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Chair

Mr. Richard Marceau

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● (1535)

[*English*]

The Clerk of the Committee (Louise Hayes): Honourable members of the subcommittee, I see a quorum.

[*Translation*]

We can now proceed with electing the chair.

[*English*]

According to the motion adopted by the justice committee on June 16, 2005, the chair will be from the Bloc Québécois. I am ready to accept motions to that effect.

[*Translation*]

Mr. Marc Lemay (Abitibi—Témiscamingue, BQ): I nominate Mr. Richard Marceau as subcommittee chair.

The Clerk: Are there any other nominations?

[*English*]

Nominations are now closed.

Is it the pleasure of the subcommittee to adopt this motion?

Some hon. members: Agreed.

The Clerk: I declare the motion carried and Monsieur Marceau duly elected chair.

Before inviting the chair to take the chair, we can, if the subcommittee wishes, now proceed to the election of vice-chairs.

[*Translation*]

I am ready to proceed with the election of the vice-chair

[*English*]

Mr. Rob Moore (Fundy Royal, CPC): I nominate Mr. Toews for vice-chair.

[*Translation*]

The Clerk: Are there any other nominations for the first vice-chair?

[*English*]

Nominations are now closed.

Is it the pleasure of the subcommittee to adopt this motion?

Some hon. members: Agreed.

The Clerk: I declare the motion carried and Mr. Toews duly elected vice-chair.

[*Translation*]

The Clerk: I will now proceed with the election of the second vice-chair.

[*English*]

Hon. Paul Harold Macklin (Northumberland—Quinte West, Lib.): I nominate David McGuinty for vice-chair.

The Clerk: Are there any other nominations?

Nominations are closed.

Is it the pleasure of the subcommittee to adopt this motion?

Some hon. members: Agreed.

The Clerk: I declare the motion carried and Mr. McGuinty duly elected vice-chair.

[*Translation*]

The Chair (Mr. Richard Marceau (Charlesbourg—Haute-Saint-Charles, BQ)): Thank you very much, and congratulations to the winners of this very difficult campaign.

[*English*]

I invite Mr. Trudell and Mr. McCormick to come forward.

Welcome to the committee. As you know, the way we work is that you usually have 10 minutes for a statement, and then we will go to rounds of questioning.

[*Translation*]

We'll start off by hearing Mr. Trudell, from the Canadian Council of Criminal Defence Lawyers.

Mr. Trudell, you have 10 minutes.

[*English*]

Mr. William Trudell (Chair, Canadian Council of Criminal Defence Lawyers): Thank you, Mr. Chair, and congratulations on your election.

On behalf of the Canadian Council of Criminal Defence Lawyers, it's a pleasure to be here.

As you know, the Canadian Council of Criminal Defence Lawyers is a national council that represents lawyers right across the country, the territories, and the north. We appreciate the opportunity to be invited back to speak to you on this important matter.

I'd like to first say it is generally accepted that we have an incredible Superior Court bench throughout this country. Sometimes they are criticized by members of the public. They can't answer for themselves, but generally I think we feel we can be very proud of the quality of justice and judges in this country.

However, if there is to be change in the system for selection of justices, we reject categorically that it become an open and public system like that of the United States. We believe there may be some room for improvement; we are going to suggest to you that the present system be complemented by confidential interviews. Before you complete your work, we will provide to you, in writing, the position of the Canadian Council of Criminal Defence Lawyers to assist you.

The public or political system of electing judges in the United States is not, with respect, where we want to go in this country. There is a better way through which persons who feel there should be some public input can be provided with that. It is in the suggestions we are going to make to you. We also believe it's important that politicians—the Minister of Justice—have a significant part in the appointment and selection of judges to the high court. We suggest this position because politicians have their ears to the ground and really do have a better sense of what the community needs. It wouldn't be right for defence counsel to appoint judges, or judges to appoint judges, or family lawyers to appoint judges, or academics to appoint judges, but all of them can provide an input. We feel it is important for parliamentarians to have a role in the appointment of judges through the minister.

In our research, we have recently found that screening committees recommend judges right across the country. This system has been introduced for a number of years; it is a much better system than once was in place. It will be our submission to you that it be complemented by another committee—I'm suggesting a seven-person committee—that interviews potential candidates for appointment.

You may now know that when the initial screening committee selects, there are categories—"not recommended", "highly recommended", and "recommended". We think the "highly recommended" category should be abolished. We suggest that once candidates are recommended, they be interviewed confidentially by a committee, and the results of those interviews be sent to the minister. It would be our submission that the minister be required to choose from the recommended candidates who have gone through the interview process.

Our suggestion, in a nutshell, is that there be an interviewing committee as a complementary process to the existing screening committees. A complementary committee offers another layer. It would be very hard, I respectfully submit to you, for one committee, unless it were quite large, to do all the screening and interviewing. In the large provinces I would imagine there may be 100 people in the pool at any one time.

The key is confidentiality. In my respectful submission to you, this protects the privacy interests of those candidates who want to apply and are not successful.

● (1540)

It's my respectful submission to you that some of the provincial processes show that confidentiality can work. There is a measure of accountability because, in our submission to you, there will be members of the judiciary, members of the public, and members of academic life who will serve on the screening committee and the interviewing committee throughout the process.

The one suggestion I'm going to ask you to consider is this. The north is the only area of our country in which those appointed don't have to be members of the bar from the north. Our representative from Nunavut in the north would ask that the committee perhaps consider that members who are appointed to the unified court and who sit in the north ought to be members of the bar. The community is large enough now, so resident and non-resident members of the bar, in our respectful submission to you, should be the ones who are qualified.

Those are my opening statements. I'd be glad to comment on how we suggest the system should work. What we're suggesting is that the system remain much the same, but that a confidential interview committee be set up and that the minister be required to choose from that committee.

Thank you.

[*Translation*]

The Chair: Thank you very much, Mr. Trudell.

We will now go on to Dr. McCormick, who has 10 minutes.

[*English*]

Prof. Peter McCormick (Professor and Chair, Department of Political Science, University of Lethbridge, As an Individual): Thank you.

I'm here this afternoon to share some thoughts about how judges are appointed to the provincial superior courts and to the federal courts, trial and appeal. I will not comment on appointments to the Supreme Court of Canada, which is quite a separate matter.

In this age of the charter, we tend to compare our judicial system to that of the United States, which also has entrenched rights and appointed judges, who apply judicial review in a purposive and creative way. But when we appoint judges, we still follow the English model: judges are appointed by members of the cabinet, which is a discretionary choice by a political office-holder. Generally speaking, when political office-holders have this discretion, they use it in one of two ways. First, they appoint their friends and allies; or second, they appoint people who share their values and priorities. To be sure, these are often the same people, but not always, and since the implications unfold down different tracks, I will discuss them separately.

Appointing your friends has an obvious label and a long history. It's called patronage. Sometimes the patronage can be purely personal—literally your friends. But for the most part, it has involved party patronage—appointing people to positions paid from the public purse as a reward for services they have rendered to a political party. For much of our history, this was accepted as completely appropriate. You need political parties to make democracy work, and parties need to be able to encourage energy and loyalty by holding out the hope of a patronage reward down the road. Patronage was long accepted as the grease that allowed the political machinery to operate.

But the past century has seen a steady retreat from this casual tolerance of patronage. With respect to the judiciary, the decade of major reform was the 1970s, when the court system was transformed from top to bottom, including the way judges were appointed.

At the provincial level, this involved the creation of judicial councils. Their federal counterparts were the judicial advisory committees. These bodies served an important double purpose. The first was to broaden the pool of individuals who were considered for appointment, which was accomplished by creating networks of connections to judges, law professors, and various professional organizations. The second was to allow legal professionals to objectively evaluate the credentials of those individuals, thereby screening out people who were not qualified and focusing the attention of the appointing authority on the smaller subset of qualified and even well-qualified people.

This represents no small achievement. Most importantly, it worked against the appointment of individuals whose only claim came from their political connections rather than professional accomplishments, and who, when put to the test, were sometimes not up to the job. I'll make the point by coining a contemporary slogan: no more Michael Browns. If the concern about patronage was that sometimes bad Liberal lawyers were appointed as judges, instead of good lawyers who weren't Liberals, then judicial councils and judicial advisory committees are the solution. But these mechanisms cannot ensure that the best person gets the job, regardless of political considerations.

At the very least, a good Liberal lawyer will still get the appointment over a good lawyer without the same connections, and probably even over a slightly better lawyer as well—although how would we ever know for sure? Merit plus political connections will tend to trump merit alone. This is because the pool of names generated by the current process is still much larger than the number of positions.

As a general rule, when the person making a discretionary choice holds office because of their connection with a political party, you have to expect that party political considerations will sometimes have something to do with who gets chosen—and the larger the degree of discretion, the greater the impact. The pool may now have been broadened to include good lawyers other than Liberals—and narrowed to exclude Liberals who are not good lawyers—but there are still lots of Liberals left on the lists. As every empirical study continues to show us, they do indeed still get most of the positions, just as Conservative lawyers did better when Conservatives were doing the appointments a dozen or 15 years ago. Nobody should be particularly surprised by this, but we certainly shouldn't ignore it.

The second thing office-holders do is appoint people who share their values and priorities. To be sure, this often takes them to the same people. Political parties are organized around specific sets of values and priorities, and you are more likely to find a fellow believer in your own party than across the floor. But political parties are often loose alliances of somewhat disparate groups, and sometimes it is necessary to satisfy your intra-party competitors as well as your intra-party friends. So there is overlap but not identity between the two considerations.

● (1545)

Of the two, this second is arguably the more principled and honourable, because you certainly shouldn't appoint people to important positions when you sincerely believe they're wrong about fundamentally important things. Of course, it depends how long your list of important things is and what sorts of things are on it.

But in a real sense, it's also more problematic because it's forward-looking. When you appoint somebody for patronage reasons, you're rewarding them for what they have done—the past tense. When you appoint them because of their values and priorities, you are appointing them for what you expect them to do in the future, and this is quite a different matter.

In the debates leading up to these hearings, it was suggested that a Liberal government would never knowingly appoint a separatist to the federal bench. I suspect that may well be true; indeed, I admit I would be surprised if it were not. But my point is that the current process makes such an embargo both possible and invisible, because all it does is take a large pool of theoretically eligible candidates and narrow it to a slightly smaller pool of eligible and qualified candidates.

● (1550)

The appointing official still has a large enough degree of flexibility to do a further values and priorities check and create a much shorter list of reliable candidates. Such a check has the advantage that this factor, unlike political party connections, does not lend itself to easy counting. Unless someone else is collecting exactly the same information for their own purposes, it will be difficult to even identify what sort of secondary screening is going on and what elements it builds on. Unless the reporters who cover these stories accept its relevance and understand its significance, it won't even do the information gatherers much good to talk about it.

Everything I'm saying here is simply commonplace observation in the republic to the south of us. Over the last 40 years, they have moved beyond patronage appointments to more policy-oriented strategies of appointment, with considerable success. Skeptics suggest that such a strategy has limitations because judicial performance can be unpredictable, but the American literature is solid on this score. The notion of the surprised president, whose appointees head off in totally unexpected directions, is largely a myth, all the experts agree.

The usual defence for a policy-oriented strategy of appointments is that it squares the circle of judicial accountability in a democratic society. Elections keep governments in tune with public opinion, and policy-oriented appointments keep the judiciary from drifting too far away from government. The Americans generally appear comfortable talking about the politicization of their judiciary, especially at the higher levels. I do not think Canadians view this prospect so casually.

Is there a solution to this double temptation? Of course there is. To repeat my mantra, when the person making a discretionary choice holds office because of connection with a political party, party political considerations will sometimes have something to do with the choice; and the larger the element of discretion, the larger the impact of this partisan factor. But stated this way, it carries its own solution. The way to reduce partisan political impact on the selection of judges is to give the politically connected official a much smaller discretionary role and the judicial advisory committee a correspondingly larger role in the advisory process. As presently constituted, the committee looks at a long list of possible lawyer candidates, collects relevant information, and then assigns each name to one of three lists: not qualified, qualified, and well qualified.

We would shift the process away from political influence and toward exclusively professional assessment if we required the advisory committee to take the further step of reducing its own highly qualified list to an unranked short list of, say, three candidates for any available position on the bench. There is, of course, nothing magic about the number three; we could enlarge it to five, or if you want to go all the way, you could reduce it to one. The point is, the shorter the short list, the smaller the scope for the impact of party political considerations in either the narrow sense of party affiliation or the broader sense of values and priorities. That is my first recommendation.

We should also tackle the more important problem of the elevation of judge candidates to higher courts. This is my second recommendation for change. There is of course concern about having official committees assessing and ranking the performance of judges, although this is easier to contemplate if we think of the committee as building a short list of genuine excellence, rather than rejecting some judge candidates as flatly undeserving.

I think it's important to take this further step for two reasons. First, appeal courts are not only dealing with alleged errors in trial court decisions; they're also providing leadership and direction to the trial courts on a wide range of legal issues and significantly contributing to the development of legal doctrine. Unless they are appealed, their statement of law stands. In the limited caseload of the Supreme Court these days, it means they are not very often appealed.

Second, and even more important, the screening of lawyer candidates for their values and priorities is something of a hit-and-miss operation unless the appointing official knows the candidate personally. I'm thinking of an example to the south when I mention this. If you don't have the judicial record to refer to, then only the appointing official who knows them personally can say what the credentials really are. But when one is elevating a judge to a higher court, a much more rigorous assessment with considerable predictive value is not only possible, it's fairly easy to do.

The Chair: You have about a minute left, so please go to your conclusion.

● (1555)

Prof. Peter McCormick: Okay.

Leaping forward, the third change I would suggest is this. There's a curious opacity at the moment in the wording for the membership of judicial advisory committees—one that would alarm me if I didn't suspect it was just misleading shorthand, rather than literally true. That's the fact that of the seven members of the committee, four are indicated simply as members nominated by the federal or the provincial minister of justice—three and one, respectively. In practice, of course, these people are qualified for their responsibilities by some combination of credentials, institutional affiliation, and personal experience. In the interests of transparency—which is the major concern we should be addressing in any changes—and in order to enhance the credibility of the committee, these should be identified more specifically.

To conclude, in the 1970s we took big steps to reform the way judges were appointed in this country in order to replace backroom coziness with a more transparent and professional process. It's time to take these reforms a step further, first by requiring that the judicial advisory committee go beyond preliminary screening to the creation of actual short lists, and second, by extending its scrutiny to judge candidates as well as lawyer candidates. I think this would do a great deal to solve the problem this committee was created to investigate and to make the selection of judges a matter of purely professional judgment, removed more transparently from direct partisan considerations.

Thank you for giving me the opportunity to comment on this very important subject.

[*Translation*]

The Chair: Thank you very much, Dr. McCormick.

We will now go on to the question and answer period, beginning with Mr. Toews.

[*English*]

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

Thank you very much. I'm sure, Professor, you'll have more time to slip in the rest of your presentation. We've seen it done before, but it was an interesting presentation—by both witnesses. We appreciate your coming here.

I want to focus perhaps on my Manitoba experience. In Manitoba we have a committee of essentially seven individuals. I'm talking about provincial appointments. One is the chief judge; another is a judge appointed or recommended by the chief judge; then there are two lawyers, one the head of the bar and one the head of the law society; then three laypersons appointed by the attorney general.

They make recommendations of between three and five candidates for each position—though I could be wrong. The usual experience is that the attorney general receives three. The committee does in fact limit the discretion as much as possible and says, here they are, here are the three.

I agree with the comment of Mr. Trudell that confidentiality is preserved in this kind of situation. I have not known a situation where confidentiality was not preserved.

What I am a little concerned about, though—and I don't know if either of you have given any thought to this—is that while we are moving away from a purely political decision, we are concentrating the power to do this in the hands of the judiciary. The chief judge appoints the one judge and has total discretion as to whom he or she appoints, and then there are the two lawyers from the law society and the bar association, who of course often don't want to be off-side from the judges, for professional reasons, one might say—or there is sometimes that impression.

Effectively, your chief judge will control four of the seven votes. What I see happening very easily is the concentration of power in terms of the actual names; you could get two clearly unacceptable names and one name that the chief judge wants. I'm being totally cynical about this situation; I'm not suggesting it does happen, but I think it could happen. You have the switch then from the political to the judicial.

So I'm wondering about replacing the elected, democratically accountably people who make these decisions with unelected individuals. I want your comments on that.

My second question is whether or not that offends the division of powers in our Constitution. The appointment of judges has specifically been given to the executive in our Constitution, and judges have certain other powers once they are elected. We found from the decision of the Supreme Court of Canada in the judges' pay case that we have to keep those two elements totally separate.

I'm just wondering what your comments are on that.

● (1600)

Mr. William Trudell: Mr. Toews, I sat for five years on the provincial appointment committee in the province of Ontario, and I can say to you that—

Mr. Vic Toews: Is that similar to the one in Manitoba?

Mr. William Trudell: Yes. There are 15 members on that committee.

That committee, I would respectfully submit, from talking to other members of CCCDL, is apolitical and balanced. The people on the committee develop such a faith in making sure the best candidates go forward that I would strongly suggest to you that whatever judge is on the committee, or whoever is nominated by a judge on the committee, carries as much and as little weight as anyone else on the committee.

Throughout the country, wherever you have these committees, people take the appointment of judges very seriously. The provincial committees—Ontario's is one and Manitoba's is another—set standards that are envied in other jurisdictions, so the politics you might be suggesting on the ground don't work.

Mr. Vic Toews: Do you mean the judicial politics?

Mr. William Trudell: Yes, the judicial politics. They're not even there, in my experience.

What happens is a good check and balance. If a judge says maybe he doesn't want this type of person or something, four lay people are there who may challenge that judge, so I don't think you need to worry, quite frankly.

Confidentiality is the key, but if you had members of the provincial committees throughout the country testify before you, I think they would all say that they are jealous of the procedure, that they respect confidentiality, and that they want the best names to go forward. Politics doesn't enter it. In the provincial system—and I would think in the federal system if you adopt the thing we propose—by the time someone leaves a committee, I personally don't care whether they're a good Liberal, a good Tory, a good member of the NDP, or a good member of the Bloc, because by then they have gone through the committee, and the community has spoken, not only the legal community but the public at large. If you were the Minister of Justice and a Tory was on that list, or a member of the Reform Party—as it then was—was on the list, and you chose, that's fine, because they would have gone through the screening system. I would respectfully submit that it doesn't really need to be considered, because these committees throughout the country....

I think you'll find that people who are talking about these screening committees for Superior Court appointments are jealously protective of trying to find the best people. There are some suggestions that people get appointed because they know people, and maybe we can do a better job, but the provincial committees—especially the ones that then interview—are really balanced, sir.

[*Translation*]

The Chair: You will be given an opportunity to reply, Dr. McCormick.

[*English*]

Prof. Peter McCormick: I would agree that you have to be very careful how you set up the committee. My intention was to take the existing judicial advisory committees as the building block and move on beyond them, but I did suggest that the opacity of a phrase like “members appointed by the Minister” should be penetrated for a more specific statement of who you want, with what sorts of credentials and what sorts of affiliations.

I would hope that in this country we could avoid the casual acceptance of the total politicization of at least the Federal Court system the way the Americans do. Finding a more purely professional mechanism for the appointment of judges might allow us to avoid going down that particular track where, since both sides are doing it, everybody runs the scores, everybody has numbers, and everybody has lists. You just see where a particular name is on your list, and you're in a political battle the minute you get past the middle initial to the last name.

I would really hope we wouldn't go down that track. I think most Canadians would rather not think of their courts as being that politicized. A perfectly transparent and professional appointing mechanism, or one as close to that as we can get, would help us avoid that particular trap, although you want to be careful that the independent screening mechanism is real and not something in which something else is going on.

I'll speak for a moment on the influence of judges. When you create these committees, the impact the judicial members have over the rest of the group—especially the lay members—is a concern. I would think, from the language of the federal legislation, they....

In a number of provinces, for a while, it was really lay members, and from the interviews that I did, they came out totally overwhelmed from the process. You'd want to select people who could stand up to the judges and contribute and not simply be made part of somebody else's agenda. That would be extremely important.

● (1605)

[*Translation*]

The Chair: Thank you very much.

Mr. Lemay, you have seven minutes.

● (1610)

Mr. Marc Lemay: I see two problems with the appointment of judges under federal jurisdiction, and I'll tell you what they are.

Judges are appointed to two very important places. There are judges who sit on the Superior Court and those who sit on the Federal Court. Judges who sit on the Federal Court can sit anywhere in Canada. I see a more complex problem there than with judges on the Court of Appeal of Québec, for example, and the Superior Court of Quebec.

I served for four years as president of the bar association and senior adviser for the appointment of provincial court judges in Quebec. Whenever a position fell vacant in any judicial district, a committee was created. There was what you call the screening committee. This isn't even a committee, it's someone who ensures that candidates have complied with the rules for the available position, that three photos, resumé, etc. have all been submitted. There is also the committee properly so called, which interviews each of the candidates.

I wonder why we can't do the same thing at the federal level, why it is always more complicated federally. I'm not talking about the Supreme Court. That's another discussion. I'm talking about the Superior Court. Why couldn't we? At present, 111 candidates have been designated as ready and able, but there are barely more than 20 positions. So of course, the minister can choose and make sure he's on the right side politically.

This is done in Quebec; nothing is hidden. Everyone does it in every province, whatever political party is in power.

What interests me is how to ensure that only the right candidates are recommended, those who are familiar with the Civil Code, the Criminal Code, Martin's Annual Criminal Code, etc. because they are sitting on the criminal court.

I can see there are fifteen or seven or five of you on the recommendating committee. There are three of us: one representative from the judiciary, one from the public and one from the Bar. That's it, that's all! And this committee sits for every appointment.

I wonder whether you have studied this possibility. If we undo them piece-by-piece, is it possible for this to be done at the Superior Court and the Federal Court? I understand that it's perhaps a bit more complicated at the Federal Court of Appeal, but that can be dealt with later. Let's just get started with the first stage.

[*English*]

Mr. William Trudell: I think we have to move to an interview process for Superior Court appointments and for Federal Court appointments across the country. A committee could be set up for the Federal Court similar to the committee we were recommending for the Superior Court.

I think the only way you get the best-quality applicant is by checking that applicant in the industry, by checking the applicant's references, and then having an interview process. If you're suggesting that this process you had in the province of Quebec be implemented, I say, yes, except it seems to me that your numbers are not big enough. It would be an enormous task for three persons, and only three persons. I think it should be set up. It should be consistent throughout the country, and I suggest that the same process be applied to the Federal Court appointments as to the Superior Court appointments.

The pressure on the Federal Court judges, especially now in the age of 9/11 and in the age of the immigration certificates, is enormous. Therefore, I would respectfully submit to you that they should not—and I don't think we suggested that or you suggested that—go through any less scrutiny or any less involvement from the community and the bar and judges than any other appointments. I would submit that this type of committee that you had in the province of Quebec should be expanded, but the principles are the same.

What happens is that sometimes in the system we have now, you get the highly recommended, and once the highly recommended are interviewed, sometimes they become the recommended. And the recommended oftentimes become the highly recommended. That's because in a confidential interview process you may find someone who says, "Well, you know what, I didn't think I was going to have to do family law", or "I didn't think this", and suddenly a person is there answering questions and you get the measure of the person. Without an interview process, confidentially, it just won't work.

Can I just say something to you? We found—and I mentioned it to your very helpful clerk and you might already have it—the *Report of the Commissioners' Review of the High Court 2003 Competition from England*, by Her Majesty's Commissioners for Judicial Appointment, July 2004. I'm going to leave it, because it's expansive. Your researchers may want to have access to it. It talks about the same issues we're talking about now and it may be very helpful. All these issues you're going to hear about, they have been dealing with or are dealing with at the present time in England.

I don't think there's any difference between the Federal Court and the Superior Court, except the Federal Court appointments can sit, as you say, throughout the country. That's all the more reason—all the more—that you should have a committee that interviews them, with not only sensitivity to the major issues the Federal Court deals with, like anti-terrorism and immigration certificates, but also the community aspects of some of the cases they'd be dealing with.

[*Translation*]

The Chair: Do you have one last quick question?

Mr. Marc Lemay: Mr. Chairman, will we be able to return to this later?

The Chair: Yes, you will have another turn.

Mr. Marc Lemay: I'd prefer to wait until everyone has had a turn.

The Chair: You took exactly seven minutes. You have a good sense of timing. You are well disciplined; that goes with your party.

Mr. Comartin.

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

[*English*]

I want to follow up, Mr. Trudell. In the process in Ontario, the committee sees all of the applicants. Correct?

Mr. William Trudell: What happens is that there's a specific location or job advertised. That's different from the federal system. What will happen is that people will be invited to apply, and then every one of those applications will be looked at by the 15 members of the committee. If you and I were on the committee and Monsieur Lemay was on the committee and we individually decided that Mr. Macklin should be looked at to go to the next step, then the next step would occur and Mr. Macklin's references would be checked and discreet inquiries would be made in the community. And then the committee would get together, take that raw data, and decide who would get an interview. Then there may be approximately 15 interviews for one particular position. After the interview process, they are sent on to the minister on a recommended and rated basis.

● (1615)

Mr. Joe Comartin: What I am trying to get at is that there is a screening process, if I understand the way it works, at the federal level by the Department of Justice that in effect screens some names out initially. I'm not sure that's the case, but if it is, could you comment?

Professor McCormick, I'd like you to comment as well on any process that would have an initial screening done by the Department of Justice or by the Public Service Commission as opposed to the advisory committee or the committee.

Mr. William Trudell: For my part, I don't think there should be an initial vetting of the list by the Department of Justice. The Department of Justice can suggest persons who would sit on both the screening committee and the interviewing committee, and the minister then has to choose the committee from them, but it should not be at the front end, I would respectfully submit.

Prof. Peter McCormick: Twenty years ago I looked at provincial judicial councils right across the country, so my information is, one, outdated, but two, encyclopedic. The general practice was that there was no such screening, that any application for the position of judge of the provincial court was sent to the committee and the committee then looked at it. In my own province the applications are supposed to be sent to the chair of the committee, but many were sent to the Minister of Justice in error, indicating most lawyers didn't quite understand their own provincial systems. That kind of pre-screening, certainly 20 years ago, was not done. I don't know if it's done today. As I said, my information is a bit dated.

The provincial practices are all over the map on this. If the research staff winds up looking at how every single province does it, I think you'll be quite astonished to discover the diversity across the country. One would think that if every province adopted a judicial council, over a period of about ten years you would find a single model they were working minor variations of, and you'd be completely wrong. Instead, there seem to be at least three different models, and nobody is looking very closely at everybody else before they adopt theirs. There is enormous variety in the provinces, and you should look fairly closely at that to get some idea of which ones are working and which aren't.

Basically there are three different models you could set up for a judicial council involved in the appointment process. Number one is to create a pool. People apply whenever they want to, a pool of eligible names is built up, and whenever you need to make an appointment, you quickly turn to the pre-existing pool.

The second method is a veto council. That's where a minister of justice wants to name so-and-so to be a judge, and now the council is activated. It looks at the person and either goes head to head with the minister, saying the minister can't have this person because they're not qualified, or else acquiesces.

The third would be a short list council, which would take a broad list of applications or nominations and reduce it to some narrower subset of names from which a final choice would be made.

I'm sure you'd find all three existing in Canada right now. You could look at how all three of them are working.

Mr. Joe Comartin: I'll switch a bit. In terms of political involvement, another concern I have is how the committee itself is chosen. I believe this is in fact universal across both the provincial and federal levels, that it's chosen by the government of the day, so you can have the political involvement—interference, if you want to call it that—simply because of who the government puts on the committee. Any suggestions as to how we get around that?

Mr. William Trudell: I don't think it follows that if the government appoints the members of the committee they're then going to do what the government wants. I would think that if you have a committee of seven, for instance, you could have the government appoint three members of the committee...and laypersons; you'd have the law society of the province appointing one lawyer and the Canadian Bar Association perhaps appointing another lawyer with expertise in disciplines like criminal law and family law; and then you can have the chief justice of the province and the chief judge of the province or their designates appoint one each.

I would suggest that there be a chair, one chair. We're envisioning two committees, a screening committee and an interviewing committee, with a total of 14 persons. I'm suggesting a chair who would be appointed by Ottawa. That doesn't upset the balance because what you have are members of the bar, members of the court, and laypersons.

If we're worried about the government appointing members of the committee and having members of the committee do indirectly what we're trying to avoid, it's my respectful submission, Mr. Comartin, that what happens with these committees is once they're appointed, the committee members give up their allegiance to who appointed them. I would think that in this day and age the Minister of Justice will be careful to make sure those federal appointments are a good cross-section of the community, because the public is aware. The public is looking. This committee will be a public committee. How they get on there is going to be an open process.

The experience I think across the country is that the people who serve on the committees—it doesn't matter how they got there—are looking to make sure the best judges are appointed. If you have a balance in the committee where it's not weighted one way or the other, I think you might solve that problem.

● (1620)

[*Translation*]

The Chair: Mr. Comartin, do you have a question?

[*English*]

Mr. Joe Comartin: Yes, actually I do have one more question.

In terms of the role of the layperson, that is, the non-lawyer, when we look at the structure of the committee, what fields should they be coming from? How much of the committee percentage-wise should they form? Have you seen any problems with lay people?

Mr. William Trudell: Speaking for myself, I would think that laypersons on the committee should reflect the cultural makeup of the community. It would be silly, in my respectful submission, in a multicultural committee if the laypersons on that committee didn't reflect the community. I don't think there's any doubt about it that members of our aboriginal community have to be reflected, members of the black community have to be reflected on these committees, and so on. I think that's why we started off by saying politicians should have a part in this because you have your ear to the ground in terms of what's going on in the community.

I would think that in some of the provincial committees you see across the country you'll see a cultural makeup and diversity that's absolutely vital. If you had two committees, a screening and a review committee, you'd have six lay people. They definitely have to reflect the community.

Mr. Vic Toews: Could we also hear from the other witness?

[*Translation*]

The Chair: Dr. McCormick.

[*English*]

Prof. Peter McCormick: My first point is that when I interviewed members of judicial councils 20 years ago they were quite concerned about how many of the lay members did not actively take part and seemed to be either intimidated or out of their depth. If you selected them more carefully, that mightn't be as big a problem, but it would always be a problem to expect someone to be taking on chief judges and senior people from the legal profession on an appointment of this nature. It's going to be hard to find people who can really contribute very much, very much of the time.

Secondly, in terms of stacking the committee, obviously your concern has to be to have a variety of bodies involved in naming individuals to serve on the committee. Diversity is your protection against stacking, and the smaller the number of bodies that are involved in having people on the council, the more your concern with stacking.

One of the ways that some provinces handle it is through ex-officio appointments. So it's not just the chief judge of provincial court, it's the chief judge or justice of every court in the province who serves on the judicial council. Since that's a person who holds office for reasons other than a willingness to follow the minister's orders all the time, I would think that's one protection for you. It's just too important a position to be swayed too easily by those concerns.

I don't want to digress too far, but I was invited to do a project involving the provincial courts a couple of years ago. I discovered quickly I was way out of my depth, because the provincial courts have been transforming themselves over the last five years or so. A lot of the offices and positions and relationships inside provincial courts aren't what they used to be, and even the chief judge of provincial court is not simply appointed by a provincial government for an unlimited term any longer. That's now the abandoned model. Instead, chief judges are appointed often by mechanisms that involve representatives of, or the entirety of, their own body of judges, to serve limited terms with no possibility of renewal. That's a whole different kind of position from the old assumption that chief judges aren't that much protection because they're just appointed by the government anyway.

I think we should recognize that there are ways of organizing our judiciary from top to bottom that get away from that kind of indirect political intrusiveness, and several provinces are experimenting with it in very interesting ways.

● (1625)

[*Translation*]

The Chair: Thank you very much.

Mr. Macklin, you have a little more than seven minutes.

[*English*]

Hon. Paul Harold Macklin: Thank you very much, Chair, and thank you, witnesses, for being with us today.

You continue to raise the questions that many people raise in this process, and one of the words that keeps coming up is "transparency". And you, Mr. Trudel, today brought back to mind, of course, the other side, which is confidentiality.

How transparent can this process become before we lose this confidentiality? I ask that of both of you.

Mr. William Trudell: I think it's very important that members who are potential judges be able to talk freely and personally in a confidential setting about why they want to be judges, their history, what they think of trends in society, and that the public has a wide-ranging committee, in my respectful submission, that's transparent.

I think confidentiality is something that England is concerned about, and they address it in this report that I refer to. So there's a real balance, I would respectfully submit.

But you want to be able to ask people some really tough questions and you want them to be able to talk openly about what they think about things so that you can get a measure of this candidate to send on to the minister. However, if that was an open process, then there are the privacy rights, especially of the person who doesn't get appointed, and when they're talking about health issues that took them out of practice, or things like the health issues in their family, the public doesn't need that kind of information.

So the public represented on the screening committees, with all different segments of society represented, in my respectful submission, covers the transparency aspect of it and protects the confidentiality, which is very important.

Just for the sake of argument, let's say we had a public interview process and some potential candidate gave an answer. It's going to follow them by special interest groups, by the media, if that case comes before them. I don't want to know how they're going to judge it. I just want to know they've got a passion for it, and you find that out in the interview. Many times you don't find that out in the written screening.

Hon. Paul Harold Macklin: Professor.

Prof. Peter McCormick: I would definitely agree that there's a danger in this process to start using the word "transparency" as a club just to hit people with. Too much transparency gives you the circus we see to the south of us and are about to see again when Harriet Miers faces the Senate committee. A circus is what it promises to be. That's going too far.

So I will drop "transparency" as a slogan. I will simply say that I think the system would be well served if it was clearer to everyone that the real nitty-gritty of the narrowing process took place by a body of professionals that were not directly connected to a political party, rather than generating a large pool and then leaving it totally opaque how you narrow the list of 35 down to one and everyone just saying "trust me".

That total lack of transparency—there's my club again—is the weakness in the system. The very fact that we are here shows what the current problem is. Nobody quite knows, but lots of people sort of suspect what's going on as the list gets narrow to finally make a section 96 appointment or a Federal Court appointment.

If more of the power was being given to a committee of professionals whose credentials could be known, who served on this committee by virtue of what they had accomplished or whatever affiliations they held, then it would be easier for the court to defend itself from the kind of accusation that lies in the background of your very proceedings here.

It's in that sense and only to that extent that I'm arguing transparency. I'm not trying to make it the total be-all and end-all and suggesting we should try public Senate hearings.

● (1630)

Mr. William Trudell: Mr. Macklin, I can also add that the criteria for the selection of the judges should be public so that the public knows what types of candidates are coming forward. There's nothing the matter with talking about, in general terms, the type of interview process that would take place, without the specific questions. So the more public information you have out there as to what the criteria are for the judges and how the system works, the more transparent it is.

Hon. Paul Harold Macklin: I have another question, completely off in a different area, and I'll direct this somewhat to you, Professor.

Do you believe there needs to be more interest in getting members from academia to our bench, and how would you suggest that happen? Obviously we seem to be somewhat.... Well, it's an obvious bias in favour of those who are practising on a day-to-day basis before our courts. Do you have any thoughts on that?

Prof. Peter McCormick: I would have thought the change began about 35 years ago. Certainly at the appellate level, academics, by which I mean people whose familiarity with the law comes from teaching in universities or serving as deans of universities—I would have thought that was part of the original wave of reforms at the federal level that took place in the 1970s, the way Trudeau and Turner transformed the process, and then you started getting far more judges with academic backgrounds, some of whom worked out and some of whom who didn't, but that's true of any set. I would have thought over the last 30 years we have not seen lawyers of an academic bent, lawyers of a professional university affiliation, better represented at the higher levels of the judiciary than we have since 1970.

So I think we've gone well down that road. I'm not necessarily saying we need to go a lot further. As a mere political scientist, I am immune from this concern anyway.

Hon. Paul Harold Macklin: That's good to hear, that you feel comfortable that in fact academia is being properly represented and there wouldn't need to be any change in that regard in order to maintain that.

On another point, I'd like to go back to Mr. Trudell. Around this place we have basically the same set of rules all the time, yet parliaments tend to operate and function in different ways with the same sets of rules. I wonder whether it may be just about as important, what we call the culture of the parliament.

Do you believe the culture of the committee is an important aspect of any advisory committee or vetting committee, and how would one in any way assure that the culture was a positive one, as you have indicated your experience to be in working with those committees?

Mr. William Trudell: I think we start off in this country way ahead of the game because I think the general public really has a respect for the administration of justice in the courts. I think we really respect the courts and the rule of law in this country.

That's why I said politicians have a role to play in the nomination of certain members of the committee. The committee would reflect the culture of the community. For instance, a committee in the north would be very different from a committee, I would suspect, in Ontario, because of the makeup, because of the laypersons on it. For instance, suppose one of the laypersons lives in Rankin Inlet. That person will bring culture to the selection process that I wouldn't imagine coming from downtown Toronto.

Just as winds of change come over Parliament Hill and you do your best to shift and reflect those winds of change, I think the same thing would happen in the committees, because they will have such a diverse makeup.

I don't know whether that answers your question, but I really think the laypersons on the committee and the judges on the committee have to be very sensitive to the cultural shifts and changes in their particular jurisdictions.

I don't know whether that helps.

● (1635)

Hon. Paul Harold Macklin: Yes, it does.

Prof. Peter McCormick: I took your question somewhat differently from the way Mr. Trudell did. What we're talking about is a kind of small group behaviour, which is affected by the kind of people who are there and how long they serve.

One of the features I like about the current system is that it's not simply an ad hoc committee generated for a short-term consideration. Instead, people are appointed for more extensive terms, and I would imagine, although I haven't checked into it, that they are sometimes reappointed. Finding a balance between continuity and renewal on a committee is part of what creates the ethos.

I would assume that this committee would tend to be dominated by the judge or judges who serve on it—and I like the provinces where it's plural, not singular—and be reinforced by a continuity of most of the members on it. I think that would create the kind of local culture of specific groups that you're talking about, which would turn it toward professionalism and a certain set of expectations, a level of courtesy, a style of questions, and so on.

It's easy to describe that and hope for it. If it fell apart, we could both regret it greatly. But I think there would be an impetus toward that, generated by the small group behaviour of the particular set, as long as you have the core that is purely professional and devoted to a particular set of concerns.

[*Translation*]

The Chair: Mr. Toews, it's your turn.

[*English*]

Mr. Vic Toews: Thank you.

On the issue of confidentiality, I'm still not certain whether it should not be transparent. All I am saying is that I've had no problems with the Manitoba process. If confidentiality is a merit and something to be achieved, then it has been my experience that those kinds of committees—the Manitoba one, the provincial one—have been very good at it.

Then I look at something like Justice Major's recent comments. He doesn't have any fear of a totally open process. I know in one of our other committees we had testimony I think from Peter Russell, who basically said that the circus Canadians talk about...in fact, if you look at the statistics, it's usually an overwhelming majority on the Senate in the United States that actually approve these. Some of them, the Bork one and the Thomas one, were pretty vocal.

My question is this. When we appoint these individuals, let's say by order in council rather than ad hoc, how does the government express any legitimate concerns it has in order to fill certain needs on the bench, whether it's a diversity—let's say a gender balance or let's say, in Manitoba, francophone or criminal law experience?

I can tell you what I did personally. I sat down with my lay members and said, "We need people on the provincial bench with good, strong criminal law backgrounds. We need a bilingual judge." In fact, that discussion with those lay people got me into trouble with the judge, who had a different view of what the candidate should be. In fact, in one case I was provided with absolutely no bilingual candidates. To me, that was simply not acceptable.

So how does a government advance legitimate concerns it has about needs it must address when it makes the decisions?

Prof. Peter McCormick: I'll break the pattern and go first.

As I understand it, under the current process the chief justice of the court to which the appointment is being made is invited to comment on the special needs of the court.

Mr. Vic Toews: My concern is on the special needs of the government in terms of who they need.

Prof. Peter McCormick: It is my understanding that for the provincial courts, in every province that I'm aware of, the chief judge has regular meetings with the minister, arranged ahead of time, with an agenda.

If we're going to be as delicate as possible about this, if you're letting the chief judge of the court have input, and if you're arranging for regular interaction between the chief judge or the chief justice and the government, that is the opportunity for the government to suggest to the chief judge or chief justice what ought to be in the recommendation, the background, or the priority indication that he is already allowed to send to the committee to take into consideration.

● (1640)

Mr. Vic Toews: Wouldn't it be appropriate for the person, whether that person is the attorney general or the lieutenant governor in council, to actually make the needs known in some kind of public document, so that there isn't the idea that the attorney general is slipping something by the public? In a document we could say that we need a bilingual judge, specifically a bilingual judge. Would that be inappropriate? Would that be something that could be done?

Prof. Peter McCormick: The more delicate language would be that we would hope that a high priority would be assigned.

Again, to use our favourite word, it would lend transparency. I think it's better to have that happen publicly in a document that can be viewed by anybody and reviewed by anybody. In this age of the Internet, we tend to meet on the minister's website. That interaction would then be available for comment, and people would have an opportunity to respond to it more publicly as well.

If the committee is large enough, and it is constituted from several different sources so that the concern about it being stacked is lower, then a public communication of that kind by the minister to the committee would not seem terribly problematic to me.

Mr. William Trudell: I don't have a problem with it at all.

If the minister says we need to consider more aboriginal appointments in certain provinces, that message is going out to the committees. The committees would welcome diverse candidates. If the minister then gets five names, and one of those happens to be an aboriginal person, then it's a win-win situation, of course, as opposed to the minister picking an aboriginal person because he or she happens to be aboriginal. With respect, that is clearly wrong.

I don't see anything the matter with that. I think it's the minister's job to say that we don't have enough women sitting, that's what happened, so let's do it. The message goes out to the community. I'm sure the minister says that as a reflection of the community. It goes back to the committee.

When the committee welcomes people, if I happen to be of a certain minority and I hear the minister, I may be prompted to put in my application. I think it's an open, transparent message that carries right through.

Prof. Peter McCormick: The real advantage of doing it through a public statement by the minister is that the very best way to have your concerns met is to have that group realize that people realize they aren't on the bench and therefore solicit more applications from those kinds of candidates.

The real concern has to be if you send the signal too bluntly by saying forget merit this time around, give me an X. That's exactly what we have to guard against. I know you weren't implying that, and I'm not saying it would very often be that extreme. But again, if you weren't careful, you could end up sending that signal.

The best way to have it happen is this. When you say we need more women judges, 25 more women would say that they should maybe take a look at it, and several of them would be meritorious enough to make a short list anyway. It's the perfect way to have that work.

[*Translation*]

The Chair: Thank you very much.

Mr. McGuinty, it's your turn.

[*English*]

Mr. David McGuinty (Ottawa South, Lib.): Thanks, Mr. Chairman.

Thank you for coming this afternoon.

I'd like to ask a couple of pointed questions about an issue that I think cuts to the pith of what we're doing here, which is politics. In interviews that are taking place at the provincial level, are applicants asked whether they are actively involved in politics, whether they have ever been involved with a political party, whether they have worked on campaigns, or whether they have been donors?

Mr. William Trudell: Let me say this. Without giving away the confidentiality of what happens in committees, a person's background and what they do in the community would be something they would probably put in their application form. It's my experience that interview processes are so wide-ranging it would come out, but not pointedly. It's not a specific question: have you ever lobbied for the local Liberal association? But we encourage people to apply for the bench who have been involved in their community, and one of the best ways to be involved in your community is by being involved in politics at the local level, or whatever. So it's just part of their involvement in the community. There's nothing inherently nasty about it. In many cases, it's absolutely the one way people are involved in their community. And when they're open and forthright about it...it's going to be obvious anyway by the discreet inquiries in the community.

It's never been a specific question that I know of, but it's something that's never been hidden either.

● (1645)

Mr. David McGuinty: In the criteria that are used, perhaps we could hear both your positions on this question of merit. If somebody is active or has been active for a long time as a volunteer, as a fundraiser, as an organizer, as someone who drops pamphlets door to door—none of us would be here without those kinds of efforts, given the stringency of fundraising today in terms of the new changes regarding what you can spend in a campaign, given the increasing costs of all materials; in fairness, I think we just couldn't get here without good volunteers and a lot of help. Do I hear you saying, in both your views, that political involvement is a part of merit?

Mr. William Trudell: I think it is. If you get involved politically, what you're doing is contributing to the democracy we live in.

I watched the parliamentary press dinner. We're all human beings; we're all working. We may have different points of view, but, quite frankly, we all know how to have fun and we all know how to take things seriously. So I think it's a very important part of giving in the community. Some people choose to do it and some people don't. You shouldn't be penalized because you've worked for one particular party; you're exercising your democracy. Some people will tell you, "I met so many people at the door when I was campaigning, and I got a real sense of the community I think I can bring to the bench." So I think it's a positive aspect.

The secrecy of being involved in a political party and bringing bags of money in the back—that's mystery stuff. We're talking about people involved in their community. What better judges are there?

Prof. Peter McCormick: Definitely. If one bad outcome is that people develop the impression that unless you belong to the right political party, forget about it, that's one unfortunate outcome. But an equally unfortunate outcome is if you've ever been publicly connected with a political party, forget about it. That would be even worse as an outcome. All the judges I talk to always say the greatest danger of the job is becoming too isolated or insulated from the everyday world, because you have to give up all kinds of things as a judge. That's the danger. You only talk to other judges, and you really have to fight that.

A person who has been actively engaged in service to the community at some level, in some way, already has an antidote against that particular concern. You certainly don't want to start off as somebody who's already isolated, because now you're really in trouble.

So I would think it's definitely a plus as well. What you want to do is set up a circumstance where it makes no difference whether it was a political party through which you were channelling your community service or, if so, which political party it was. That would be the ideal. But I certainly don't want to make it sound like political parties are a touch of contagion that should be eliminated completely.

Mr. David McGuinty: In the paper we received from Professor Ziegel for tomorrow's presentation, which you haven't had the benefit of seeing, he talks about adjusting for biases. He illustrates that by saying if someone were, for example, not particularly favourably disposed to capitalism or the free market, or were a notorious misogynist, they might not be considered appointable to a commercial or family law court.

In the context of Judge Robert's comments in Quebec, which I think were one of the flash points that led to the creation of this subcommittee—though I didn't see, read, or hear the comments made by the judge—this is a really tough question. But if a known bias of an applicant for the bench in Quebec, for example.... No, let me rephrase that. If someone were to apply and a committee were to consider a known bias, for example, from being actively involved in a party whose constitution's number one article was the promotion of the division of the country, whether they be from Alberta or from Nova Scotia, could that be considered a bias, given the kind of experience you both have on the front lines?

● (1650)

Mr. William Trudell: To me, in and of itself, no. But the interview process becomes extremely important, because that person can then put into context exactly what they meant by it and whether it would affect their ability to decide on the evidence in front of them.

I'm not a politician, but if the position is that the parties from Quebec, or the Bloc, decide they don't want to be part of the country, that doesn't mean they don't offer a great service on issues that are important to the country. Lots of biases come out in the interviews that you never would have thought would have come out, or that you would initially think, oh my God, what's that person saying, and then that person goes on to put these into context. That's why I believe that the interview process is so very important, because a perceived bias may not be a bias at all, and somebody may have a hidden agenda that comes out.

But, no, that's the secret here of this country and this democracy. It's a problem, but it's a problem that only gets solved I think by letting the person talk about it, and you do that in an interview process.

It may very well be that as a result of what they said, this wide-ranging committee with lots of experience from different areas of society would say, uh, uh, we can't recommend this person. But if they do, the chances of a hidden bias getting through an interview process are a lot less than getting through a process where there is no interview. We don't want to find out about it once they're sitting.

Prof. Peter McCormick: My first point would be that judges are still human beings; therefore, all judges have personal tendencies and inclinations. The nasty word for that is "bias". A good judge is one who learns to be aware of their biases and to keep them out of places where they aren't appropriate, and that can only be a judgment call, and you have to assess whether you're appointing a person who can make that kind of judgment call. A judge who possesses no biases and no previous inclinations is like Dworkin writing about a Hercules. Well, good luck finding one.

The second point would be that there is a distinction between something that you personally want or like or prefer, and that which is required by the law or the Constitution. The two don't have to be in perfect sync. A person can say, well, personally, I'd prefer it if—and you can fill in your own blank, as I'm not sticking my neck out on this one. Personally, I'd prefer a different state of affairs, but I recognize that the law or the Constitution is the other way—and as a judge in particular I would honour it. In the United States, it's always Roe v. Wade or the abortion thing, and they always segue into it this way—but it's a very important distinction to be made.

And it's only if neither one of those answers is satisfactory to you that bias becomes a critical problem, and possibly one that would disqualify a person from judicial office.

[*Translation*]

The Chair: Thank you, Mr. McGuinty.

Mr. Lemay, you have the floor.

Mr. Marc Lemay: I think you have done a very good job of outlining the debate. That was very interesting.

It seems to me that interviews are essential, and I think this will be the general opinion within the committee. In fact, the Bloc position is clear: interviews must be held before someone is recommended for a judgeship.

In a region like mine—I'm from the North, from Abitibi-Témiscamingue, when candidates were interviewed, their political views were already known. The political views of anyone who has been involved in society are well known, whether in Quebec, Ontario or elsewhere. Everyone must have a political colour or flavour. In my opinion, a person who has never been involved in society or who has never taken a position cannot sit.

So the political opinions of the person who is to be interviewed are well known, which is why the interviews are important. We are trying to find out not what his political views are, but whether he is able to occupy a position as judge on the Superior Court, the Court of Appeal or the Federal Court of Canada.

In my opinion, the process has to be transparent, and we must have recourse to calls for applications. For example, if a position falls open in Montreal or Toronto, on the Criminal Division or the Superior Court, those interested can apply, and confidential interviews are then carried out. To me, it appears much more important during the interviews to verify the person's knowledge. We are talking about a position as judge on the Court of Appeal or the Federal Court of Canada. If the applicant is going to be in a position to make decisions relating to immigration certificates, she must be familiar with immigration. Otherwise, she won't even be recommended. That is what I am trying to understand.

Under the present process, the name of a qualified person is placed on a list, and the minister chooses from this list, without interviews. This is not right. I don't know if you are following me, but there would be a lot less political interference if we designated or recommended, for example, three or four or five candidates for a judge's position on the superior court of criminal jurisdiction in Toronto, and we told the minister that he can select someone from the list as he wishes. We want to ensure that the person has the applicable knowledge.

If, for example, a misogynous person applied for a judge's position on the Superior Court, the committee should have this information. Imagine the repercussions that this could have in the media. On the Court of Quebec, I saw a person apply for a judge's position who had not consulted the Criminal Code in 20 years. No matter how good a Liberal he may have been, the person was not accepted.

I do not believe that placing the process of transparency and assurance of confidentiality into the balance of justice constitutes a problem.

I don't know if you're still following me, but I would like to know your opinion on this matter.

● (1655)

[*English*]

Mr. William Trudell: In terms of your last point, you're not suggesting that the interviews be public?

[*Translation*]

Mr. Marc Lemay: No, I say that the call for applications must be a transparent process, but the interviews must remain confidential. This is essential, in my opinion. However, during a confidential interview, we must go... We have a one-hour interview.

[*English*]

Mr. William Trudell: I agree. That's basically the submission we're making, that there be the combination and transparency in how the process works.

One of the more mechanical issues is that as opposed to the provincial court appointments where there is a specific vacancy and people apply for it, in the Superior Court what may happen is that someone is going to retire. I've heard criticism that the federal government would know six months in advance, for instance, that someone was going to retire, and then it would take six months before anything happened. I think if you had a pool of candidates who had gone through the interview process, the minister could choose from it, and if that pool lasted for a couple of years, vacancies would be filled a lot quicker. If there are five names that go up through the interview process, it's probably likely that all five of those candidates are going to be appointed at some time.

The only thing I'm quibbling with is the advertisement of the vacancy. If the minister decides there are going to be more vacancies or more places in a particular court, I guess he announces and advertises them. But there's a natural progression of judges retiring from positions that this committee can be ready to fill—not wait until there is an advertisement, but have a pool of candidates who are ready to go.

● (1700)

[*Translation*]

The Chair: Thank you, Mr. Lemay.

Mr. Comartin.

[*English*]

Mr. Joe Comartin: *Merci encore.*

I also want to raise the issue of interviewing with you because of a pretty negative experience we had in Windsor just in the last month and a half. For the rest of the committee, a local candidate was interviewed by one of the members of the committee and asked specific questions about a murder case he had been involved in defending. The person from the committee asking the questions knew the family of the victim. The lawyer had taken a somewhat unusual position around victim impact statements and had lost the argument in front of the court. This was raised with him in a negative way. Somebody else was appointed to the position, and this very well-respected lawyer in the city has now raised it as a specific complaint.

In that situation there were two issues: what types of questions were appropriate, and, of greater concern, what appeared to be, at least on the surface, the obvious negative bias of the person asking the questions to the candidate? How would we go about doing that?

To Mr. Trudell in particular, your position that the interview be in confidence would make it very difficult for that type of questioning, if you see it as negative, as some way of controlling it.

Mr. William Trudell: I'm sorry, but on another side of the coin, I'm happy that you raised this issue. I was interviewed on this very problem.

The process in the Judicial Appointments Advisory Committee in Ontario is confidential. I take great issue with this candidate going public, because the persons who were interviewing him can't go public. They can't talk about how this might have come up. If he has a complaint, he can complain about the process, but quite frankly, in my respectful submission, he has breached the underlying principle, and that is that it's confidential. The layperson who was involved in this can't talk about how it happened.

I actually spoke to him, and I have a great deal of respect for this lawyer, but he is burning the process needlessly, in my respectful submission. I respect him. I don't know why he did it. But quite frankly, I think it's case-specific. It's like me criticizing a judge. They can't fight back. Quite frankly, knowing something about this and not being able to talk a lot about it, I really think it's an aberration.

A lawyer in front of a committee can say, “Wait, I don't think we should talk about that. I don't think you should be asking me those questions.” We know when to stop and when to go forward. Quite frankly, I think the principle on confidentiality and the fairness of the successful candidate and the rest are damaged a little bit by what's happened, but I think that's case specific. You know how conversations start. We'll never know the context, I suppose I could say.

But if you're saying that maybe there should be some openness about what types of questions can be asked, I don't have much difficulty with that. That's kind of public already in the province. But you don't want to stick to a script, because then you'd have rehearsal. You want a member to be able to say to the committee, “That was a very difficult case for me. Some people may not agree with me as to how I did it, but that was a very difficult case.” Or you want this person to be able to say, “I don't think I should talk about that. I don't think you should ask me that question.” That's the type of confidentiality and full-range discussion that makes that confidential interview process so successful.

So I wasn't there and I don't know exactly what happened, but I don't have a lot of sympathy for his public criticism.

● (1705)

Mr. Joe Comartin: Setting that aside, though, in terms of the process of a bias being expressed, how would we build in some way of protecting the candidate? Because you can't do it in the public sphere, if we follow your model, how do you protect a person from that kind of bias?

Mr. William Trudell: How do you protect an accused person from going in front of a judge who gets “judgitis”?

Mr. Joe Comartin: But that's in public.

Mr. William Trudell: Well, what happens is that the colleagues of the judge hopefully will exert some pressure on this person. In the committee, if someone shows a bias, it would be up to the chair of the committee and the rest of the committee to say, “That's improper. You shouldn't go there without bias.” I've seen that happen, because, as Mr. Macklin said, there's a culture that has developed within the committee itself.

Nothing's complete. We can't provide for all of those possible things, because there are biases and they'll come out sometimes. If you have a committee of two, they may control the process. But if you have a committee of seven or 14, they're going to be put in context. I don't think you can legislate for things like these that are going to happen. I think people bring all their biases to the table, but they have to put them into perspective and they have to be corrected. If I say something completely inappropriate here, you'll correct me. I think that same thing can happen.

With respect, Mr. Comartin, I don't think it's a big issue. I don't think you'll see a lot of complaints across the country when questions are asked in the confidential hearings.

Prof. Peter McCormick: As long as it's not a blackball system; some judicial councils work that way. A single, absolutely negative vote on a judicial council takes a name off the list, and ministers will say they would never appoint anybody who came on a divided vote. So in that case, your candidate is just dead out of luck if that's how the system is working.

Normally, you would expect the other members of the committee would react internally to what's going on—somewhat the same way you are. If the candidate bore up well in an apparently unfair line of questioning, one would have thought it could have rebounded very much in his favour.

In the much lower-level setting of making appointments at a university, in one famous round we had a while ago, we really went after one candidate on what somebody would have thought was the weakest part of his dossier. We went after him really well, and he handled it beautifully. When he left the campus, he was convinced we'd never look at him, just wrote the whole thing off. We decided to appoint him. He'd handled it so well, there was just no question in our mind that he'd thought it through and could deal with it. On the other hand, if he'd handled it badly, then that would have been a reason for shooting him down in flames.

So you never quite know what the total dynamic is. You would hope the other members of the committee would not share the same kind of bias, the same kind of previous concern, and that would give the candidate a chance to gain points, not lose, through the experience.

At any rate, it seems like an awful lot, to throw out the whole notion of personal interviews with a select group of decision-makers chosen from a variety of backgrounds just because it might go wrong once in a while. Frankly, everything goes wrong once in a while. You have to decide on balance what the better way to go is.

● (1710)

[*Translation*]

The Chair: Thank you, Mr. Comartin.

Before giving Paul Macklin the floor, I would like to ask Dr. McCormick a quick question, if you will allow me, since we have already had two complete rounds.

Dr. McCormick, on October 3, Mr. David Gourdeau, the Commissioner for Federal Judicial Affairs, told us that 111 people had been highly recommended and that 283 had been recommended, for a total of 394. There were 23 positions to be filled. This means that there were 17 candidates for each judgeship available. This name bank will remain open for a certain length of time.

According the process you suggest, the short list, would a committee be formed each time there was a vacancy? Three or five people are chosen and the list is closed. Another position becomes vacant elsewhere, another committee is formed and three to five people are put on that list. Is this how you see it, or will the list of three to five people remain open for some time?

[*English*]

Prof. Peter McCormick: The difficulty with discussing a process like this in Canada is that we're dealing with units of completely different sizes.

I come with an Alberta bias. I have in my head a notion of how many judges there are on the provincial superior court in the province of Alberta and how frequently vacancies come up, so when I fall back on a description of a basic model, I'm dealing with that scale. I recognize that for Nova Scotia, that's already overwhelming. You don't need something that fancy. And for Quebec, or for Ontario, or for the Federal Court as a whole, it's way more complex than that. You need something trickier. Rather than run out of time even quicker than I did, I simply extrapolated from my own province and the way I thought the system would work there.

The provincial court experience is not totally relevant to us here, because provincial courts are way more specialized. There, one list cannot be generated and held onto, because there are four or five different tracks inside most provincial courts. You can't just hire from a single list, you have to hire from a focused list.

At the Federal Court level, I would have thought you could carry names over. I see nothing wrong with that. You're not focusing as much on a single vacancy.

I want to steer away from creating an enormous pool, because that tilts the balance back in favour of the wide-open discretion, which it seems to me creates the uncertainty that has us all sitting in this room today.

[*Translation*]

The Chair: Thank you very much.

We will go on to Mr. Trudell.

[*English*]

Mr. William Trudell: I think the pool should continue to be accessed. I think if you combined the interview process, you'd have fewer than 394 people in the pool.

[*Translation*]

The Chair: Thank you very much.

Mr. Macklin, you have seven minutes.

[*English*]

Hon. Paul Harold Macklin: Thank you, and thank you for asking my question about the pool.

The question you've raised too is on representative courts. Is it your position that, other than for such basic things as where there are needs for court cases to be dealt with in both official languages, or the potential is there, the representative nature of a court should therefore be left completely to the political side, or should the committees have some influence over that? When I say “representative”, I refer to when you talked about an aboriginal representative or whatever in a court.

I see you're deep in thought.

Mr. William Trudell: Can you just ask the question again? I'm sorry, I missed it.

Hon. Paul Harold Macklin: In terms of a representative court, there was a conversation going on here at one point as to what the chief judge might say he or she needs or wants. I would ask you, beyond the need for a bilingual capacity in that court, should everything else be left in terms of its constituent parts to the political side? I guess what one may bring forward in some argument would be that you want it representative of the community where that judge is going to sit, potentially.

I'd just like to get your feelings as to where you think that representative court should come from. Should there be some influence by the committee or should there not? Should it simply be that this person is a meritorious candidate, period?

● (1715)

Mr. William Trudell: With the committee sending up five names or so, all five names may have some different aspects. One of the persons may be a person of colour, for instance, and the committee's choice, as the committee sent that person's name up, would obviously reflect this person's colour. If the minister then decides it's time for a person of colour, he or she may decide that this person of colour is the proper choice. The minister may decide that if five people came up and one of those persons was born in the community, it wasn't a good idea, that maybe familiarity with the community was less important in this than having somebody with other traits. The circuit court used to solve that problem.

I think when the message goes out that all types of persons from different backgrounds and cultures should be applying, the committee will get the message that they just don't send up a number of people who look exactly the same. The minister then can choose. That's why I said in the beginning that the parliamentary choice is important, because you people know what's going on; you know what's needed. If the pool is there and the pool is broad enough, then the minister can decide what is needed.

Prof. Peter McCormick: That is an absolutely critical point. The danger is that in a pure merit system you can wind up with a pretty closed system. You wind up saying that a good judge looks like the good judges we have right now. If you're not careful, that can keep getting narrower and narrower over a period of time. That's the risk on the one hand.

The risk on the other side is that you certainly don't want representation to turn into mirror representation. You don't want to say we absolutely must have 10% this because they're 10% of the public. The more delicate phrase we use is that it must reflect the diversity of Canadian society. I love that because it indicates the concern, but it doesn't lead you off in mathematical directions, which is important.

As to the point of the trade-off, I would prefer to have this group focusing on merit. I would keep emphasizing a purely professional body assessing credentials and capacity as revealed through a variety of sources, including interviews. I would rather lean in that direction and let the chief judge talk on paper to the committee about what they might want to bear in mind. Or perhaps there's the very clumsy one I suggested in my written comments I never got a chance to say out loud. That is, you could set up through legislation a requirement that there be some diversity, but that's going to be awfully clumsy, and as I wrote that paragraph, I was less than delighted with it.

I'd rather be dealing with it in those clumsy ways or those indirect ways and letting it be a much more professional, merit-driven process and take my chances that they're not all going to turn out to be 55-year-old white males, but maybe that's naive of me.

Hon. Paul Harold Macklin: Another area, Mr. Trudell, is where you talk about the importance of confidentiality. When we have a breach by a candidate, that's significantly different from a breach by one of the members of the committee. Do you believe there should be any rules or sanctions for members of the committee if in fact they have chosen for one reason or another to breach that confidentiality?

Mr. William Trudell: First, I think the confidentiality of the committee has to be protected by statute so you cannot go into the committee to drag out things you may want for your own purposes. And then yes, confidentiality as I know it right now is not legislated and I could breach it, but I think it should be.

[*Translation*]

Mr. Marc Lemay: On the other hand, it's protected in Quebec. I think it's also the case in Ontario. Those on the selection committee sign a document. This is the way it is in Quebec. In Ontario, you cannot break this promise of confidentiality on pain of criminal proceedings. However, this doesn't apply to the participants, and that is where the problem lies.

● (1720)

The Chair: Is that all right? That's fine.

Mr. Toews, I would ask you to be brief.

[*English*]

Mr. Vic Toews: Thank you.

I have just one point of clarification. I thought I heard one of the witnesses say one negative vote can result in a candidate being blackballed by the minister. If that's true, then that would really concern me, because then essentially the minister holds the veto in a negative way.

I remember many years ago when I started my civil service career, a civil servant once said to me, "I can't help advance anyone's career, but I can sure sink it." It's something I've always kept in mind, and I'd be concerned in this context as well that one person can sink another person—very concerned.

Prof. Peter McCormick: My reference was to a set of interviews I did 20 years ago with every member of every provincial judicial council in Canada who would talk to me or who was allowed by the provincial statute to talk to me. And several provinces—I admit I haven't looked at the article lately and I couldn't tell you which ones—at that time had effectively a blackball system, and that's not my phrase. That was the phrase either the chair of the judicial council mentioned or the minister mentioned, that a divided vote would be reported to him and he would never appoint on a divided vote.

I'm not saying that's the universal practice. I'm certainly not recommending it. I was just saying, in the context of Mr. Comartin's question, in some jurisdictions that would be an enormous problem, and that's the danger of a blackball system. One person, for whatever reason, can shut something down.

And I'm not saying that's the general practice. I don't even know to what extent it's the practice today, but I do know that in at least three provinces the blackball system did exist 20 years ago. That's a pretty weak statement.

Mr. Vic Toews: But still I think you've brought forward a very valid concern, and I would suggest that perhaps we have a system where the minister never knows who voted against someone or even if it was a split vote; if there is a recommendation, the minister never knows whether it's a consensus or a vote. When that recommendation is made, the recommendation is made. That would be my feeling on that.

Any comments from the panel on that?

Prof. Peter McCormick: Obviously, the blackball refers to a system like the current one we're discussing, where you're generating three different sets of names and a name doesn't go on the qualified or well-qualified list unless everybody agrees. It's in that context it existed. In those provinces where they just submit a smaller set of names, I don't believe the blackball system applies.

Mr. Vic Toews: Thank you.

[*Translation*]

The Chair: Thank you very much.

I thank the witnesses for coming to explain their points of view to us. It was very instructive and, believe me, it will be very useful.

I thank the members of the committee.

The session is adjourned.

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