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Chair

Mr. Richard Marceau

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● (0910)

[*Translation*]

The Chair (Mr. Richard Marceau (Charlesbourg—Haute-Saint-Charles, BQ)): Good morning and welcome, Minister, to meeting number four of the Subcommittee on the process for appointment to the Federal Judiciary of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness. Because of circumstances out of your control, you will have to leave at 10:25. Despite the absence of our colleagues David McGuinty and Joe Comartin, we will begin. I'm convinced they will be joining us during the discussion period.

Minister, you have ten minutes. We will then proceed to a question and answer session.

Hon. Irwin Cotler (Minister of Justice and Attorney General of Canada): Thank you, Mr. Chairman.

Dear colleagues, I'm very pleased to be here and to join in our common cause. I am referring both to judicial appointments—because administrators are the cornerstone of our democracy—and to the importance of the process used in appointing judges.

[*English*]

If you would have asked me about my priorities when I first was appointed Minister of Justice I would not have included judicial appointments among them, but I've learned that this is a critical part of the administration of justice. This is a legacy issue, and this will live on long after those of us who have the temporary stewardship of this position are no longer there.

Let me say that I regard the current appointment process as being sound in principle. This does not mean, however, as I've said elsewhere, that improvements cannot be made to the manner in which the current process operates in practice. Indeed, as early as the fall of 2004, long before the events that gave rise to this subcommittee, I was suggesting publicly that we may want to examine the current process, and I'm pleased to participate in this examination.

Before focusing on the description of the appointments process, including some of the critiques, allow me to affirm the common ground that I believe we share on this issue.

[*Translation*]

First off, we agree on the importance of merit in appointing judges to the bench. Mr. Chairman, you yourself stated in the House on June 3rd that there is a "need to ensure that merit is the only consideration when people are appointed to the bench". During the same debate, Mr. MacKay stated:

[*English*]

"We need the best minds, the best individuals, and the most qualified persons comprising the bench at all levels."

[*Translation*]

I agree wholeheartedly. I'd simply like to add that merit must be assessed in light of the specific needs of the court at the time, and we must ensure that our courts reflect the country's diversity.

[*English*]

Second, we agree that our appointment system has been successful in ensuring excellence on the bench. My colleague Mr. Comartin pointed out to the House on June 3 of this year, and again I quote, "we have an excellent judiciary in the country". Indeed, he suggested that it may be the best in the world. I would certainly concur with this sentiment.

Accordingly, any reform of the appointments process must ensure that we preserve this legacy and requirement of excellence. I do not agree with those who suggest it is acceptable to risk the quality of our judiciary in the name of improving the process at some level of abstraction or otherwise. We have to keep our focus on our shared objective of having a first-rate judiciary where excellence is the standard.

Third, and again I would regard this as a shared commitment, we need to protect the independence of the judiciary and the integrity of the institution.

[*Translation*]

That also includes judges' reputations.

[*English*]

Fourth, we agree, at least I hope we agree, that any changes contemplated must be consistent with our constitutional framework. Section 96 of the Constitution Act of 1867 is the governing provision in relation to judicial appointments to our superior courts. It gives the executive or the federal cabinet the responsibility to appoint judges by order in council. Accordingly, in considering any reform of the federal appointment system we need to ensure that any proposed reforms comport with section 96. There's no point trying to fit a square peg into a constitutional round hole.

[*Translation*]

I think that we should bear this in mind when assessing the relative value of the appointment process in other jurisdictions. It could be very useful to do a comparative analysis of other systems, including those in the provinces and territories. However, I should add that their constitutional context may differ.

Fifth,

● (0915)

[*English*]

we would agree that yet another shared objective is increased transparency and accountability.

[*Translation*]

I'll be referring to that later on in my remarks.

Sixth, I think we all agree that any reshaping of the appointment system must be functional and practical. The system must allow for the efficient processing of approximately 500 applications per year, requiring approximately 60 meetings per year. It should also recognize Canada's varied geography and wide-open spaces, and it should specifically focus on local needs.

[*English*]

I've heard and read numerous suggestions, for example, that we can interview every candidate or have MPs on the appointments committees or have a process where short lists are established. I would only caution you—because I'm open to all suggestions and approaches—again to think of how some of these proposals might work in a practical sense given the large number of applications that are made, the large number of jurisdictions we are dealing with, and the large number of appointments that have to be made and the timeframes within which they have to be made. We cannot end up with a process that may look nice on paper but may not be capable of handling the applications submitted or filling the vacancies as they come up.

[*Translation*]

Seventh and finally, I think we all recognize political affiliation should not be a prerequisite in the choice of a candidate. Nor should it lead to the exclusion of certain candidates.

On June 3rd, you yourself Mr. Chairman stated that:

> the fact that a person was previously involved in politics is no reason not to appoint him to the bench. On the contrary, we would be sending a very bad message if we told people they should do their civic duty by getting involved in politics, but that this will prevent them from being appointed to the bench.

You added "political experience can often prove to be very useful, once a person becomes a judge." I must say I agree with you on these two points.

This is what I have tried to put into practice when I decided who would be in charge of appointments. I'd also like to stress that I do not consider a candidate's political affiliation in making my decision.

[*English*]

I turn now to a brief description of the appointments process. There are seven features that I want to highlight. The process is designed to ensure that the Minister of Justice receives broadly based, fair, and objective advice about the qualifications of those who seek a judicial appointment.

First, the process, as you know, is organized around independent judicial advisory committees that assess the qualifications of potential candidates. Committees are independent and at arm's length from the minister. There are 16 committees—three in Ontario, two in Quebec, and one in each remaining province and territory.

Deuxièmement, the Commissioner of Federal Judicial Affairs has a responsibility for administering the appointments committee. He receives the applications and ensures assessments are done in an efficient and complete manner, so he has a superintendent responsibility and is independent from the minister as well.

Third, committees include nominees of the judiciary, the Canadian Bar Association, provincial law societies, and provincial attorneys general. All of these are independent, respected entities. In addition, I select three members, two of whom must be laypersons so that we have two non-jurors on these committees. These nominees are intended to ensure that there's a balance on the committee, be it for reasons of language, gender, regional representation, or other diversity considerations. Some of you have asked why I should have three nominees on this committee. I would welcome your comments and am prepared to respond on that issue as well.

Fourth, judicial advisory committees vet applications from candidates in accordance with prescribed merit-based criteria that are publicly available on the commissioner's website and in reference to which applications are made. The merit-based criteria include general proficiency in the law, intellectual ability, analytical skills, ability to listen, ability to maintain an open mind, ability to make decisions, capacity to exercise sound judgment, reputation among professional peers and the general community, capacity to handle heavy workload, capacity to handle stress and the pressure of isolation of the judicial role, awareness of racial and gender issues, bilingual ability, and such personal characteristics as a sense of ethics, patience, courtesy, honesty, common sense, tact, integrity, humility, fairness, reliability, tolerance, and a sense of responsibility and consideration for others.

Note that there is no reference to political affiliation or political belief. It is simply not considered relevant—and, I would underline, nor can it be considered relevant. Five, the committees assess candidates in one of three categories: recommended, highly recommended, or unable to recommend. The files of all candidates are maintained in a separate and confidential data bank at the commissioner's office.

● (0920)

[*Translation*]

Six, the minister may only make his choice from amongst recommended or highly recommended candidates. No candidate has ever been chosen that hadn't been recommended by a committee. It gives you an idea of the importance of the committee's work.

Seven, I proceed to consultations in order to have the widest possible range of information. The objective here is to determine who would be the best candidate to fill a particular position. I can consult with judges, members of the bar as well as my provincial and territorial colleagues. I also welcome advice from groups or individuals, regarding factors which should be taken into consideration when filling a vacancy.

Further to these consultations, I make a recommendation to cabinet. The Governor General then proceeds to the appointment, with a recommendation from cabinet.

[*English*]

The candidate's political affiliation, if any, is not a relevant criteria. It will not be a factor in the choice of a candidate, nor will it be a factor in the exclusion of a candidate.

I would now like to briefly address some of the criticisms that have been made of the current appointment process, taking into account some of the witness testimony before the committee and what I otherwise appreciate in this regard.

The first criticism is that there's too much discretion in the hands of the government. Mr. Chair, I believe this was one of your principal concerns when you addressed the House on June 3, although you did acknowledge that you did not want ministerial discretion to be completely eliminated. I just want to remind the committee that the discretion, or what I'd rather characterize as government responsibility, is anchored in section 96 of the Constitution. When you are thinking about your recommendations, you need to consider whether they will be consistent with section 96.

The second criticism does relate somewhat to the exercise of discretion, and is the minister's power to appoint from the recommended list as well as the highly recommended list. It is important to note that I do not have open-ended discretion here; rather, I am limited to appointing from the list of either recommended or highly recommended candidates. In addition, in my view there is a presumption in favour of appointing a candidate from the highly recommended list; however, there are occasions when diversity considerations or the requirements of the court in question may dispose me to select from the recommended list instead. It's important to emphasize that candidates on the recommended list are nonetheless of superior quality.

The third criticism is that appointments are tainted by political consideration. Here I can only speak to my own experience. I can say clearly that this is not something I have ever taken into account in developing my recommendations to cabinet. Quite frankly, I couldn't care less and for the most part don't even know what the political affiliation is, if any. It simply doesn't matter. In addition, allegations that candidates who contributed to political parties of their choice were appointed to the bench are just that—allegations. Even if true, they only demonstrate a correlation, not a causative factor. Clearly, as you yourself mentioned, Mr. Chairman, people should not be appointed because of such contributions, but they should not be discriminated against either, lest we begin to discourage participation in the political process.

While I believe that the current appointment process is sound in principle, this does not mean that improvements cannot be made in practice, and I've indicated I am open to such improvements.

[*Translation*]

This is why, with respect to judicial appointments, I have sought out the advice of the chairs of various provincial and territorial advisory committees. These are committees which have an accurate understanding of the process as it applies in practice. In June, I had a meeting with all chairpersons. They made comments and very useful suggestions for concrete measures which could enhance transparency and trust in the process.

[*English*]

Further to those discussions, I've decided to take some initial steps to improve the process as it relates to transparency, accountability, and other matters that I will now share with you.

First, I am releasing publicly today a code of ethics that will provide clear professional direction to the members of the judicial appointments committee in relation to the exercise of their functions. The code covers such matters as conflict of interest, communications with persons outside the committee, and confidentiality.

Second, I am releasing publicly today the guidelines that govern the advisory committee members' participation in the process. This will provide a better and more detailed appreciation of the way in which information on the merit criteria is gathered and assessed by the committee members. It will also demonstrate the careful steps that are taken to preserve confidentiality that is central to the process.

Third, I am releasing publicly today the mandate letter that is provided to advisory committee members once they agree to participate in the committee process.

● (0925)

[*Translation*]

Four, I recently asked the Commissioner for Federal Judicial Affairs to publish two important sets of information on an annual basis. The first is an updated list of committee members responsible for appointments to the federal judiciary. The second concerns applications for judicial appointments, including the total number of candidates and the number of recommended and highly recommended candidates.

[*English*]

All of the above information will be made available on the commissioner's website. I strongly believe that the measures I'm announcing today will improve public understanding of the strengths of the judicial appointments committee process, and address and dispel the unfounded innuendo and criticism that have been increasingly directed toward judges in the past number of months.

Before concluding, I believe it is our role as parliamentarians to engage in a respectful and constructive debate on the challenges we face, not to engage in any careless and casual condemnation of the judiciary that would do nothing to enhance public trust in this vital institution.

I must admit that I've become concerned over the past year—and I say this in my capacity as the Minister of Justice and Attorney General—about any unfounded and politicized critiques of the judiciary, both within and without Parliament, whose effect may be to undermine respect for the independence of the judiciary and the reputation of its members. I think we all share the view that the judiciary is an extremely important public institution that is fundamental to the operation of our democracy,

[*Translation*]

In other words, the cornerstone of our democracy.

[*English*]

It is also an institution that depends to a large degree on public trust and confidence.

[*Translation*]

Canadians have reason to be proud of their legal system. It is a fair, impartial and independent model studied throughout the world. This fact is due in large part to the high level of competency of Canadian judges. They are diligent and dedicated. In Canada and abroad, they garner much respect and admiration, which they fully deserve.

[*English*]

I would like to thank you, Mr. Chair and colleagues, for permitting me to speak to you today.

[*Translation*]

I would now be pleased to answer any questions or hear any comments you may have.

The Chair: Thank you very much, Minister. Indeed, very interesting things are being said in the House of Commons. I'm pleased to hear you say so.

Mr. Moore, you have seven minutes.

[*English*]

Mr. Rob Moore (Fundy Royal, CPC): Thank you, Mr. Chair.

It's interesting, Minister, to hear about your new guidelines for these particular committees, and I look forward to looking them over. But I can't help but feel, and I think most Canadians are feeling, that this type of thing is window dressing. A code of conduct or guidelines for a committee, when we don't substantively change the process, is not going to have the desired effect. It reminds me a bit of the revelations from the sponsorship scandal, and so on, when we came out with a code of conduct for MPs who are not ministers and who do not have any control over the public purse, which wouldn't have had any impact on the type of challenge that we were facing with the sponsorship scandal.

So, again, I would be interested to know how you feel a code of conduct for this committee is going to have substantive impact on the input into the selection of judges.

Now the Prime Minister says that in the ten years he's been in government, politics has not entered into the selection of judges. That's what the Prime Minister said on this issue. I would like to know, Mr. Minister, how do you reconcile that with the report we saw recently, which found that since the 2000 election five years ago, 60% of the judges appointed had donated to the Liberal Party of Canada?

How do you reconcile the Prime Minister's statement and even your own statement today that even if it were true that politics could enter into it, you've seen no overwhelming evidence? We had a witness yesterday, Dr. Peter McCormick, who's studied this issue extensively, and I'll quote from what he said yesterday. He said that "At the very least"—and this was clearly a big understatement—"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...."

Well, that's a problem. That's a problem in a free and democratic society, and I know you often speak.... And I don't think there's any contradiction with the qualifications of those who are on the bench, but the fact remains that in a free and open and democratic and fair society, one's political affiliations should not impact on one's appointment to the bench. Yet I would say the overwhelming evidence is that it does.

The problem, and the reason I'm pleased we've had this subcommittee struck, is that your proposal to the justice committee of taking eight candidates and then having a committee whittling those down to three and having you select from the three for appointment basically still gives you unfettered ability to appoint, at your discretion, who you want to be on the bench. You take ten of your choice candidates, and at the end you have three of your choice candidates. It's still a process whereby politics can enter it into it.

I'm not accusing you of that in any way, but I would say that the overwhelming evidence from the studies of individuals like Mr. McCormick, and from research that's been done by the media.... These aren't partisan things, but studies that have been done in a non-partisan way—let alone what's been done in a partisan way in Parliament. But these unbiased studies have found overwhelmingly that political affiliation does enter into it, and what you've proposed so far will not address that.

So I'd like to know, are you even concerned? Are you even concerned about those revelations? Does the quote that I gave you bother you at all? Do you refute that political affiliation has obviously entered into the selection of these judges?

● (0930)

Hon. Irwin Cotler: Let me go to your questions and respond to them seriatim, the first being whether these guidelines and code of conduct are just window dressing.

I guess it's too much to expect that we can conduct the hearing without partisan political characterization, to begin with. What I'm saying is that I'm open to all critiques, but politicization can cut both ways. They can also be expressed in the manner in which the critique is made, as well as that of the question, including the important one, which I take very seriously, as to whether appointments are ever made on the basis of political affiliation or contribution. I can state unequivocally, and I take this both personally and professionally, there has never been any appointment that I have made on the basis of political affiliation or contribution. I will go further: I wouldn't brook any interference. People who know me know there's no point to ever make a representation to me on any political grounds: it would be rejected out of hand. So I want to—

Mr. Rob Moore: Well, Mr. Minister, what do you say to the evidence that says 60% of these appointees had donated to the Liberal Party? There's only a fraction of Canadian society that makes donations to any party, but these overwhelmingly donated not just to any party, not just to parties in general, but they donated to the Liberal Party of Canada. I take you at your word, but how do you reconcile what the Prime Minister said in the past with the evidence?

Hon. Irwin Cotler: I couldn't care less whether people donated to any political party. I don't even know if they donated.

● (0935)

Mr. Rob Moore: Somebody knows and somebody cares.

Hon. Irwin Cotler: I make the recommendation. I know. I care.

It does not factor into anything I do. I resent even any insinuation that it does, and I state here unequivocally for the record that it has never entered into any recommendation I've made and it would never enter into any recommendation I make.

At the same time, there is another issue, and that's freedom of political association. Here I share the comments made by the president. If somebody wants to associate with a political party or even wants to make a contribution to the political party, it was perfectly permissible the last time I looked at the Charter of Rights and Freedoms.

The problem is not whether people would make contributions to a political party. People are free to do that. The problem is if somebody were to take that consideration into account in the nominations process; that's what would be pernicious. We have to separate the two. The issue is not to preclude people from associating with a political party; the issue is not to prejudice anybody because of participation in the political process.

Mr. Rob Moore: There is no argument. I haven't heard it suggested that you shouldn't be able to donate to a political party. I agree. There's no problem there, but are Canadians to believe that it's some huge coincidence that the only people being appointed happen to donate to the Liberal Party of Canada? It wasn't to the Bloc Québécois, it wasn't to the NDP, and it wasn't to the Conservatives. We have donors to our party and the other parties have donors to their parties, but the only people appointed were donors to your party.

Benoît Corbeil, former director general of the Liberal Party in Quebec, said out of the 20 lawyers who volunteered on the 2000 campaign, half have been named judges. You haven't commented on it yet. I know that you've said it doesn't enter into your consideration, but there's overwhelming evidence just in what I've cited that donations to the Liberal Party do count to somebody somewhere along the way. Whether it's to you or someone else, somewhere along the way it does count. It's overwhelming. These judges who were appointed donated to the Liberal Party of Canada.

Could you comment on the evidence? Do you refute the evidence?

The Chair: That will be the last question.

Hon. Irwin Cotler: You referred to allegations and passed them off as evidence. There can be a correlation between somebody making a contribution and that person subsequently or ultimately being appointed a judge, but a correlation does not necessarily involve a causative factor. It doesn't mean that because a person is affiliated with a political party or contributed to a political party, it caused and was the reason for him having been appointed a judge.

The nature of the nominations process itself, the role of independent judicial advisory committees.... The fact that it is those committees that choose the candidates to be recommended—and highly recommended—that I can only choose from the list that is given to me, that in making that choice I engage in my own broad consultation, that merit is the only criterion that is taken into account, and that I would not brook any political interference, that is also evidence. The kind of testimony I'm giving today is also evidence, and I would say it is first-hand evidence, from the experience of someone who's been in the process, as distinct from allegations made by Benoît Corbeil that he himself acknowledged he had no evidence to support.

That's the kind of thing, trading in innuendo, I find quite disturbing. We have a responsibility to not impugn the integrity of members on the bench or allow the suggestion to somehow be inferred that people were appointed for their financial contributions. Frankly, nobody would get appointed by reason of the kind of financial contribution that is alleged to have been made. If one understands the process and if one understands the integrity of the people who sit on those judicial advisory committees with whom I've met and engaged in that process, one wouldn't so facilely make suggestions that there is a causative relationship between making a contribution and the person ultimately being appointed. That's simply false, and to trade in that kind of innuendo frankly undermines the perceived independence of the judiciary and the integrity of its membership.

As Attorney General, I've got a responsibility to counter that kind of allegation, made even in good faith. I'm not saying you're not making it in good faith. I'm just saying we've got to be very careful when we facilely make those allegations because the protection of the integrity of the institution is also at issue.

● (0940)

[*Translation*]

The Chair: Thank you.

Mr. Lemay.

Mr. Marc Lemay (Abitibi—Témiscamingue, BQ): I don't intend to enter into a long debate. Minister, for 30 years, I was a lawyer in my province, in Quebec. I have appeared before almost all jurisdictions and have assisted in the appointment of judges. Let us not delude ourselves: at the Superior Court in Quebec, Liberals appoint Liberals, Conservatives have appointed Conservatives, and PQ members have appointed PQ members. I don't think financial contributions to a political party were the main reason for this, but political party affiliation? Probably.

On this subcommittee, I am much more interested in an in-depth reform of the process for appointment to the federal judiciary based on two things, and I would like to hear your view on the matter. Since the beginning of our hearings, we have looked at striking a balance between transparency and respect for confidentiality. These are our two major concerns. I sense it everywhere and all stakeholders have mentioned it.

With respect to transparency, Minister, clearly—and I say so from experience—the current process is no longer tenable. It is decided by a committee one year ahead of time, based on a list, that a given person would be fine as a Superior Court, Appeal Court or Federal Court judge, and he is highly recommended by the committee. But things can change over a year. I could give you some examples, but I don't have much time.

For four years as a representative from my section of the bar, I was involved in appointments, designations or recommendations to the bench. I'll give you a specific example. At the moment in my riding, there is a vacancy in Superior Court because a judge announced six months ago that he would be retiring in March. Why not strike a committee when there is a vacancy? The committee could hear from candidates and make recommendations. Its composition could be discussed. Obviously, the committee's deliberations would be confidential. That would be an essential premise and I wouldn't depart from it. According to my experience, it is in our interest for committees to meet with candidates, and for the process to be confidential due to some important matters.

Regarding transparency, you could publish guidelines today. However, we do not know who is sitting on a committee. It's somewhat secret, "confidential" if you will. Someone's name is on a list, to be considered.

When I was president of the bar, a committee member called me to ask me what I thought of somebody. I asked for what position the person was being considered. I was told it was for a vacancy in Superior Court. I then said Superior Court hears divorce cases and that the person's experience in those matters had to be assessed. That's the way things go, Minister.

I have a great deal of difficulty with a committee from Montreal—because my example is from Quebec—refusing to sit in the regions and advising whether a given person could be recommended and added to the list, when there is a vacancy, and not six, seven, eight, twelve or fifteen months ahead of time, as is currently the case.

I know that there are many appointments to consider, but would this be feasible according to you?

● (0945)

You also said you make recommendations to cabinet. Have any of your recommendations been rejected and have you been asked to reconsider?

Finally, is there somebody from your office considering recommendations from committees to make sure they are acceptable? I am referring to the current situation, which I find deplorable, obviously.

Hon. Irwin Cotler: Mr. Lemay, these are very important considerations. We are talking about transparency and confidentiality, as well as the means—if means there are—of bringing them together.

I will come back to the example you gave, the fact that we do not know who sits on a given committee. Today, that is indeed the case. However, one of my recommendations today—and this is a request I have put to the Commissioner for Federal Judicial Affairs—is that we publish the names of those who sit on such committees. I'm open to your comments on this, but I should say quite frankly that there may be a problem with this.

When the names of the members of a given committee are not known, it is difficult to put pressure on the committee. Once the names are known, pressure could be put on the committee. So far, we have not published those names in order to protect committee members during the process, and to more effectively protect their independence and integrity. However, ensuring transparency may be more important than protecting the confidentiality of members' names. That is why I have made the suggestion. This would not necessarily change the process for the better, but we will see.

You also talked about going before the committee when there are positions to be filled. You asked why we would not fill such positions through competitions. Basically, it's a question of efficiency. As you have seen yourself, there are some 1,100 judges, and some 50 appointments to be made each year. There is significant turnover in federal courts. As I have already said, the system allows for appointments to be made quickly when positions become vacant.

If we had to hold a competition each time a position became vacant—and in some cases we cannot predict they will become vacant—we would have serious problems with system efficiency. I should tell you that I myself talked about this issue with committee chairs at a meeting in June. They said that this would make the appointment process much less efficient.

As I said, I am open to all suggestions, and my answers are based on the experience of those who work with the process. I can also say from my own experience that we don't always know when we will need to fill positions. However, when a position does become vacant, there is a committee with the experience and knowledge to apply the consultation and assessment process as quickly as possible.

● (0950)

I will ask my judicial affairs advisor to answer that question, since Mr. Lemay also asked a question about his duties.

Mr. François Giroux (Judicial Affairs Advisor, Office of the Minister of Justice): As Judicial Affairs Advisor, I deal primarily with consultations before a judicial appointment is made. When an individual is assessed and his appointment is to come into effect only one year later, the situation may have changed by then. On this issue, I would point out that, before a judge is appointed, there are very extensive consultations conducted by one of the following: the Chief Justice of the province, the Chief Justice of the Court of Appeal, the Chief Justice of the Superior Court, the Attorney General of the province, the Barreau du Québec, or the local section of the Canadian Bar Association.

Then, we look at potential candidates; there is a list of candidates eligible for judicial appointments. Then, we look at their record. We check whether their situation has changed, whether they have gone bankrupt, whether they have been charged with criminal offences, or are in arrears with alimony payments, for example.

The Chair: Mr. Lemay, you have used up your 12 minutes, just as Mr. Moore did before you.

Mr. Comartin, I give you the floor with all the generosity you know I have.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Like all lawyers who work in the courts, Mr. Lemay does not know how to count, and our minister is turning out to be a very difficult witness for the same reasons.

[*English*]

Thank you, Mr. Minister, for being here.

Hon. Irwin Cotler: I cited you before you arrived, I should tell you.

Mr. Joe Comartin: I apologize for being late, but I was composing a memo I had to send.

Mr. Minister, I say this in all honesty to you: no one is questioning the role you've played with regard to appointments or in terms of any politicization of the process, but I would ask you to be open enough to recognize these facts. The current committees are not all composed of members you appointed. Now, I said this to you in the House and I repeat it here. The reality is, my experience today is no different from what it has been under previous ministers, whether they be Liberal or Conservative, and it is that in my community and in the province of Ontario—and I know a lot of the practising bar were the major candidates for these positions—it's just a given that if you're not associated with or have some association with the party in power, you don't even apply. That's still the reality today. Even if we have completely, perfectly depoliticized the process, that message has not gotten out to the community, the legal community in particular.

My question to you is, can you see any way to get the screening committees and the people who do the interviewing appointed in a more transparent fashion so they're not seen as simply appointments coming from the government in power?

● (0955)

Hon. Irwin Cotler: I think the question itself illustrates the dilemma we have. The question was posed in the best of intentions—I want to make that clear. But as you put it, and I'm in fact almost quoting directly, are the current committees not composed of people I have appointed? If that impression is allowed to be appreciated publicly, then it can be seen that this is a hand-picked committee by the minister.

The point is I have no role whatsoever in four out of those seven. In other words, you've got one representative from the judiciary, one from the Canadian Bar Association, one from the provincial law societies, and one from the provincial attorneys general—each and all of which are respectable entities. They make the appointments they deem appropriate, and their reputation is at stake if they would ever appoint a political hack. I would assume each of those organizations—the judiciary, the Canadian Bar, the law societies, and the attorneys general—as I said, will appoint, and have appointed, distinguished representatives. That's four out of the seven, and it's important.

Now you get to the three I have the responsibility for. With regard to these, what I would seek to do is look at the four that have already been appointed, then say of the three, two must be lay people, non-jurists. So how do I provide a committee that would have balance in terms of gender, region, and language? For example, if I look at the four, and *par hasard*, each organization appoints a male, I say, I've got four people on this committee and so far there are no women. With regard to the exercise of my discretion, at least I better look to see there is a woman there. Or in terms of the region, I better look to ensure where I can have regional representation, or minority representation, or whatever.

With regard to the three, I've been thinking about it, and I said to myself, well, maybe I shouldn't have three people, maybe it should be only two. After the other four do their nomination for committee, I believe it's valid for the minister to take into account those factors, as I mentioned. And if the minister were to appoint somebody who's a political hack, he or she would feel the weight of public scrutiny and critique.

You have to take seriously who the other three are. I'll tell you I've been thinking of something, and I'm throwing it out. I'm prepared to consider giving up one of my three people. Frankly, I thought I might do so by suggesting that the council of law deans in a particular province make one of the nominations. The reason for that is because we have a representative there from the judiciary, from the law society, from the provincial attorneys general, and another from the Canadian Bar, but we don't have anyone from academe. You've heard witnesses from academe and the like. There are professors who specialize in the question of judicial appointments. Why not say to the council of law deans, you appoint one of the three people I now appoint? Then you'd have five people I have nothing to do with, and I would appoint only two who would be lay people with regard to the considerations I mentioned.

I am prepared to look into those possibilities and at any suggestions you would make. With regard to the other point you made when you said only political-affiliated people need apply—or let me be more crude about it, only Liberals need apply currently—my sense is that when the Chief Justice, or the president of the Canadian Bar, or the provincial attorneys general decide to appoint somebody onto this committee knowing the public accountability, they would think twice about doing so simply on political affiliation. I don't deny it may be done. I'm just saying there is a sense of public accountability here.

● (1000)

If we make the names public now, with that transparency, people will have to say that it's no longer secret who's on there. So if I'm appointing somebody and it's going to now be subject to public scrutiny, I'd better make sure I'm appointing the best possible person.

Mr. Joe Comartin: Mr. Minister, it would also give me—and I suggest this to you—additional consolation if one of these eight points had a specific provision in it that political affiliation was not to be considered. It's not in the eight points you have in your code of ethics, that I can see. If it is, it's in a very general way. I know they're not to ask questions, but I think a stronger statement in number three with regard to it not being a factor would be more effective. You may feel you've accomplished that.

Hon. Irwin Cotler: I'll tell you that certainly your intention and objective I share. I thought we had accomplished it, because we said here with regard to the code of ethics: "No questions concerning a candidate's political views or political affiliation are to be raised."

One would assume that this is the case, because none of the criteria in respect of which an application is made contain any reference to political affiliation. So we made that clear, and then we added:

> If a candidate has mentioned active participation in a political party as part of his or her social involvement, no inference, favourable or unfavourable, is to be drawn other than the indication of the candidate's capacity for social involvement.

If you feel that it needs to be further clarified, I'm certainly open to it. Clearly the intention is that political affiliation is utterly irrelevant. It should neither factor in to assist, nor should it factor in to exclude.

Mr. Joe Comartin: I have just one more quick question. In the process of names being given to the advisory committee, do they see every single name of the people who have applied for that position?

Hon. Irwin Cotler: Every application is vetted by the committee. That's why these committees are sort of standing committees in place, and that's what makes it different to put up a new committee every time there is a candidate, because there is a need for continuity in the process in respect of which the candidacies are assessed. They look at every application, and they then make their judgment as to whether a candidate is to be considered highly recommended, recommended, or not recommended—that is, other than if we're talking about provincial court judges; they're not factored into that process.

[*Translation*]

The Chair: Thank you.

[*English*]

Hon. Irwin Cotler: In other words, the process is one with regard to lawyers who present their applications. Suppose you have an opening on the superior court. The provincial court judge does not enter into an application process. There's some presumption, I guess, that the person already went through a process. I have to say that in terms of provincial court judges, I've taken the view—and I took the view only when I found out that the view apparently had not been exercised before—that there's no reason why somebody on a provincial court should be excluded from elevation to a higher court or to an appellate court.

In one of my appointments, I elevated somebody from the Provincial Court of Québec to the Court of Appeal of Québec, but then I read afterwards that it was the first time a provincial court judge was ever elevated to the court of appeal. But he did not go through the application process, which is one that lawyers go through, not provincial court judges.

[*Translation*]

The Chair: Thank you, Mr. Comartin. Your 12 minutes are up. We will move on to Mr. Macklin.

Mr. Macklin, you have the difficult task of trying to keep the minister within the time he has.

[*English*]

Hon. Paul Harold Macklin (Northumberland—Quinte West, Lib.): Thank you very much, Chair.

Thank you, witnesses, for sharing your time with us today.

In reflecting on this process, clearly I think there have been great strides made in going forward. The question that arises, I think, is how we may refine this from where we are today. Yesterday it was interesting to listen to Mr. Trudell, who represented the Canadian Council of Criminal Defence Lawyers. He related his experience of sitting on the advisory committee for a number of years as a representative.

In that process, he has come to the conclusion—and I would suggest he was fairly persuasive—that maybe there is room for an interview process within the structure, whether it were to be with the original advisory committee or in fact with a subsequent screening committee. I'm not sure anyone has defined how it might be created.

He was of the belief that having gone through an interview process with applicants, obviously protecting their confidentiality, they were able to discern as a committee certain members who had been highly recommended who in fact likely shouldn't have been, or who would fall into a slightly different category once you had the opportunity to interview them; and conversely that some who were just recommended in fact rose in the opinion of the committee to a higher level and would have qualified themselves more as "highly recommended".

So the question is whether there is room for a process of that nature to be brought in as a refinement to the process we have before us, and secondly, whether there is room, if there were such a screening process, to consider having a more refined job description. In other words, if you were looking for a candidate from that broader pool, is it possible that a job description would be appropriate; in other words, that you not only have a pool, but would refine the pool as a job or a posting became available? If that appointment were available with a description, would it be helpful for that committee to use that description in their screening process and to bring forward, shall we say, a more refined group of candidates for your consideration?

● (1005)

Hon. Irwin Cotler: Let me respond. I read Mr. Trudell's testimony and I appreciated his appearance and his testimony. I have to say his testimony reflected some lack of understanding of the process; I sometimes find this in some witnesses' testimony. They were well-intentioned recommendations—for example, that eligibility criteria for judges be made public. Well, in fact they right now are public on the website of the Commissioner for Federal Judicial Affairs.

It says community representatives can be included on these committees along with lawyers and judges. In fact, they are included; I have to choose two community representatives, so to speak, who are not lawyers and judges in my approach.

Qualifications and the make-up of the advisory and interview committees can be made public. Well, we've sought to act on that particular recommendation of his today, by making public a code of ethics for the members of the committee, as well as by the publication of guidelines and a mandate letter.

Then, both Mr. Trudell and Professor McCormick wanted to reduce my discretion in selecting the successful candidate by forcing whoever is the minister to select from a list put forward by the advisory committee. Well, I have to select from a list put forward by the advisory committee; that's how the process works, in fact.

In other words, a number of things that have been said by your witnesses reflect a lack of appreciation of the committee, asking that things be done that are in fact already being done now. However, having said that, in the matter of the interview process—because that was one of the recommendations of Mr. Trudell—my position is, frankly, it's up to the committee. There's nothing that stops a committee from engaging in an interview process. I don't prescribe to them to interview or not to interview. If the committee should feel it is appropriate for them to do so and the opportunity presents itself, in terms of time constraints and otherwise, and if they feel that there's a value to doing so, that's fine.

In other words, as it now stands, a person applies to be considered for a judgeship, and there are some 16 criteria that are identified as merit-based criteria relating both to professional skills and personal qualifications, and the committee then vets that candidacy with respect to the 16 merit-based criteria.

Will it assist to also have an interview? I don't know. If it would assist, is it possible logistically to do so? When you have the large number of applications you have to consider, and given that the committee members are operating in a pro bono or voluntary capacity—and when I met with them, they indicated to me the literally hundreds of hours they are putting in now in a pro bono capacity without engaging in interviews—would interviewing, as I said, be possible from a logistical point of view? And would it assist from a merit point of view? I leave that determination up to the committee.

Did you have another related concern?

● (1010)

Hon. Paul Harold Macklin: The question was, is there any merit, when a job becomes available—a posting, an appointment—that the description of the posting...? In other words, whether the chief judge was interested in a specific background of an individual candidate—would it be helpful to make sure this was brought to the attention of the advisory committee before you actually processed the series of applications?

Hon. Irwin Cotler: Frankly, I think that would be problematic. I'll tell you why. When judge X retires from the bench, goes supernumerary, and a vacancy is open, the committee has already engaged in a process of vetting candidates on the basis of their professional and personal qualifications. At the point of the vacancy opening up, I would have a list before me of highly recommended candidates.

I would engage in my own consultation at that point, on the presumption that the person should come from the highly recommended list. How would I distinguish—you might want to ask this—between highly recommended and recommended? I'd take how the chairpeople of the advisory committees characterized it when I met with them. Highly recommended would mean that a person was truly outstanding; in other words, it would be reserved for that small group that was truly outstanding. Recommended would mean people who were also of superior quality, who were excellent. Therefore if you took someone from the recommended list you would be appointing somebody to the bench who was excellent, but maybe not from that small group that was truly outstanding. Therefore I'd begin with the truly outstanding and vet that.

When I'm in discussions with the chief justices of the courts involved, they might say to me, "You know, the person who is retiring is an excellent criminal law expert. In my court now, given the nature of our docket, I really need that person to be replaced by a criminalist if you can do it." I'd then look at the list of candidates who were highly recommended to begin with. If I went through that list and didn't find a criminalist, I'd look at the list of recommended and maybe find an outstanding criminalist.

In the agreement I made with the judicial advisory committees, if I didn't exercise the presumption to recommend somebody from the highly recommended list, I would go back to the committee and say that I would have chosen from the highly recommended list but the need of the court at the time was for a criminalist. How would you feel if I chose criminalist X from the recommended category, who for all intents and purposes appears to be a superior candidate of excellent standard who would dovetail with the needs of the court? I'd go back and make that point.

I did this in one instance, when for the reasons I mentioned I wanted to go to the recommended category rather than limit myself only to the highly recommended category because of the needs of the court, and so on. I went back and found out, in discussions with the committee, that there was very little to choose from, in a sense. The person who I thought was recommended was indeed excellent, of superior quality, and maybe just a shade below the truly outstanding. But if the need of the court was for a criminalist, okay.

On another example, take recent appointments in a Quebec region. The number of women on the court in the Quebec region was less than 15%, so when I looked at the list, if I felt there was a need for gender equity and sought to choose a woman, and there wasn't a woman among the limited number in the highly recommended category, I might have gone to the recommended category to get a superior candidate who at the same time would have provided gender equity and diversity.

So that's to try to explain to you how the thing has been working.

● (1015)

[*Translation*]

The Chair: Thank you very much. I would simply like to ask one question, which will be very brief, then I will give the floor to the Conservative Party. I will watch my time. I have promised myself that I will take up less than two minutes.

Minister, please be aware that everyone here is proceeding in good faith—we have talked about this—and wishes to find the best way of appointing judges to federal courts.

You quoted me in your presentation, and I'm happy to see that at least one person is reading what I write. However, I have a great deal of difficulty in reconciling your statement to the effect that political partisanship was not a consideration with the statements made by my colleague Rob Moore, who stated that over 60 per cent of judges appointed in Quebec since 2000 had contributed to the Liberal Party. Moreover, if we looked only at judges who came from private practice, that percentage would be 73 per cent. I wanted to point this out.

You said that any process we suggested would have to be constitutional, in that it would have to take into account section 96 of the Constitution, which gives the governor in council authority to appoint certain judges. You imply that restricting discretion could come into conflict with section 96. However, in the same presentation, you said that you had never gone beyond the list of names which were highly recommended or recommended, thus implicitly accepting restrictions on your discretion. You accepted that restriction, and you say that the current process is constitutional.

If the committee does no more than suggest less discretion for you, how would that be less constitutional than the current process, which, according to your own words, does restrict your discretion?

Hon. Irwin Cotler: First, with respect to the study revealing that bench appointees in some legislatures were more likely to have contributed to the Liberal Party and to be Liberal supporters, there might be valid explanations for some of the observations made. However, the study and the way in which it was conducted would have to be looked at in depth, something which has not been done to date.

In a nutshell, the results of this study as set out in the newspapers are not in line with my experience of the process. Even if the allegations were well-founded, all they do is establish a correlation, rather than a causative factor. I repeat that I take no account of someone's political affiliations in the recommendations I put before the governor in council.

Second, I prefer to talk about “final responsibility” rather than “exercising discretion”. You are quite right in that a process which begins by obliging me to make a selection from a list recommended by committee inherently restricts my full discretion. However, this occurs at the end of the process. I'm talking about the constitutional responsibility I had as Minister of Justice and Attorney General of Canada, the responsibility that, at the end of the process, the recommendation is made by myself as minister, and the final decision is made by cabinet.

However, changes and reforms are being suggested, and you may say those changes and reforms would restrict my discretion, particularly in discharging a constitutional responsibility. I'm open to all recommendations, even though they may limit the minister's discretion, provided that constitutional responsibility at the end of the process remains with the federal government.

● (1020)

The Chair: Thank you.

Mr. Moore, the minister has three minutes left. Your questions will be the last.

[*English*]

Mr. Rob Moore: Thank you.

Mr. Minister, my question is, why is there the reluctance to acknowledge what most people who are involved in this process feel is absolutely the way things are? They take it for granted that affiliation does play a part. You mentioned it's not causative but there could be a correlative value when someone is a donor. I would say that's obvious. You're not going to be appointed to the bench just because you make a donation to the Liberal Party. I would think you might not show up, make your donation, and you're automatically appointed, but the correlation, that's very broad. I think all anybody is saying is that there is a relationship there between one's political affiliation and one's appointment. There's a correlation between donating to the Liberal Party and being appointed a judge in this country.

We look to our neighbour to the south sometimes and see very openly a process where affiliation comes into play. But in this country, or at least with this current government, there's a reluctance to even acknowledge that it exists. This is what I hear from you in the face of this evidence that it does play a part. If I go back to my riding in New Brunswick and speak to the legal community there, they would say it does play a part. It goes without saying. Why is there coming from the department, or from you, a refusal to even acknowledge that this is the current climate, it is the status quo, rightly or wrongly, that affiliation does play a part in the appointment process?

Hon. Irwin Cotler: Mr. Chairman, I come as a witness before this committee. I'm obliged as a witness to speak truthfully to the process as I'm engaged in it. If I were to tell you that there are political influences that enter into my decision I would simply not be testifying truthfully. I have to tell you, and tell you categorically and unequivocally, that I do not take into account in any way a candidate's political affiliation, nor, for the most part, do I know what the candidate's political affiliation is. Frankly, I couldn't care less.

As to the question of why I wouldn't acknowledge that there may be a correlation, I did acknowledge that there's a correlation, but there's a difference between a correlation and a causality. You could probably find out that 60% of the people who applied for a judgeship go to hockey games. So what? That's a correlation no different from the correlation of 60% who made a contribution—

● (1025)

Mr. Rob Moore: Mr. Minister, with all due to respect—

Hon. Irwin Cotler: If you'll allow me.... I didn't interrupt you.

Mr. Rob Moore: There's a huge difference. A good number of Canadians from coast to coast do attend hockey games. A fraction of the Canadian public donate to political parties. If you break it down by which political party they donate to.... What I'm hearing from you —

Hon. Irwin Cotler: If you'll allow me to conclude, I didn't interrupt you and I didn't conclude my point.

All I wanted to say in the analogy I was making is that it makes no more difference to me that somebody contributed to a political party than if I knew they went to a hockey game. That's the point. In each case all you have is a correlation: 60% went to a hockey game, 60% contributed to the Liberal Party, and it may be the same person who went to the hockey game as contributed to the Liberal Party. In either case, I couldn't care less. It doesn't influence me whatsoever. That's the point I'm making. There may be a certain correlation, but there is no causality, and that's the issue.

I have to tell you that when you go and speak to your electorate, and to the Canadian public, it doesn't help in promoting public understanding of the process or public confidence in the administration of justice to allow the inference to be drawn that people who are sitting on the bench today got there by reason of the fact that they made a political contribution. I'm obliged to reject this, not only because it's simply untrue, but I've also got an obligation to protect the integrity of those sitting on the bench so they will not be sitting there under a cloud. That's what undermines the confidence in the administration of justice, and that could lead people to go ahead and say they're sure this is going on. If we repeat these kinds of falsehoods, people will think that goes on.

My responsibility is to tell you, on the facts, that this simply does not take place. I would not allow or acquiesce in any process that ever would allow something like that to take place. As I said, all you could find is a correlation no different by analogy from finding a correlation that somebody goes to a hockey game, the cinema, or whatever.

[*Translation*]

The Chair: Thank you very much, Minister.

The meeting is adjourned.

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