was examined, and I thought to myself, if the government thinks it's important enough to bring a member of an environment committee before the public, how much more important would it be to have a prospective member of the Supreme Court of Canada appear?

I'm not suggesting there be unlimited or unfettered questioning. What concerns me here is that there is no questioning at all. There is no public input. There is simply a confirmation by this nominating committee of one of the five or eight people the government has picked out. How is this in any way different from what already goes on?

With respect to the nod to provincial authorities, which is already being done in one way or another, and to the nod to members of Parliament, who will be a part of this confidential, secretive process where they have to sign a confidentiality agreement, what substantive change are we seeing here?

I'm quite frankly quite disappointed, Mr. Minister, that you couldn't have addressed what are three glaring problems with this proposal.

Hon. Irwin Cotler: Mr. Chairman, I would hope that once the honourable member can appreciate the proposal, some of his disappointment might be addressed. Frankly, some of the premises on which he made his submission were factually incorrect. I would appreciate it if the honourable member who asked the questions might allow me the courtesy of responding to him.

Let me just take each of your points—which I'm glad you raised—seriatim and seek to respond to them.

The first is that you said what we've seen is five to eight names from which the committee will pick three with no input from the advisory committee, and this is nothing else but a right for the advisory committee to limit the list the government has chosen or a confirmation of what the government has chosen. I think that seriously misrepresents what I've sought to put before you. You can disagree and I will respect that disagreement, but you're going to have to do it on the facts.

Let me just go through the facts. With regard to stage one, the identification of five to eight candidates, this comes after a consultative process in which you can make suggestions; in which anyone can make suggestions; in which the public is invited expressly, as stated in my statement, to make suggestions; in which any organization.... It's not a confirmation of a list proposed by a government—

What? I didn't interrupt you in your questions.

● (1140)

Mr. Vic Toews: No, but you've had half an hour to explain yourself. I have five minutes.

What I am concerned about, Mr. Minister—through the chair—is that you can consult with whoever you want or the minister can consult with whoever he wants. In the end, it's the minister's or the Prime Minister's decision as to who makes it onto the list. He can consult with anyone he wants. There simply isn't any substantive input, so the list is determined essentially by the minister.

Hon. Irwin Cotler: If the honourable member would allow me to conclude, I might even have answered that question.

Apart from the fact that the minister is accountable for a process that has wide consultation in accordance with a public protocol for who is being consulted—we're not just going ahead and consulting indiscriminately with regard to a preordained list—we ask the Chief Justice of Canada who they recommend, which has to do with the skill set the Supreme Court needs. We ask the chief justices of the provinces or regions concerned. We ask the attorneys general of the provinces or regions concerned. We ask the heads of the provincial law societies of the provinces or regions concerned. We ask the Canadian Bar Association in each of those. And we ask the public; we will invite the public to make suggestions. The notion that this is somehow being done arbitrarily and in secret is an absurd characterization of that process.

I've also mentioned that if you feel the list of five to eight is not enough and there should be somebody else, you can propose it. The advisory committee is able to propose—

Mr. Vic Toews: You said, Mr. Minister, that would be an exceptional circumstance.

Hon. Irwin Cotler: I did not say that. Read my—

Mr. Vic Toews: That's what you said in your testimony here.

Hon. Irwin Cotler: I just want to say, Mr. Chairman, this proves that the honourable member is confusing different elements here. I said, with respect to the short list of three, after having determined which we would choose from that list of three, only in an exceptional circumstance, if there had been some rare breach of confidentiality that had seriously prejudiced that process...then we would be accountable if we went outside that list, but I said I would hope and anticipate that would never happen.

I said, otherwise, in a separate sense, when you're considering the five to eight, if you feel there needs to be an additional member who was not included in that five to eight, then you can recommend it.

That's why I say you're mischaracterizing the proposal, but I'll take into account the fact that you haven't had a chance to fully appreciate some of what I said in French about the public input. That may not have been carried by the translation; I'm not sure.

As to the fourth stage, when the minister comes before the parliamentary committee, you've said this is just an autopsy of what the minister has done. This is an autopsy of what you've done. It's the advisory committee that has a significant role in stage two and stage three. You're conducting.... If you want to go ahead and marginalize your own role, that's your view, but—

Mr. Vic Toews: Mr. Minister, let's just stop you on that point.

The Chair: This isn't a debate. You've asked him questions and he's answered. You'll have time later to come back and question further. Otherwise, we'll be here going back and forth all day.

● (1145)

Mr. Vic Toews: With all due respect, Mr. Chair, I have five minutes.

The Chair: Which has elapsed; we're at eight minutes. I want to get the answers in, and then you can ask on the next round. Otherwise, we get nowhere.

Hon. Irwin Cotler: You've asked three questions, Mr. Toews.

Mr. Vic Toews: Mr. Chair, all I'm trying to do is get clarification as the minister is making his points, because he certainly is misrepresenting—

The Chair: Let him make them, and then you'll have another round to come back.

Hon. Irwin Cotler: You asked your questions and I'm trying to answer them. The questions are somewhat interrelated. After I answer them, you can come back at me.

I have nothing here to hide. I'm putting forth a proposal here and I think it's a serious proposal. I'd like you to give it at least the seriousness of treatment it warrants even if you don't agree with it. In that I'm prepared to respect your disagreement.

But with respect to the question of an autopsy of what you said the minister has presented, it's an autopsy—if that's how you want to put it—of what the advisory committee will itself have been engaged in.

Finally, you mentioned a lack of public debate in this process. As I indicated, it begins with an invitation to the public to participate in the initial identification of candidates. It continues with public input through the advisory committee, including, for the first time, having two members of the public sit on that advisory committee who are neither members nor lawyers.

Then you say, how is this whole process different from what has gone on up to now? Frankly, it's as if you haven't heard anything I've said.

Disagree with everything, but you cannot say I have come before you to put forward the exact same process that has gone on until now. Did this process have in its first stage the kind of broad consultation we are suggesting with an initial list of five to eight? Did it have any of the consultation, evaluation, and participation of an advisory committee in the sustained manner in which we are suggesting? Did it have the capacity for an advisory committee to look at the five to eight candidates and to suggest one who was not on that initial list and then to come to their own independent determination as to which are the three people they want to recommend for a short list? Are you going to tell me any of these things have occurred up to now?

You mentioned confidentially, and yes, there's confidentiality, not secrecy, for a process that has to be respected.

Mr. Vic Toews: You came to this committee a year or six months ago and you said the process isn't secretive; it's unknown. Then you went about talking about how much consultation was done with the Supreme Court.

I haven't seen anything different in what you're saying today compared to what you said the other day, and to suggest that by putting it on fancy paper and making it a little thicker it is in any way more substantive—that's serious concern I have. There is simply nothing more here than a Liberal minister and a Liberal Prime Minister picking eight candidates and then asking the committee to choose one of eight Liberals, for example...if there were eight Liberals on the bench.

An hon. member: Hear, hear!

Mr. Vic Toews: That's all it is.

Hon. Irwin Cotler: Mr. Chairman, it would be helpful if the honourable member could for some moments shed his partisan and political clothing and look at the merits of the proposal.

The only place where this reflects the process that went on before is in the initial stage, and even that has been refined to include, at the end of that consultative process in stage one, the identification of a shorter list of five to eight candidates, which will then be given to the advisory committee.

The entire involvement of an advisory committee in its representational nature in terms of the composition of the committee, which includes public representation, but more importantly, in the consultation they engage in with respect to the identification of who is on the list, the evaluation and assessment of those on the list, and the recommendation of three short people to the minister—all that has never been part of any proposal that has ever been presented to any Parliament. That is something Mr. Toews should at least acknowledge.

The Chair: Thank you.

Mr. Vic Toews: I have point of order. I'm sure the minister didn't mean only "short" people would be considered, but tall or middle-sized people as well.

The Chair: Thank you.

Monsieur Marceau.

[*Translation*]

Mr. Richard Marceau (Charlesbourg—Haute-Saint-Charles, BQ): Thank you, Mr. Chairman.

Thank you, Minister, for being here today.

Currently, the way judges are appointed to the Supreme Court is determined by two legal documents, the Constitution Act, 1867, and the Supreme Court Act.

The five following points come from those two documents: first, the judges of the Supreme Court are appointed by the governor in council; second, anyone who is or has been a judge of a Superior Court of a province or a barrister or advocate of at least 10 years' standing at the Bar of a province may be appointed a judge of the Supreme Court; third, at least three of the Supreme Court judges must be from Quebec, and convention dictates that three judges come from Ontario, two from the west and one from the Atlantic; fourth, five judges constitute a quorum; fifth, the judges hold office during good behaviour until mandatory retirement age, set at 75 years.

That is the current legal framework.

In this context, what would have prevented you from stipulating—and I know you see where I am heading—that the original list should be closed and should come from the province or region where there is a vacancy on the court?

● (1150)

Hon. Irwin Cotler: You are referring to the first stage, the identification of candidates stage, right? Very well.

At this stage, any provincial government can suggest names of people to be evaluated and included in the initial list submitted by the Minister of Justice to the advisory committee. So the province can contribute to the first stage and continue to do so in an ongoing manner throughout the subsequent stages through the representatives sitting on the advisory committee. At the second stage, it is a matter of targeting vacancies in a region or province through consultations with the representatives of the government of that province, in this case, parliamentarians.

So there are provisions for each province's contribution. As for Quebec, as I have said a few times outside this committee, it is not just another province. Its legal system is based on civil law. We are aware of that and appreciate that, just as we appreciate the significance of Quebec's contribution in terms of this unique legal system.

Mr. Richard Marceau: I understand your explanation, Minister, that the provincial contribution is one among many. On the advisory committee, for example, it might have the same value as the contribution of a member of the public or of a law society.

Hon. Irwin Cotler: In a sense, you are right. It is the same contribution as that of the other provinces because we have, under this approach, enlarged and increased the contribution of each province. It's a strengthening of the powers of all of the provinces. When we talk about increasing Quebec's contribution, we have to appreciate Quebec's juridical specificity, in particular during these consultations. The government of Quebec—like the other provinces, admittedly—can participate in all stages: first in the recommendation to include certain people on the list, and then in the choice of people on the short list. Throughout the consultation and evaluation process, it is very important for all provinces for there to be an increased participation. And in the case of Quebec, an appreciation of the specific contribution of its legal system.

Mr. Richard Marceau: In a federal system like ours, pending a change in Quebec's status, the Supreme Court is the supreme arbiter of jurisdictional disputes between orders of government. But when you look at your proposed method of choosing that arbiter, you see that at the first stage, the federal government consults. One of the entities consulted is the government of Quebec, for example. The role of the federal government is already very important as compared to that of the provinces.

At the second stage, on the advisory committee, the province is one body among many. At the third stage, it's the minister again—so you or your successor—who, with the Prime Minister, makes the final choice. In the proposal you are making to us, for the choice of the supreme arbiter of jurisdictional disputes between the provinces and the federal government, there's a great imbalance between orders of government. Not only must justice be done, it must also appear to have been done; it seems to me that there has to be a much better balance when it comes to choosing the people who are going to decide jurisdictional disputes. That's why, I have to tell you, I can't support the reform you are proposing today.

● (1155)

Hon. Irwin Cotler: I understand your position as well as the reason you take it. I agree with you that the Supreme Court is the arbiter of disputes between the federal government and the provinces. However, experience and research shows that it has been a very impartial arbiter. That has really proved its excellence in that regard.

Our appointments are based on merit. They are not based on any interests other than merit; we are not interested in political ideology. That is not an adequate approach to appointing judges to the Supreme Court of Canada. The government of Quebec, like the other governments, can suggest people who, in its view, possess the professional qualities and aptitudes required, in other words, meritorious candidates. That is what we want and what we hope to achieve with this process.

The Chair: Thank you, Minister and Mr. Marceau.

Ms. Neville.

[*English*]

Ms. Anita Neville (Winnipeg South Centre, Lib.): Thank you, Mr. Chair.

Thank you, Minister, for your attendance here today, and thank you very much for your proposal, which I view as a very thoughtful and comprehensive one that is inclusive of a full host of constituencies.

My concern is the whole issue of confidentiality, the reconciliation of confidentiality with transparency. I would define the process in the proposal, as you've put it forward, as being a confidential one, not a secretive one. In my many years as a lay member of the Law Society of Manitoba, I was party to many confidential discussions regarding the profession that were not secretive but were confidential and required as well a level of transparency.

What I am concerned about is, how does the department currently, in its appointment of judges, balance the need for transparency with the need for confidentiality in the deliberations? Taking it a step further, I ask you, will there be any potential punitive actions for breaches of confidentiality?

This is an important process. We want the best people to allow their names to go forward. We want a system that is true to the parliamentary system of government. How do we ensure the confidentiality is maintained and is accorded as well as the transparency?

Hon. Irwin Cotler: Let me just say this. Presently, before this proposal and under the present appointment process, confidentiality is really something that would have to be observed by those I consult, according to the public protocol, and by me. There's little likelihood of a breach of confidentiality since the people I consult, the chief justices and the attorneys general, are not likely to breach it, and I would not breach it at the cost of breaching my own responsibilities.

Why confidentiality becomes so important is that we are talking about a serious, comprehensive, and sustained role for an advisory committee that will be engaged—it won't be the minister—in a range of comprehensive consultations. With confidentiality, the likelihood of a breach—which we hope would not occur—is more likely if you're dealing with a nine-person advisory group engaged in consultations with a myriad of people than it is if one minister is engaged in consultations with a designated group. It's a simple mathematical type of appreciation.

What we're talking about here is not a secret process; the process will be public. The nature of that process is to be known. We will know there are four stages in that process. We'll know who is consulted. We'll know what the criteria are by which the initial identification of candidates is done, and we'll know the criteria the advisory committee is using. We will know all these things. The only thing that will be asked to be confidential will be the conversations themselves that take place in the course of that consultation, not the process, not who is being consulted, not the four stages, and so on.

Unless those who engage in the consultations as members of the committee and those who are consulted by the committee as confidants in terms of their representations can be assured that what they are going to say is going to be kept confidential, they may not wish to give a candid expression of their views. At the same time, unless the candidates who've agreed to put their names forward can be assured there will be confidentiality with respect to what is said about them, they may not want to put their names forward.

What's at stake here is the reputation of the individual judges, the integrity of the court, the integrity of the parliamentary process, and the integrity of the advisory committee's role. I would just hope that because of the people involved and the seriousness of the process and the importance of the institution at stake, the Supreme Court, people will respect the confidentiality of the conversations and the assessments and evaluations that go on. But the whole process is otherwise public.

● (1200)

Ms. Anita Neville: Thank you.

The Chair: Thank you.

Mr. Moore.

Mr. Rob Moore (Fundy Royal, CPC): Thank you, Mr. Minister, for being here.

I have to say, as a new member of Parliament, I'm actually pretty disappointed in what I've seen coming forward here. I'd like an explanation on a couple of fronts.

This very committee put forward what I think are some well-thought-out recommendations. There was some broad agreement on many of them, but one of the recommendations was that a committee would put forward a list of candidates and that it would compile that list. What we have here is that you basically have full, unfettered discretion and control at the front end of the process and at the end of the process. At the front you're compiling a list, as has always been the case, through some means Canadians do not understand, and there's very little transparency. I'll get to that in a second.

You compile a list of candidates, you ask a committee to consider them and narrow the list somewhat, and then from that narrowed list you make your final determination. So ultimately, at the start and end of the process, it's completely within your control, and your candidate is ultimately going to get in as the next judge.

I'd ask you to consider a couple of facts. Now, you mention there's all this provincial input and broad consultation. I'll use an analogy from something we've had recently. Take the Province of Alberta; they've put forward their province's choice for senators. What consideration is given by this Liberal government to those choices? This is one of my questions: why should we as a Canadian society believe any real, tangible, measurable weight is given to what is put forward from provincial interests?

Also, I had the opportunity to travel to Israel at one time, and I was on a tour of their supreme court. They told me how they went through their process, and they informed me that their advisory committee ultimately votes and that it's made up of a broad spectrum of people, some lay people, members of the Knesset, and members of the judiciary. They make a determination on who that next appointee is going to be.

When I told the tour guide how Canada selects its judges, she was shocked. She couldn't believe it. She just could not believe that it's at the unfettered discretion of the Minister of Justice and the Prime Minister to make that decision. I know you're familiar with their system and I'd like you to comment on that.

My question is, why at the front end and at the back end of this process do you have to have complete control? Why can you not do as is done in other jurisdictions and as this committee recommended, which is to give some real control to what I think should be a broad working group of individuals who could provide meaningful input into the selection, rather than just trimming down your own list, where you will ultimately make the decision?

If you could, answer those two questions.

● (1205)

Hon. Irwin Cotler: Thank you for the questions.

First of all, again, I'm somewhat dismayed at the characterization or mischaracterization of the processes. For example, you referred to the “unfettered discretion and control at the front end of the process”. This not only mischaracterizes my role in the process.... It would be unfettered, if you wish, if we didn't have a process at all, and we could do that with the constitutional framework as it now exists, where the Constitution vests the authority in the executive branch of government to make this decision. That is not unfettered. In practice you might say that, but it is constitutional.

So let's at least appreciate what the constitutional framework is. If I went to the Prime Minister and gave him a name and he appointed the person after recommendation and cabinet approved it, we would be going in accordance with the Constitution. That is not what we want to do. We want to open up this process, we want to democratize the process, and we want to take seriously the recommendations that are made.

So not only is it mischaracterizing this whole process to say that there is no process at all, that we're operating as if...and in accordance with what the Constitution would otherwise allow us to do, but the important point is that you're also impugning the integrity of that process.

Do you think that if I go ahead and consult with the Chief Justice of the Supreme Court of Canada and the chief justices of the courts of the regions and the provincial attorneys general, I'm going to say I don't give a damn about what they say? Am I going to say I'm going to go ahead and draw up the list of five to eight and never mind these consultations? Life doesn't work like that. Law does not work like that. You go there because you want to respect what the people you are consulting advise you to do.

Mr. Rob Moore: Mr. Minister, what assurances or what framework is in place to ensure that the consultation is valued? I used that example of the Senate elections. It is unfettered: you put forward eight names; they are your choices, and at the end of the day one of those individuals is going to be—one or two, depending on how many we're considering—a Supreme Court of Canada justice.

Our role, if any, is in that middle ground of narrowing down your choices rather than as an advisory committee putting forward names, as was recommended by this committee. Of course, you would be consulted also in that recommended process, but you are in control at the front and at the end, so ultimately the result is going to be the appointment of the one you've chosen. We don't know—and there's no way to measure—what weight is given to those inputs.

Hon. Irwin Cotler: First of all, you're correct. This is an advisory role you have; it's not an American advise and consent role. We do have a different Constitution here. We are opening up that Constitution, which now vests the power in the executive branch of government, to involve a serious role for an advisory committee, which will have the kind of composite representation we indicated and the serious involvement I've identified.

I just want to say that at the front end of the process there is nothing to stop you personally from making any recommendations. There's nothing even stopping the tour guide you mentioned if he wanted to, although I'd rather rely on a tour guide for showing me the archaeology of Israel than for submissions to this process. What I'm saying is, anyone in the public can make a submission.

Who we've identified in the public protocol are the people we have to consult, and I've indicated who those are. They represent a repository of experience and expertise that in the history of Confederation has given us the best and most exemplary Supreme Court in the world with regard to excellence, merit, impartiality, and the like. This process we've had up to now, before we engaged in advisory committees, has actually produced an exemplary Supreme Court, so there's been no politicization up to now. It's not been just the choice of the minister.

And when you say—

● (1210)

Mr. Rob Moore: If I could, I'll interject there. That's your feeling on it, and I think that's why you're loath to make any substantive changes here. You mentioned the United States. I'm mentioning Israel, where a similar committee—

The Chair: The minister can answer that now.

Hon. Irwin Cotler: I think I know the Israeli process reasonably well. I've appeared before parliamentary committees there with regard to comparing our system with their system. I should tell you there are critiques in Israel at this point, as we are speaking, with regard to the undue politicization that process has produced. There are some thoughts that maybe they ought to explore the kind of process I'm suggesting before you today.

Maybe the tour guide is not aware of that particular aspect of the discussions that are presently going on in Israel. In other words, they are considering moving toward the system I'm proposing before you, while you're saying we should go to the system they have, which is now engendering some criticism.

Every system—and this is the important thing—every process, has to be anchored in the legal culture of that society, in its constitutional framework, in its legal culture, and in the overall appreciation of the history and sociology of that country. In Canada we have a constitutional framework that is distinguishable from that of the United States and distinguishable from Israel's, and frankly, I like the constitutional framework we have. We have a parliamentary system of government that is different from the one the United States has. We don't have a congressional system, which has an advise and consent role. We are suggesting something today that I believe offers the advisory committee, offers Parliament, offers the provinces, and offers the public, within the framework of the stages I've described, an opportunity for significant input and contribution.

The Chair: Thank you.

We have to move on.

Mr. Macklin.

Hon. Paul Harold Macklin (Northumberland—Quinte West, Lib.): Thank you very much, Chair, and thank you, witnesses, for being with us today and bringing forward this concept.

What I would like to do is probe a little bit. First of all, how far have you gone in terms of consulting on this particular process with provincial attorneys general, and what reaction have you received, if any, to date? How do they perceive of how you're going to deal with it, in particular in the regional situation, as to how you're going to get a determination as to who's going to represent or who will reflect the regional interests.

Beyond that, there's nothing in this proposal that deals with territorial input. Is there going to be territorial input in this process?

Hon. Irwin Cotler: First of all, with regard to discussions, I have had ongoing discussions with my counterpart provincial attorneys general since the process was initiated. They are aware of the report of the parliamentary committee, and we discussed the initial report produced by the parliamentary committee and its recommendation for an advisory committee to be established. I believe that was concurred with, and indeed, it would have been the remedy of choice of all the provincial attorneys general in terms of the democratization of the process.

We had discussions after the ad hoc committee process, which they and I acknowledge was inadequate at the time and insufficient with respect to the approaches and requirements of transparency, accountability, participation, and the like, but which the exigencies of the day warranted because of the unanticipated vacancies on the Supreme Court at the time. And we've had discussions since then in the process of arriving at this proposal.

I have shared, to the extent I am able to do so consistent with my respect for the parliamentary process, some of the basic elements of this proposal with my counterparts. I could not share the proposal with them, as you can appreciate, but they have now received the proposal. I sent a letter to each of the provincial attorneys general just before coming in here today, in which I set out this proposal in the detail that is warranted. The full proposal itself has now been received by all the provincial attorneys general. In my discussions with them I told them I would get back to them after they'd had an opportunity to fully appreciate the proposals you have here in a parliamentary context.

My discussions with them have been ongoing. They provided input; their input is reflected in this proposal as well, and I want to acknowledge their participation, as I did in my opening remarks.

With regard to the territories, at this point the territories do not in the constitutional framework have the equivalent status for purposes of this type of process, but we have had discussions. I had discussions just several days ago with the minister for the Northwest Territories, as an example, in which I again shared the broad perspective of this process, but for reasons you can appreciate, I did not go into details.

● (1215)

Hon. Paul Harold Macklin: With respect to the first stage of this process, there are questions that could be asked. First of all, why is there a limitation in the first instance on how many candidates the committee is actually going to consider? Second, why isn't the committee simply independent, just identifying and assessing on their own whose names ought to come forward on this list that's brought to you?

Hon. Irwin Cotler: On the first point as to the number of candidates, it's not written in stone. It's a point on which we are prepared to be flexible, and it might vary depending on the province or region involved. If you have a large province such as Ontario, then the list may have closer to eight or ten. If it's a smaller area, the list may smaller. So it's not fixed in stone. We've just indicated that it will be somewhere between five and eight.

On the independence of the committee and why we don't turn this over to an independent committee to identify and assess the candidates they consider meritorious, the response to that has to be given on the levels of principle and practicality.

On the level of principle, as I indicated, the federal government has not only the constitutional authority to appoint the judges of the Supreme Court of Canada, but it's a non-delegated authority. We cannot hand over that authority to an independent committee to allow them to engage in that process, because it is a power that has been reserved in the Constitution for the federal government. We can enlarge that authority and democratize its application. We can engage a committee and give the committee very principled involvement, but we cannot delegate away that authority.

So a balance has to be struck between providing for a more independent and transparent process, as we're seeking to do, that will have significant parliamentary, provincial, and public input, and ensuring the persons who are appointed to the court are those who are considered to be truly meritorious. We believe this process will strike the balance.

There are practical considerations that have to be taken into account. There is the importance of assuring, to the extent possible, that the court always has its full complement of nine judges at all times, given its workload, the importance of the cases, and the like. Vacancies are often unanticipated and must be filled within a short period of time—usually three months at the outside. So it would be simply impractical, apart from the principal constitutional reasons, to have an advisory committee—with a membership of MPs and other eminent people who themselves have very engaged lives and are nominated by their various constituencies—undertake all the work that is necessary to consult, develop an initial list, consult further, and come up with a short list, all within three months or less, unless you have this kind of co-linkage between the government and Parliament with respect to a prescribed frame of reference within which this advisory committee will have the opportunity for a serious and sustained contribution, engaging parliamentary, political, and public inputs.

● (1220)

The Chair: Thank you, Mr. Minister.

Thank you, Mr. Macklin.

Monsieur Marceau.

[*Translation*]

Mr. Richard Marceau: Thank you, Mr. Chairman.

Quebec is currently governed by the Liberal Party of Quebec, which is the weakest, most federalist and least assertive party in recent history in Quebec, at least since Joseph-Adélard Godbout, premier of Quebec from 1939 to 1944. I quote what that party stated in 2001 in a document:

> [...] would be to have the provinces submit lists of candidates to the federal government, from which the latter would make appointments to the Supreme Court.

That position was repeated—if I remember correctly—by Minister Benoît Pelletier on December 28, 2004, in an interview with the newspaper, Le Droit. I therefore feel compelled to give you notice of a motion that I am tabling and that reads as follows:

> That the Committee expresses its great disappointment with regard to the proposed reform of the appointment process for the Supreme Court justices by the government; denounces the overly broad discretion given to the Justice Minister and the Prime Minister in the suggested process; requests that the government reconsider its position and come back to the committee before the end of June with a new and more ambitious reform proposal, including a more important role for parliamentarians and the provinces.

I am tabling the motion with 48 hours' notice and have had copies of the motion distributed. It will be voted on at the next meeting.

The Chair: Our next meeting is next week, I believe.

Mr. Richard Marceau: Yes. That is it.

[*English*]

The Chair: Mr. Toews, on a point of order.

Mr. Vic Toews: I obviously can't support the motion for the same reason as the member advanced in respect of the separatist cause...or that the Quebec government is the most federalist, but—

The Chair: Has he made any motion?

Mr. Vic Toews: No. I just wanted to clarify that, Mr. Chairman.

The Chair: We only received it as notice. We'll have an opportunity to debate it.

Mr. Vic Toews: All I'm suggesting is that there be a small amendment that would allow me to support it. I'm giving notice that we would like to add “and the public” after “the provinces”.

The Chair: That can be done at the next meeting when we debate it. Amendments can be moved at that time.

[*Translation*]

Let's continue. Are you done, Mr. Marceau? You have three minutes left.

Mr. Richard Marceau: I am done, Mr. Chairman.

The Chair: Okay.

[*English*]

Next on our list I have Ms. Neville.

I'm sorry,

[*Translation*]

You are not finished answering, Minister?

L'hon. Irwin Cotler: I have not begun to answer.

The Chair: Okay, but it was not a question.

Hon. Irwin Cotler: I am disappointed that the member gave notice of a motion during our discussion. It gives the impression that it was ready to go regardless of whatever I was going to propose to the committee today. Giving notice of a motion without evaluating everything we have to propose is disrespectful.

Give me a chance to respond to that. I would have hoped that you would take a closer look at our proposal before tabling a motion; that could have been the result of this meeting. You are entitled to table a motion, but I do not have to respect the approach and the process behind this motion, because I get the feeling it was prepared before I got here today. No matter what I say today, there is a motion. This way of going about things disappoints me.

[*English*]

The Chair: Mr. Toews.

Mr. Vic Toews: I thought the minister said he was going to answer the question. I was cut off from debating the motion, and now we have the minister debating the motion.

The Chair: He was commenting on the motion.

Mr. Vic Toews: That's all I was doing; I was commenting on the motion.

[*Translation*]

The Chair: Mr. Marceau, do you have another comment?

Mr. Richard Marceau: Minister, I am a bit surprised by your outburst. I can understand your being disappointed that we do not agree, but I saw in a widely read newspaper in English Canada that the chair of this committee was discussing this proposal, saying that the idea of the federal government being bound by the initial list had been rejected. You yourself have said so repeatedly. I can assure you that I very carefully read what you presented, but you have told me, personally and publicly, that you could not go as far as I would like. Acting surprised that I am criticizing and rejecting your proposal, when you knew my criteria, seems rather disingenuous to me, and I say that in a spirit of friendship and respect.

● (1225)

The Chair: I have to cut you off. I did make some comments, but not about that, because I had not seen that. I made some general comments about the work of the committee and what has been done so far. You should always be wary of what you read in the newspapers without knowing the facts.

[*English*]

Ms. Neville, do you have another question?

Ms. Anita Neville: Thank you, Mr. Chairman.

I'm going to go a different way, Minister. I want to ask you about the second set of consultations you're proposing, in terms of the three candidates who one expects will come forward from the advisory committee.

Granted this is a new process, what do you anticipate will be the nature of the second round of consultations? In what circumstances could you anticipate appointing a candidate who is not one of the three coming out of the advisory committee?

Hon. Irwin Cotler: I would proceed from the assumption that the short list of three candidates had been arrived at after a serious, deliberative, and consultative process by the advisory committee. After making an assessment of the initial list of candidates, they would arrive at their own informed and considered recommendation of those three candidates. Under the mandate approach, they would also offer the reasons for their assessment, share the consultative process that they had engaged in, and identify the strengths and weaknesses of the respective candidates on the short list of three, without ranking them. They would submit, as I say, their short list of three and their assessments to the minister.

The minister would then decide if there is any need for further consultations on the part of the committee with respect to any information that may not have been sufficiently forthcoming. I could meet with them for that purpose, or they could indulge in further consultations. Then I would move, by reason of their assessment, to consider the submissions they had made, maybe engage in my own further consultations, possibly with some of the initial people with whom I consulted, and make a determination regarding which of the three I would recommend to the Prime Minister. He, in turn, would have the responsibility to make the recommendation to cabinet, which, as the Governor in Council, makes the ultimate decision as per the constitutional requirements. I don't anticipate—and this is your point—nor should any Minister of Justice ever anticipate having to go outside that list of three.

I mentioned in my remarks that in exceptional circumstances such an extraordinary remedy might arise only if the process had otherwise broken down by reason of breaches of confidentiality. But as I said, and for the reasons I set forth in my initial remarks, the Minister of Justice, whoever he or she may be.... I don't anticipate such a thing happening at all, but if it ever in a rare circumstance did happen, the Minister of Justice would have to publicly explain the reasons he or she departed from the recommended list of three candidates and the compelling considerations, such as breach of confidentiality, that led the minister to do so.

But for the reasons I gave, given the stature and composition of the people on the list, given the seriousness of the deliberations I expect they would engage in, and given the cost to everyone if such a breach of confidentiality were to take place that required the minister to move outside that list, in my view I would expect that will be the process. The minister would choose from amongst the three that had been proposed by the advisory committee.

● (1230)

Ms. Anita Neville: Thank you.

The Chair: Thank you, Ms. Neville.

Now, Mr. Comartin.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Thank you, Mr. Chair.

Minister, thank you for being here. I apologize for having to leave for a while, but I had to address an issue in the House.

I'm hoping this hasn't been asked. If it has, then stop me right away.

My concern with the proposal is the initial screening and not having a broader participation in that initial screening. A secondary question then comes out of that. Would you take into consideration that the advisory committee, in the course of doing their work, in the course of their consultation, their own contacts within the legal community, whatever, could come up with a name that was not on the initial list? I think the two go together, but I would ask for a response.

Hon. Irwin Cotler: Yes, actually, those questions did come up, but I owe you the courtesy of a response, and the response may be better appreciated than the one I gave then.

In the initial screening, we invite broad participation in two respects. First, the public protocol, which I shared with this committee, identifies all the people I have to consult with. Those people represent a repository of experience and expertise that is significant in terms of the initial identification of candidates for the Supreme Court, the initial list of five to eight. The Chief Justice of the Supreme Court, who speaks on its behalf, will proffer not only a name but also the skill set that the court needs at that time. The provincial attorneys general, the heads of the provincial law societies, the president of the Canadian Bar Association, and the chief justices of the courts of the regions and provinces will make their contributions as well. So we have a broad spectrum from which to choose.

However—and this is a point I wanted to emphasize as well—I will invite the public to participate. Any person or organization can also make submissions with respect to candidates they believe worthy of consideration. So ultimately the initial identification of five to eight people, which is not set in stone—depending on the province or region, it could be a little bit more—would represent a broad spectrum of participation of all actors in the process, legal and non-legal, those identified in the public protocol as needing to be consulted and all those outside of it.

The advisory committee could say, “You've given us five to eight names, but we think there's an excellent candidate you may have overlooked. For all your consultations, however serious they may have been, there was one candidate you're overlooked. Would you like to consider X also?” We are open and the process reflects that. The advisory committee can suggest another candidate not on the list of five to eight. In respect of such a candidate, I would go back to my original consultative process with the chief justices and all the others I mentioned and say, “We have this candidate here. Do you believe this candidate would warrant inclusion along with the five to eight?”

So there is the possibility for the advisory committee to include people other than those on the initial list. There are also possibilities for you, as the honourable member, to make your own contribution in the initial identification, to say who you think should be on the list of initial nominees.

● (1235)

Mr. Joe Comartin: Mr. Minister, in the process in Ontario there's a formal announcement made that the position is open, and then the process begins. I have two questions.

First, would you consider making an announcement, to be posted perhaps in the *Gazette*, that you expect responses during this period of time from the broad community?

Second, you talk about a broad consultation process. I don't think there's a written policy on who the minister or the department should consult in that initial phase. I may be wrong on that, but I've never seen it, so I'm making the assumption that it does not exist in writing.

Hon. Irwin Cotler: First, as to whether I would consider making reference to the public's capacity to participate by way of a notice in some form or another, yes, and I think that is included in our proposal.

Second, with regard to who is consulted in that broad consultative process, I just want to say we shared a protocol that I made public before this committee during my first appearance here. I identified the people who, by way of convention, the Minister of Justice consults. That protocol is available, and I summarized it in my presentation this morning. I'd be happy to do it again. I've also made public in that protocol the particular qualifications—in other words, the professional qualifications and the personal qualities—that one would consider in making a merit-based appointment. We are not acting in a vacuum. We are identifying five to eight people for merit-based appointments, and we are using prescribed criteria. These criteria are set forth in a public protocol identifying the people we are obliged to consult.

The Chair: Thank you.

Thank you, Mr. Comartin.

Mr. Toews.

Mr. Vic Toews: Thank you.

Mr. Minister, you took exception to the characterization of my colleague Mr. Moore that your process is unfettered, and you indicated that we have a process in place. The point is that at the onset you still determine the list; ultimately you determine the list. After consultation, it's still your list, and at the end of it you come to explain which individual....

So having a process in place doesn't mean progress, and it doesn't necessarily mean fairness. We can look at processes around the world. We can look at the troikas in the Soviet Union in 1937 and say there was a process in place; it was all “a process”. But again, no rational person would say simply that because you have a process in place the system wasn't unfettered, and it was unfettered. In the same way, your system is unfettered in terms of there being no substantive control over who you can eventually put on that list. It's not set out in legislation.

What I would is suggest at this time is that you perhaps might want to look at Manitoba, where it's true that the minister receives a list, but that list isn't originally formulated by the minister and whittled down by the committee. The list is in fact established by the committee after there is a public announcement that there are vacancies. So there is a true representation from the community, both by public notice and by the fact that it isn't simply the minister's list whittled down.

Are you willing, first of all, to look at legislating, and second, to open up who can actually make the list on recommendation by the committee or, indeed, allow the committee to make its own list?

● (1240)

Hon. Irwin Cotler: Mr. Chairman, with regard to the reference to it not being set forth in legislation and to the system being unfettered, I just want to remind the honourable member that it is set forth right now, not only in legislation but also in the Constitution, which sets forth the process by which the appointments to the Supreme Court take place.

Mr. Vic Toews: Excuse me. This process—

The Chair: Mr. Toews, we can't interrupt every answer we dislike. You've asked the question; let the minister answer the question.

Mr. Vic Toews: All I was asking about is this process, Mr. Chair, whether he will put this in legislation.

The Chair: Well, that's what he was addressing. These meetings are not going to run if, every time a witness is asked a question, we object to the answer in the course of their making the answer.

Mr. Vic Toews: In fairness, Mr. Chair, if he chooses to mischaracterize what I was asking—

The Chair: He was half way through an answer, and you don't know where he was going. Let him finish.

Mr. Vic Toews: Well, all right, let's see what he answers.

Hon. Irwin Cotler: Mr. Toews, I've given you the courtesy of sitting patiently and listening to your question even if I thought it mischaracterized my remark, because you're entitled to finish the question as you put it. I think I'm entitled to not more of a courtesy, but an equal courtesy. And if you'll allow me, I might even give you the answer you are looking for if you would not interrupt me in the course of the sentence with a prearranged intervention. So let me just go on with regard to the response.

The response is with respect to having an appreciation of principle and having an appreciation of practicality. On the issue of principle—and it's important that one begins and proceeds with this—there is a constitutional framework right now that defines the executive exercise of authority. So it's not absent legislation. We have put forward a proposal here that takes us beyond the Constitution and provides for democratization of the process, with a significant role for the advisory committee at four different stages.

On the first stage, which you referred to as mindless, I don't sit in my office and draw up a list and then come to the advisory committee, or develop it through ruminations in the night and the like. I come at a list that is the result of representations and has been submitted to me by those designated in the protocol. And I don't think I would marginalize a submission made by the Chief Justice of the Supreme Court of Canada, or any of the other chief justices, or any of the provincial attorneys general. So this is not my list. It represents the collective expression of the recommendations that have been made to me in accordance with prescribed criteria as to the professional qualifications and the personal qualities of the candidates, as appreciated and assessed by all those who make the recommendations to me, including the public in the initial identification.

So it's not “my” list, and it's a mischaracterization to put it that way. It's unfair, as I said, not only to the process but also to those distinguished people whom I'm consulting and who are taking the time, in accordance with the prescribed criteria and with their experience and expertise, to make their recommendations to me. That's number one.

The second is that we are not the Soviet Union, Mr. Toews, and I knew that constitution very well. I appeared on behalf of political prisoners. I wish the constitution in the Soviet Union would have allowed me to do there what I could have done on behalf of any accused here in Canada. I recently met with the president of the constitutional court of Russia, formerly the Soviet Union, who indicated that they are looking now to our approach with respect to the appointments process, with respect to the refinement of their approach now in the Soviet Union, because they want to democratize, and they are in a situation of democratization of the appointments process as well.

So what we are talking about here is in fact having a process that has a serious role for the advisory committee for parliamentary input, for provincial and public input. Does it have a veto for the advisory committee? No. Is it an advise and consent role? No. Is our Constitution providing for that? No. Are we seeking to do something both consistent with the Constitution on a matter of principle and yet consistent with what we are trying to do here as a matter of a serious role for Parliament, the provinces, and the public? Yes. That's the way we've been approaching it.

Mr. Vic Toews: I have a point of order, Mr. Chair. I waited patiently. He gave an answer to neither of the questions. I just want to make that clear for the record.

The Chair: Well, we certainly dealt with the list—

Hon. Irwin Cotler: I'm not sure anything I can answer would in fact dovetail with what you want to hear.

● (1245)

The Chair: Okay, Mr. Macklin.

Hon. Paul Harold Macklin: Thank you very much, Chair.

I have a couple of detailed questions.

Maybe it's beyond the scope of where we're at, but is there any contemplation that the original list, that is, the original group from which you would choose the five to eight candidates and submit on.... Is there any transference of that broader list to the committee that's doing the advisory work for you?

Secondly, when you look at this whole process, is it now theoretically arguable that this committee could only submit to you, in the end, candidates who were never on your original list? In other words, could the three candidates they choose be of their own choosing, outside of the five to eight that you submitted, so that in effect they could, at least at that point, circumvent your initial wishes as to who would be considered on that list?

Hon. Irwin Cotler: With regard to the original list of five to eight, again, the range of numbers on that initial list can have a certain flexibility. Based on my own experience in consultations regarding the Ontario appointments to the Supreme Court—and I use that because Ontario had an embarrassment of riches—I don't think one would be going much beyond that. Let's say in a province like Ontario you might go up to 10, but I don't believe the consultative process would arrive at a larger list than that.

I should tell you that when I engaged in the consultative process, there was an overriding consensus as to who would be initially identified as part of the list of five to eight. It became more difficult, as you saw, to condense that list into a shorter number, but that would be the role of the advisory committee. That initial list would reflect and represent, in my view, the significant consensus of those consulted in accordance with the prescribed merit-based criteria that would normally have produced that list.

But as I indicated, even if that list—which I take would represent the composite consensus based on the expertise and experience of those consulted, including a public dimension—were not seen to be exhaustive, the advisory committee could come up with one or two names they believe should have been included in the initial list. There's that flexibility that is built into the proposal for that purpose. They could go outside that initial list if the merit-based criteria warranted the suggestion of an additional name not somehow initially considered and recommended by all those whose names I indicated I would be consulting, where it had somehow escaped their notice there was somebody else whose inclusion might be warranted. That possibility is allowed for in the proposal.

Mr. Garry Breitkreuz (Yorkton—Melville, CPC): I have a point of order. Mr. Minister, in your own submission you say that if that committee wants—

Hon. Paul Harold Macklin: That's not a point of order.

Mr. Garry Breitkreuz: No, but this is relevant to what you're saying, that it's only with your consent they can add another name. Is that not true?

The Chair: It's not a point of order, but maybe the minister would like to answer it anyway.

Hon. Irwin Cotler: I said so in my initial remarks; it's right there. I said that would be because this is the nature of the process, and I have to go back to the notion that what we're trying to seek here is a balance with respect to issues of principle and issues of practice. Yes, because there is the significant relationship between the executive and the advisory committee, whose role is advisory, whereas the role of the executive is decisional in this respect, we would take seriously any recommendation the committee would offer for someone outside the initial list of from five to eight, though I suspect, just based on experience, that it is unlikely to happen. As I said, if you could show you had a candidate who in fact met the qualifications for a merit-based appointment, we would be prepared to include that name. The whole approach is to get the best people for the Supreme Court on a merit-based approach. If we've overlooked somebody, then so be it.

● (1250)

The Chair: We'll go back to Mr. Macklin, then we'll go to Mr. Comartin and finish with Mr. Warawa. We have to be out of here by one o'clock.

Mr. Macklin, you had a minute left.

Hon. Paul Harold Macklin: Thank you very much, Chair.

I have one other question. Say this advisory committee does its work and finishes its list of up to three candidates it wishes to recommend. I don't see any proposal in here that suggests they could rank those or add their reasons for that ranking, and maybe that's something that ought to be considered. Have you this as part of your proposal and we just haven't seen it here today?

Hon. Irwin Cotler: That's a good question, Mr. Macklin.

I have come here with two experts, and I feel somewhat uncomfortable that I've not called upon them to respond to the questions. I think you're entitled to hear the things they might contribute to help enlighten you, so I'm going to ask Judith Bellis, who's really been involved in this thing from the beginning in a very sustained way, both in a principled way and in a practical way on the ground, for her response.

Ms. Judith Bellis (General Counsel, Courts and Tribunal Policy, Department of Justice): Mr. Macklin, the proposal actually does address the issue of whether or not the list would be ranked. The proposal indicates the chart list would not be ranked. It was considered; the thinking was that getting the committee to agree to a ranking might contribute to divisiveness, rather than to an effective contribution on the part of the committee.

As well, the committee, as the minister has indicated, when it puts forward the short list, will not just be putting forward three names. It will be putting forward all the information—the consideration, the records of consultation with respect to all the candidates who were considered, and in particular a commentary on the various strengths of the three on the list. It seems when you are starting with what is expected to be an excellent pool to begin with, as with any of these kinds of analyses of the strengths among equally strong candidates, the commentary and that information will be of greater value than some probably less useful and potentially divisive ranking. That's the rationale.

The Chair: Thank you.

Mr. Comartin.

Mr. Joe Comartin: Mr. Minister, I think the major flaw in this system, as Ms. Bellis was just mentioning, is that the pool we draw from is almost exclusively the judges at the lower courts. I know there are some exceptions, but they tend to be rare. If that pool is not a good one, not a strong one, then obviously the appointment to the Supreme Court will reflect that over a period of time.

Have you given any consideration to opening up the process of appointment for any of the federal appointments to a similar type of process, at the trial level in particular, and perhaps also at the Federal Court of Appeal level?

Hon. Irwin Cotler: I'm glad you asked that, Monsieur Comartin.

The short answer could be that we're having enough difficulty seeking to perform this process without engaging ourselves in another parallel process for other levels of the judiciary. But I want to say with regard to the other levels of the judiciary, it's important to appreciate that there are in place now, in every province and territory and within the regions in a large province like Ontario, judicial advisory selection committees who engage in the consultative process in such a way that they make the determination of the list of prospective candidates. I can only choose from a list the judicial advisory selection committees themselves submit. So if you look at it in terms of the other levels of the judiciary, in those instances I'm responding to their identifiable list of prospective nominees, not a list that I draw up.They have "highly recommended" and "recommended", and then I receive those nominees and make the determination, but only after I engage yet again in a very comprehensive consultative process, not unlike the one I'm engaging in now, in determining which of those identified to me by the advisory committee are worthy nominees for appointment.

I also want to say something parenthetically, because you did make a point—though I'm not sure it was intended to be that way—about judges at the lower courts. I think you were speaking about the process of appointment for courts other than the Supreme Court, but I'm not sure if I have inferred incorrectly that you were also asking about whether people other than judges would be looked at for appointment.

As you know, at the lower courts, and certainly for the courts of first instance, we choose only from the members of the bar. The higher we go up the ladder of the appellate court, the more there is the possibility that it will be judges who are appointed—but then again, not necessarily. In terms of my own appointments to the Quebec Court of Appeal, for example, I've had occasion to appoint several distinguished academics to the Court of Appeal, and to appoint a lawyer. So in my view, it need not necessarily be limited to members of the judiciary, even at the higher levels of appointment.

As to the appointment process itself, at this point it works reasonably well at the lower levels, or at the levels lower than the Supreme Court, because we do have judicial advisory selection committees in place who identify the candidates, from which we then make an evaluative determination after a consultative process.

That, too, can perhaps be improved by ensuring that the composition of those judicial advisory selection committees themselves reflect the emerging demographics by including representatives of visible minorities on them and the like. That's a representational issue, but as a process issue, the initial identification is made by those committees themselves.

● (1255)

The Chair: Thank you very much.

Thank you, Mr. Comartin.

Now to conclude, Mr. Warawa.

Mr. Mark Warawa (Langley, CPC): Thank you, Mr. Chair.

Thank you, Minister, for being here.

I acknowledge your constitutional authority as the Minister of Justice for those appointees. You brought that to our attention. I acknowledge that. I also appreciate and acknowledge that the reputation of the Supreme Court is very important. The Supreme Court's reputation must be protected to ensure that Canadians respect the rule of law in Canada.

You brought up some very important points here that nothing must be done to jeopardize the importance of the legacy of respect for our Supreme Court. You brought up the point that the choice was based on merit. That was your first point.

Your third point was regarding judicial independence and the integrity of the courts, how important that is. I'd just like to elaborate a little bit on that, on its importance.

The past decisions that were made by the government would concern Canadians, and me, in terms of the lack of consideration that was provided regarding recent appointments and the lack of input from and consideration of recommendations. I'd like to first point to the recent appointments to the Supreme Court. Prior to that, in May last year there were recommendations that came from the committee. Actually, eight points were made, and those points specifically addressed the advisory committee. The advisory committee was to make the recommendations. They would be compiling a list of candidates—not the Minister of Justice, but the advisory committee. That apparently was not considered. We had a recent appointment of the justice committee. We had the ad hoc committee.

You did actually start off making a comment about that on page 1 of your speech. You said, "The insights which we have gained from both the justice committee hearings and the ad hoc committee proceedings underpin this reform initiative".

It appears the recommendations were not listened to. It appears the ad hoc committee was informed, and not consulted, during the appointments.

In recent appointments to the Senate, as my colleague brought to your attention, the province of Alberta actually elected senators, and the government ignored those appointments.

So we have, I think, concern being expressed, and therefore support for the motion of my colleague from the Bloc, that there does not appear to be a consultation. There appears to be a policy being brought forward that hopefully will be sold as input, but the past history, the track record of the government, does not support that. In my opinion, Mr. Minister, that would cause a concern over whether we can trust the process. Will the process be democratic and fair and, in turn, be able to provide respect for the way the appointments are made?

So I would ask your input on how you plan to address the concerns, in that recommendations don't appear to be listened to. You will be the one compiling the list of the candidates, as was pointed out. The recommendation of the committee was that the advisory committee compile that list.

● (1300)

The Chair: Thank you.

Could you respond, Mr. Minister, within a couple of minutes, because we do have to wind up.

Hon. Irwin Cotler: All right.

I want to thank the member for the questions he put, which are pertinent to the issue before us. I'm also going to ask my colleague, Judith Bellis, to supplement this response that I give, and her response may be even more helpful than my response.

The first is the notion that we didn't listen to the recommendations of the committee. As I understood it, the principal recommendation that came out of the committee was to establish an advisory committee, and in fact that is the bulwark of our proposal—namely, establishing an advisory committee and providing for serious parliamentary, provincial, and public input. So we did take the principal recommendation seriously.

If you say we did not accept all of the recommendations of the parliamentary committee, that is correct. But as I indicated, we engaged in a process of a year's study on this in which we consulted, I believe, widely and well. In the process of that consultation we also engaged the discussions about the initial identification of the candidates. And as I said in my opening remarks, we sought in our proposal to reconcile different perspectives and different considerations. We did not expect that everyone would agree with each element of our proposal, because we may not have been responding to the particular perspective that we then had to reconcile from a particular submission.

So what we have sought to bring forward is a proposal that seeks to reconcile the diverse perspectives that we heard not only from the parliamentary committee, whose experience, as I said and will reaffirm, was valuable for us...and in particular, the recommendation for an advisory committee and process. But we did not accept all the recommendations of the advisory committee for the reasons I mentioned, and we sought to reconcile both on the level of principle and on the level of policy the different recommendations.

With regard to the appointment of senators, I'd rather not get into that because I don't think this is relevant for our considerations here and I'm not going to speak to the appointment of senators process.

I want to respond to the last thing you mentioned, which I think is maybe the most important one, and this is the assurance that the process would be fair. We have tried to share with you what we believe is a considered proposal that has sought, as I said, to take into account a diversity of perspectives and serious and sustained exchanges over the year. And Judith Bellis has been involved herself, I would say, almost full-time in that consultation process.

We brought forth a proposal. I don't expect that everyone will agree with every element of that proposal, but we believe the proposal is serious. We believe it is fair. We believe it is comprehensive. We believe it will provide not only for the establishment of an advisory committee as recommended by the parliamentary committee, but for a serious involvement through that advisory committee in its consultative and evaluative processes for significant parliamentary, provincial, and public input.

If there are different interests engaged, if Mr. Marceau wants us to be tied to a list in the course of that consultative process that is proposed by a province, my answer to him is that you can suggest names for that list. You can suggest it at the front end of the process for initial identification of candidates. You can engage in the evaluation during the course of that. You can be part of that evaluative process and recommend three names. But what I can't do from a constitutional point of view—and that's why I said these considerations are matters of principle and matters of policy—is say I'm going to delegate the power vested in the Constitution to the executive branch of government. As the Attorney General of Canada, I have a responsibility of fidelity to that Constitution. If it's a non-delegated power, I'm not going to say no, it's okay, on behalf of the Government of Canada, in breach of the Constitution, I'm going to delegate this power to the provinces. I can't do that.

That's why I say our response is on the level of principle and on the level of policy. I'm trying to go as far as I can, to accommodate Mr. Marceau and those who take those views into consideration, to give the provinces a serious involvement at all stages of the process. I've identified in my remarks—I won't go into it again—the four opportunities for significant provincial involvement, along with significant parliamentary and public involvement.

● (1305)

So as I say, I think the proposal is a serious one. I think it's a fair one. I think it's a balanced one. I think it's worthy of appropriate and serious consideration and adoption. But I acknowledge that there are elements in that proposal that will not please everyone.

Mr. Mark Warawa: Mr. Chairman, my question was whether the committee has the authority to create the list. And I believe they do. Does the committee have the constitutional authority to create the list that you would be able to look at?

Hon. Irwin Cotler: If I may say so, I don't know where in the Constitution you would even find the existence of a committee, let alone the authority to create the list. It simply is not there.

Mr. Mark Warawa: You've found everything else there.

Hon. Irwin Cotler: What we're doing is saying we will go out beyond the Constitution, which does not provide for a committee, and we will establish that committee. But you cannot then say, well, now that committee can also have the constitutional authority—which cannot be given to it—to determine the list. That is not just enlarging and democratizing the process; that is breaching the Constitution.

The Chair: Thank you.

Hon. Irwin Cotler: Can I ask Judith to maybe—

Ms. Judith Bellis: I don't have anything in particular to add, Chair, except to say that I think when members have an opportunity to read the proposal in detail, they'll see the proposal does what the minister undertook to do in his letter to the committee, which is to respond to each of the committee's recommendations as well as the dissenting reports.

So I hope that when you see the report in full you will see that each of the recommendations has been noted and responded to.

The Chair: Thank you, Ms. Bellis.

Hon. Irwin Cotler: I want to thank the committee members for their consideration and attention. As Ms. Bellis put it, we sought to reply to every consideration that was mentioned. We may not have agreed with every consideration, but our full report addresses every one of the concerns the parliamentary committee properly raised, which we sought to reconcile and respond to in a principled way in our response.

Thank you.

The Chair: Thank you, Mr. Minister.

Thank you to the officials.

We're now adjourned.

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