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Chair

Mr. Richard Marceau

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● (1530)

[*Translation*]

The Chair (Mr. Richard Marceau (Charlesbourg—Haute-Saint-Charles, BQ)): Good afternoon and welcome to meeting no. 5 of the Subcommittee on the Process for Reappointment to the Federal Judiciary of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness the second meeting of this Tuesday.

With us we have Allan C. Hutchinson, Professor at Osgoode Hall Law School; Jacob S. Ziegel, Professor Emeritus of Law from the University of Toronto; Joseph Di Luca, Director of the Criminal Lawyers' Association; as well as Linda Rothstein and Paul Monahan from the Advocates' Society.

I want to tell my colleagues that Professor Hutchinson will have to leave at five o'clock; that was agreed upon at the start. He apologizes, but he will have to leave for reasons beyond his control.

[*English*]

We will have ten minutes for your presentation and then we'll go to questions and comments. That should be seven minutes, but it usually lasts much longer—but it usually works.

[*Translation*]

We're going to start with Mr. Hutchinson, who has 10 minutes.

[*English*]

Professor Allan Hutchinson (Osgoode Hall Law School, York University, As an Individual):

Thank you for inviting me to participate in this hearing.

What I'd like to propose is to push a little further on the kinds of reforms that have already been achieved and those also suggested, in order that we advance further what I think is the democratic basis on which we appoint the judiciary.

To me, it seems trite to say that what we want to do is appoint the best judges, when it seems that we launch very quickly into how to do that without spending too much time on thinking about what it is to be a judge and what it means to be a good judge. If I could just seek your indulgence for a moment, I would like to say something about that.

Obviously, in a democracy it has become more and more important that with the charter and the shift toward using litigation for social change, our judges have the confidence of the society on whose behalf they act, and for accountability participation is important. But it seems to me to be largely accepted that any notion that judges can simply go about their task in an entirely objective, neutral, value-free way has very much gone the way of most things. Therefore, we need to acknowledge that the identity of judges—and by the identity of judges I particularly mean the values and commitments that judges hold—is an important part of the process.

However much people wish that judges could somehow operate in an objective and neutral fashion, this seems to be something that cannot be achieved, even with the greatest good faith. After all, when we think about some of our greatest judges in Canada, we praise them not simply for their formal qualities. I think of someone like Chief Justice Brian Dickson, who was not just praised because he had a good hold on the law or because he understood logic or argument. People liked him, praised him, because of the values he held and the commitment he had toward social justice. He was a great judge, not in spite of his values, but because of his values.

Therefore, when we're looking for the best people, it's important that we recognize the values they bring. Any system of appointing such judges must therefore acknowledge and be able to inquire into the values judges have. I don't think this is to expose the system or to undermine it. In fact, far from it; I think it's to strengthen the system.

How might we go about doing that? In recognizing that judges resort to values, the best people for the job can be seen in a couple of ways. One, it's important that they're representative of the society of which they're a part. This of course means that the judiciary is much more representative than it presently is; although various efforts have been made to make the judiciary more representative, it's important that we push that along.

But it's also important not just that they be representative and therefore diverse, but that they also are seen to be meritorious in terms of having the kinds of values we wish to advance as a society. Therefore, it seems important to me that we elaborate a process whereby those values can be explored. When judges are utilizing values and are accused of such things as activism—and I should say activism always sounds good to me; it always seems to me that the older you get and the more active you can be, the better it is, but activism nevertheless is seen as a bad thing for judges. Enhancing the legitimacy of the judges, particularly insofar as they hold judgment upon the actions and decisions of our elected representatives, seems important.

What I'd like to suggest is to push a little further in the process, which has been initiated and continued by Minister of Justice Irwin Cotler and by other recommendations, and say that we do need a standing commission in order to do this. This commission should be represented by various constituent groups. It should be an independent commission, a commission that has the power both to select candidates and to appoint candidates, and not merely to recommend candidates. This commission might be representative of three constituencies, and in terms of it perhaps having something like 15 members, it should have five members from the House of Commons, five judges, and five citizens.

● (1535)

There are other formulas that one could use, of course, but I would then empower this panel, which would have a tenure of something like three years, both to fulfil a traditional role of interviewing applicants and to be proactive in seeking the people to be on the federal bench. It seems to me to be particularly important that the commission does not sit back, but takes an active involvement in seeking out the best people to be members of the judiciary.

I am prepared to say that such interviews should not be in public and that they should be rigorous and testing events, but the decision of any committee should be final and direct. In this way, when one looks at comparisons with what goes on in the United States with things like George Bush and Harriet Miers, for instance, then we can avoid that kind of problem and hopefully obtain people who have been validated by an independent body that not only represents the best of the legal profession, but also, most importantly, seems to have the kinds of values that are not simply accepted as something that goes with the judge, but values that go to the very heart of the particular judge and go to the heart of adjudication.

I think we have begun a good process of becoming much more serious about how we appoint our judges, but we still have a long way to go. I would suggest that boldness in this regard would have great benefits and pay great dividends to not only the parliamentary process but to the democratic process at large.

Thank you.

[*Translation*]

The Chair: Thank you very much. You took only six minutes.

Mr. Di Luca, over to you.

[*English*]

Mr. Joseph Di Luca (Director, Criminal Lawyers' Association): Thank you, Mr. Chair, members of the committee. The Criminal Lawyers' Association welcomes the opportunity to appear before the subcommittee on what is obviously an issue of fundamental importance to the administration of justice.

Our organization represents approximately a thousand criminal defence lawyers in the province of Ontario. In many respects, along with the crown attorneys—whom I do not speak for but who no doubt would join me in many of my submissions—we are the front-line workers of the justice system. We all share in a belief that the judiciary should be strong and independent. It is obviously the cornerstone of a fair and properly running democracy and justice system.

Our day-to-day work before the courts will always confirm the need for an existing judiciary that is free and independent, not one that is subject to having its views subject to reprisals after the fact, or even before the fact for that matter. We know first-hand that judging requires a very high degree of skill. It's a difficult job. Fairness demands that it be done properly. We are obviously in full support of any appointment process or appointment mechanism that places merit as its number one criterion for appointment.

Looking back, we cannot say the current process is fatally flawed. Obviously, by far and large, the quality and calibre of the majority of judicial appointments is already beyond reproach, but it is a system that can bear improvement. The public must have confidence in the process that selects judges. The process should not be shrouded in mystery. It should be visible, it should be accessible, and it should be transparent. We support an appointment process that is aimed at selecting the best candidates for the job, and we support an appointment process that is open and understood.

In that regard, our main proposition or proposal to this subcommittee is the adoption of a judicial appointments advisory committee similar to that which is already in place provincially in Ontario. It is a committee that was modeled on the work of Professor Russell. It is a committee that, in our respectful view, has dramatically heightened both public awareness and public acceptance of the judicial appointment process provincially in Ontario, and it has produced a better judicial product and a better judicial system on many levels.

In this regard, the Criminal Lawyers' Association specifically supports the following: the creation of a similar judicial appointment advisory committee for each province, or perhaps regionally within each province if the need is that great.

This committee, or set of committees, could be run under the auspices of the Commissioner for Federal Judicial Affairs as an independent or at least arm's-length body for the administration of the committees.

The committee members, structure, rules and principles should be readily available to the public, be it on the Internet or in some other form. An interested member of the public should be easily able to discern the workings of this committee.

The committee should be comprised of a variety of judicial, legal, and lay members who reflect the cultural diversity of the Canadian populace and respond regionally as well to various concerns.

The actual composition of the committee is subject to debate. I don't think it really matters whether there are seven, nine, five, six or fifteen committee members. As long as it is representative and divided and publicly known, I think that is the real key we are looking for.

At a minimum, the legal representatives on the committee, be they from the respective law society of the province or from the Canadian Bar Association, should be legal members who are advocates before the court. They should be lawyers with a civil, family, or criminal law background, seeing as they are working toward an appointment process geared towards selecting trial judges or appellate judges who will deal with those types of issues.

Whether the committee considers establishing a set of standards to govern appointment to the committee is an option, but the committee members obviously should be in a position to contribute usefully to the judicial selection process.

● (1540)

The terms of the committee members must not be too short. To use a colloquialism, the committee needs to gel over a period of time in order to assess a number of applicants who feel the community need and respond to it adequately. Conversely, though, the periods shouldn't be too long. They shouldn't permit or provide for too many successive appointments of the committee so that it stagnates. A proposal would be either three or four years, with a maximum of one or two terms. That's just a consideration to keep in mind, and it shouldn't permit for stagnation.

The judicial positions should be advertised. Someone should be able to look in either a legal magazine or a legal publication and say, yes, there is a judicial vacancy for district X in whatever province. That provides public awareness that the process is going to be engaged, it permits the committee to publicly accept applications for a specific judicial district, and it is demonstrative that the committee is acting in an open and transparent fashion.

The Criminal Lawyers' Association supports a three-stage review process. The first stage is a threshold screening stage aimed at weeding out the weaker applications or the applications not likely to result in a recommendation. The second stage, or what we would call the confidential inquiry stage, is a stage at which confidential inquiries are made through senior members of the bar or the judiciary and community members. Subsequent to that, there should be an interview stage, in our respectful submission.

The interview stage can be restricted to those candidates who successfully pass the first two stages, so that it's not overly onerous. Not every candidate who applies should be getting an interview, much like in any job in the business world. However, there should be an interview stage, because these are people who will populate the trial courts, the appellate courts, the front lines of the justice system. I think the committee owes it to the public to interview these people to see whether the qualifications they profess on paper manifest themselves optically and facially, once you meet them face to face.

The end result, in our submission, should be a short list of candidates for a specific job posting. That list should be submitted for consideration. While we would prefer having candidates ranked and the selection made in that process, we accept, for the time being, that it may be best to leave a short list of three to five, to have the ultimate decision made on that basis, and to have the judicial officer chosen from that list.

The one thing we would insist on is that the list should be a final list. It should not be rejected in its entirety, and appointments should not be made off-list. I say that for a number of reasons. One, if we are to enhance the transparency of the system and give the public confidence that we are intent on a proper judicial appointment process, the judges must be chosen as a product of the work of the committee. If the committee works, appoint those people.

Finally, I should say that the process for reviewing the applications must remain confidential. It is a very difficult choice to make on behalf of any advocate. If the person is not chosen for judicial office, it should remain a private matter that they can address on their own without having it publicly known.

Ultimately, in our view, if we have a selection process that is transparent, based on merit, and respectful of confidentiality, the applicants who apply and are chosen will not only enhance the public perception and understanding of the process, but will also enhance the administration of justice on an overall basis.

Those are our submissions.

● (1545)

[*Translation*]

The Chair: Thank you very much, Mr. Di Luca.

Professor Ziegel, you have 10 minutes.

[*English*]

Professor Jacob Ziegel (Professor of Law emeritus, University of Toronto, As an Individual):

Mr. Chairman, how many minutes do I have?

The Chair: You have ten minutes.

Prof. Jacob Ziegel: Mr. Chairman, members of the subcommittee, I'm very encouraged by what I've heard from my colleagues up to now, and I'm also encouraged by the submission that I understand you'll hear from the Advocates' Society of Toronto. I think this indicates that among outside observers there's a high degree of consensus both about the existing shortcomings of the existing system and what a revised system of judicial appointments should look like. In addition to commenting on the shortcomings of the existing system, I'd also like to address one of the other terms of reference of this committee, and that is to what extent it is appropriate for a selection committee to consider the political views of candidates for appointment to a federally appointed court.

I turn, first of all, to the shortcomings of the existing system. As members of the committee will know, the existing system is based on recommendations partially adopted in 1988 by the then Mulroney government, based in turn on recommendations made by a special committee of the Canadian Bar Association and a special committee of the Canadian Association of Law Teachers. Both committees recommended the appointment of advisory committees for each of the provinces as far as provincial courts were concerned. Those committees would compile a short list of names that would be presented to the Minister of Justice. The Minister of Justice would then be confined to choosing one of the names on the short list.

These committees were called—and still are called—advisory committees. However, in the system adopted in 1988 and still in existence today, they are not advisory committees, members of the committee; they are screening committees. Their only function is to determine whether, in the committee's view, a particular candidate or appointment is recommended or highly recommended, or whether the committee is not in a position to make a recommendation. That is a vast difference from the advisory committee that actually compiles a short list of names from which the Minister of Justice and the federal government are then obliged to make their appointment.

Under the existing system, there is ample scope for the Minister of Justice or cabinet colleagues to continue to indulge in politics and personal preferences in appointing candidates who are partial to the incumbent government. These are not idle speculations, it is important to recognize.

One of the reasons this subcommittee was established was because of the scandal that emerged during the summer, when it appeared that something like 10 out of 20 members of the Liberal Party campaign committee had been appointed to the bench because they had intimated that this was the form of reward they were seeking for their otherwise gratuitous services to the Liberal Party.

Also, members of the committee will know that subsequently at least two other newspapers—the *Montreal Gazette* and the *Ottawa Citizen*—conducted inquiries of their own and discovered that a high percentage of the judges appointed in Ontario and the western provinces since 2000, a very high percentage, had made political donations exclusively to the Liberal government in the years preceding their appointment to the bench. In other words, there appears to be an understood text among Canada's judicial office that if you want to be considered sympathetic, you had better send a signal to the government in power that you support that particular administration.

In short, what I am saying is that the existing system of appointment is deeply flawed. It is not transparent. It is not objective. It is not based solely on the merits of the individual candidate. All kinds of extraneous considerations come into play.

Now, our Canadian Constitution guarantees the independence of courts in reaching their judgments, expressing their opinions, but it doesn't appear to guarantee the independence of the system for selecting the judges. With all respect, this is what this committee ought to be aiming for. I understand my colleagues endorse this position. I find it tragic that in 2005, which is 140 years since Confederation, we're still arguing over the principle of independence in the selection of judges. We still treat appointment of judges, at least to some extent, as being partisan, as being the gift of the government.

● (1550)

The present Minister of Justice has made great play of the fact that under the Constitution, the federal government has the responsibility for making the appointments. That statement needs to be qualified. All section 96 says is, “the Governor General in Council”. It does not say that the federal government, much less the Minister of Justice, should make the anointment. As for the Governor General in Council, anybody theoretically can be appointed a member of the council. I see no reason why the members of advisory committees of the different provinces, if it's necessary, could not be appointed members of the Governor General in Council for the purpose of advising on appointments to the bench. I view this as a red herring, to inhibit the adoption of a truly independent, transparent, and fair system.

Let me also add this. We always focus on the appointment of new judges and we neglect the interests of incumbent judges. We have many highly able judges on the trial bench who ought to be considered seriously for elevation to the courts of appeal. This does not happen at the present time because elevation of judges is viewed as being an exclusive prerogative of the federal government. There's no accountability, and there's no advisory committee that is involved. There is a complete lack of transparency. I think this is grossly unfair to sitting judges, some of whom, to my personal knowledge, are of outstanding quality and should have been considered for elevation long ago. I think as is true at the universities, as is true in many public institutions, where there is an established system of promotions for those who feel themselves eligible and desirable of promotion, they are entitled to make such an application, and the application would be considered in some transparent and objective manner. We need a comparable system with respect to elevations at the provincial level and indeed at the Federal Court level.

Let me turn finally, Mr. Chairman, to what may be a more controversial aspect of my brief, and that is the relevance of considering the political views or biases of candidates for judicial office. Obviously, the legislation establishing recommended federal judicial appointments advisory committees will have to indicate, at least in broad outline, the criteria to be employed by the committee in going about their work. In principle, the political affiliation or ideology of a candidate should be irrelevant. The overarching question should be whether he or she meets the appropriate high standards of professional competence and personal suitability and integrity.

This is not to suggest that the committee may not take into consideration known biases of an applicant—biases that cast serious doubts on his or her ability to decide cases impartially. A relentless critic of capitalism or a notorious misogynist would be a dubious appointment to a commercial or family law court. Similarly, in my view, the committee will be entitled to consider whether a committed activist sovereignist could be relied upon to impartially decide—to the extent impartiality is plausible in constitutional cases—a constitutional dispute between the Quebec government and the federal government. If the candidate has shown by his or her prior conduct the capacity to separate his personal views from his professional responsibility, then he or she should be eligible for appointment. There should be a strong presumption that an otherwise qualified candidate will leave his politics outside the court once he or she is appointed to the bench.

● (1555)

And I go on to say in my written brief that the position expressed in the preceding paragraph is amply supported by the current controversy in the United States involving the appointment of justices to fill vacancies on the U.S. Supreme Court. Both opponents and proponents of particular candidates have made it overwhelmingly clear that ideology does matter in key areas and is legitimate, and that it is essential to determine what the candidates' views are on such topics as abortion, women's rights, the role of religion in schools, and the scope of the U.S. federal government's commerce power before voting for or against the nominee's appointment.

It would be naive to pretend that the same is not true of judicial appointments in Canada involving Canadian-oriented issues of similar sensitivity. However, there is this important difference: the issue is not likely to rise nearly as often in appointments to the trial bench at the provincial level in Canada. Importantly, too, the interposition of the advisory committees, which we all agree should be established, between the candidate and the federal government, should optimally ensure that the candidate is judged fairly and is not dismissed out of hand because he or she belongs to the wrong party or holds minority views. The question, I venture to emphasize again, should be whether the candidate has demonstrated his or her capacity for separating their personal views from their professional responsibilities if they were to be appointed to the bench.

● (1600)

[*Translation*]

Thank you, Mr. Chairman.

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

[*English*]

For the Advocates' Society, will it be Ms. Rothstein or Mr. Monahan?

Ms. Rothstein.

Ms. Linda Rothstein (President, The Advocates' Society): Thank you very much, Mr. Chairman.

I've had the honour of being the president of the Advocates' Society for a year. Permit me a word about who we are and what we do.

We are an organization of more than 3,100 members who make their living as litigators—to use the increasingly outdated English expression, as barristers. We appear before the entire range of courts, criminal and civil, provincial and federal, and the wide range of administrative tribunals. We also have some judicial members, both sitting and retired judges, as well as some arbitrators and mediators.

I think it's safe to say that we are, as a group, to a person, keen, hopefully astute observers of judges and of the business of judging. For us, talking shop means discussing what makes a good judge and just as often, I suppose, what makes a bad one.

Let me say something about our mandate. I hope I don't sound too defensive, but our mandate is to promote high standards of competence and professionalism in the bar. It's to promote access to justice, enhance the administration of justice, and defend the principles of an independent judiciary. We do not fashion ourselves as a trade union. We believe that advocating for the interests of our members can be left to others, and that as a group we have to defend the public interest that is served by a robust and compassionate justice system. That is our overriding objective.

Most of us at the Advocates' Society use our skills and abilities as advocates to ensure that the gifts we've been given as professionals—and they are many—are given back to society.

We struck a task force a number of years ago, back in 2004, when the issue of judicial appointments first reared its head here on the Hill. The task force consulted broadly in our organization, including with sitting members of the judiciary.

While there is almost invariably debate among our membership about everything, because that's what we do best—debate—and while there is almost never agreement around our table about substantive legislative change, let me tell you that when it came to the selection process for judicial appointments, we found remarkable consensus.

We have not got as finely a calibrated position as my friend representing the Criminal Lawyers' Association has presented to you, although I'm sure many of my board would agree with some of the finer elements of their proposal. But let me just underline for you what we think the principal essential planks are. You will find these set out at page 6 of our written submission.

The overarching goal, of course, we all agree on. It is public confidence in the process, and ensuring not just that merit dictates—because we actually think that is too watered down a conception of the point—but that the best and only the very best are appointed to the bench. I emphasize that because we are blessed in Canada, I think most would agree, with a remarkably large talent pool from which to draw. For whatever reasons, being a judge is still reasonably popular. It is still well paid, it is still a job that we all hold in high esteem, and it is still something that many of our members eventually aspire to.

So in order to ensure that the process meets those objectives of increasing public confidence in having obtained the best and only the very best, we believe we have to make every reasonable effort to eliminate political partisanship and political connections, or the appearance of either, because, as all of you will know around this table, the appearance of those things is as damaging to public confidence in the end as the fact of them.

What we have suggested to you is a recommendation that says it's not just merit that should dictate, but all appointments must be measured against the gold standard of excellence and meet that standard.

● (1605)

While we do not judge the current system quite as harshly as do perhaps some of my colleagues—Professor Ziegel, who calls it sorely defective, and Professor Hutchinson, who says we need bold and dramatic change—we absolutely agree that it can and should be improved.

The current system is worth thinking about for a moment because it effectively groups candidates into three categories: those who don't make it at all, those who are recommended, and those who are highly recommended. Of course, the Minister of Justice is entitled to pick from the last two groups.

If one thinks about it for a moment, one realizes that not only does this accord great discretion to a minister, but it actually entitles him to choose a recommended candidate over a highly recommended one, assuming appropriate due diligence, all the consultation, and all the rest. To put it really frankly, it allows the minister to choose the B candidate over the A or A-plus candidate. That can't be right. Whether it happens with frequency or not, the mere fact that the system allows for it—and people don't of course know on the outside where the particular appointee fell in those two groupings—necessarily erodes the public confidences that we believe Canadians seek and are entitled to.

We say one must remove this kind of latitude from the discretion of the minister and adopt what we've set out as a short-list system, which could be seen as a system that says excellent candidates only should be considered. Then the job of the advisory committee or the selection committee wouldn't simply be to determine the threshold of qualified, but the very best—excellent only. This would ensure that only the most qualified candidates were chosen and that the Minister of Justice had the hands-on benefit of the direct consultations that were undertaken by the committee, because he would have the opportunity to choose from this very short list only.

In the minutes remaining, let me take you to the second recommendation Professor Ziegel has made a point about. Like Professor Ziegel, we agree that the process for sitting judges is sorely lacking. There just isn't one, and that can't be right. It can't be right that sitting judges don't really have a transparent and obvious process by which to make their interests known. It doesn't make sense to us that there is no assessment of sitting judges and their suitability for higher appointment.

What we have suggested at pages 7 and 8 of our brief is that all sitting judges be provided with an opportunity to indicate their interest in appointment to a higher court by completing an application form, and that there be an assessment process with all the guarantees of due diligence with respect to that application, much as is done now for those appointed to the bench for the first time.

Thank you very much.

[*Translation*]

The Chair: Thank you, Ms. Rothstein.

We'll move on to the period for questions and comments. Mr. Moore, you have the floor for seven minutes.

[*English*]

Mr. Rob Moore (Fundy Royal, CPC): Thanks to all the witnesses for your very interesting comments. I appreciate your recommendations. In listening to all of you, there seems to be a bit of consensus that we at least want to have an open, fair, and transparent system that is above reproach and above question. I think that's the goal of most of us on the committee also.

I've questioned the Minister of Justice a number of times on these issues, and sometimes the defence is that we shouldn't be questioning the process because we're impacting Canadians' views on particular justices; that you're bringing into question their qualifications. I don't think that's the intention. Many of us are not arguing about the fact that these individuals are on the bench; we're just questioning whether we can have a better system of making these appointments.

I guess there's the old adage that in order to make a change you have to admit you have a problem. My question for all of you is, why has there traditionally been reluctance to admit that patronage does exist? Some of the evidence I read about recently was referenced in a Montreal *Gazette* story about the appointment process. Some of the stories that sparked the creation of the subcommittee and the demand for its creation were that patronage does exist, and one's political affiliation does impact one's appointment to the bench. I guess I wonder why there is reluctance in the Canadian context to admit that, when the evidence shows it does exist, rightly or wrongly. There is a connection.

On my second question, why is there reluctance in Canada to admit that a judge's personal value system, their past work, or their social circle would impact the outcomes of their decisions? A couple of the witnesses referenced what we're seeing now in the U.S. My first recollection was with Clarence Thomas. But it's very open and out there that these individuals' value systems are being debated. There's very much an openness that his background...or currently Harriet Miers. Everyone is wondering where she stands on all these issues, because they recognize it'll probably affect the outcomes. It's being debated whether there were some predetermined outcomes in her process.

So my question is on those two things. Why do we not recognize that patronage exists now, and why is there this reluctance to bring those issues into the process?

● (1610)

The Chair: Who are you directing your questions to?

Mr. Rob Moore: They're to anyone who wants to answer.

Ms. Linda Rothstein: I'll take the second one. Let me just take a slightly different approach from Professor Hutchinson on the issue of values. If you get outside the Supreme Court process and you look at what judges do day in and day out in courtrooms in Ontario, British Columbia, and across this great country, it's really different from what gets portrayed in the newspapers.

What gets done in most courtrooms, most of the time, puts all the reporters I know to sleep in a nanosecond. It is built on the most tedious recitation of factual minutiae one can imagine—only lawyers and judges seem to have the patience for it. It has very little to do with broad issues of public policy, but whether or not, for example, an obstetrician in the course of a complicated labour made the right decision in electing to do a mid-forceps delivery instead of a Caesarean section, and whether or not they made that determination in the labour room instead of the delivery room; that's a real case, of course, which I just read in the "Ontario Reports" on my way here to Ottawa. Courtrooms deal with that kind of case.

I guess as lawyers we resist the argument that a probing analysis of someone's values and fundamental ideas—if we could figure them out in any reliable way—would assist us in deciding whether or not the person in front of us would be a good judge of the issues in that case, because we believe that the best judges are the ones who actually listen carefully, consider the law, apply the facts, and use good judgment. I can't give you a list of the values that would fundamentally guide the judge and that could be detected in an interview process, or by any other means that I know.

So that's why I think lawyer-like groups traditionally resist the notion that this is all fundamentally about ideology, or this is all fundamentally about politics, because the business of judging, for us, 99% of the time, isn't about that. Compassion is important, honesty is critical, integrity is absolutely mandatory, and some considerable intelligence is absolutely necessary.

But as for values, assuming that someone is fundamentally ethical and believes in Canada and our fundamental values as a country, we can't be more precise than that, in my view.

● (1615)

Mr. Joseph Di Luca: If I might add something to that, on a very brief note, and leaving aside the issue of bias for a second, every human being walks through life collecting baggage—emotional, historical, family, experience, whatnot—that bears upon any decision or judgment a person makes ultimately.

I think from a judging perspective, the criteria that Ms. Rothstein just listed are what make a good judge. What underlies those are not so much the presence of biases, in a sense, but the ability to disabuse oneself of biases in conducting the judicial function. Right?

I think the great judges are the ones who can go through life informed by all the history and paths they've taken, yet approach a matter with an open mind and open ears and compassion and understanding. So while they may be ardent constitutionalists or they may be ardent anti-abortionists in their private sphere, the ability to disabuse themselves and come at a judging problem with the criteria that Ms. Rothstein just mentioned is probably what makes them a great judge.

Prof. Jacob Ziegel: If I may, I'd like to address myself to both questions.

Your first question was why governments are reluctant to admit the role of patronage. Well, why is the king reluctant to admit that he is naked? The answer is because he would find it indefensible if they said, "I appointed Joe because he's a member of the party, he's a good friend, he needed to rest from the hard work of being a practising lawyer", or "I appointed so-and-so as chief justice because he was politically supportive and I thought he had served the country well and I thought he would be a reasonable chief justice". These are not fictitious reasons; they are genuine reasons.

We are embarrassed, it seems, in Canada to admit what we all know is happening. We must bring out into the open that which has been hidden for far too long. I think it's part of the sign of a maturing society. As all my colleagues have said, we've come a long way since 1867, but there are still more miles to walk. I think it's incumbent upon all of us for the next generation to ensure.... We will never reach an ideal stage. We are not seeking Utopia. We are seeking something that reflects our maximum attainable maturity in a highly imperfect world.

As someone who has tilled this particular vineyard for many years, what has troubled me is the reluctance of too many politicians, once they get into power, to relinquish this extraordinary patronage power. This is extraordinary. Judges will make, under the latest round of increases, close to $230,000. They probably have the best pension system in the country. They have interesting work. They have high prestige. Understandably, it is a job that's most sought after, and the giving of the job confers great patronage powers on the members of the cabinet. They would be less than human, I suppose, if they did not exercise them. Our role should be to protect them from the weaknesses of the patronage power. I'm saying you have lots of scope for your patronage powers in political areas, genuinely political areas, but appointing judges is not all within this sphere.

Now, with respect to the ideology of judges, I don't entirely agree with my colleague to the left. I think the reason this issue hasn't been brought up much in Canada is because there has been broad consensus on I think most of the issues in Canada in this century, but increasingly there are important differences of opinion. We saw that in the context of same-sex marriage. There's an acute difference. To suggest, therefore, that judges do not bring to bear a certain amount of baggage—quite legitimately—and that it is not legitimate for outsiders to ask questions about a prospective appointment...and not just to the Supreme Court. I entirely agree with Rothstein that the ideology of Supreme Court members is of critical importance because so often the Supreme Court has the final say on highly sensitive issues of public policy. But it's not only the Supreme Court. Same-sex marriages often were litigated in the lower courts, taken to courts of appeal, for at least five years before they got to the Supreme Court.

So I think increasingly, as Canadians become aware of the enormous powers exercised both by the Supreme Court and the lower courts in interpreting and applying, massaging, if you will, the Canadian charter, questions will be asked about the ideology.

I would like to think it would only be in a small minority of cases, but as you see in the United States, if an issue becomes deeply divisive, questions will be asked about the people who are going to make the ultimate decision.

Again, I think it's a question of maturity. We shouldn't be naive about it and pretend it doesn't happen. Let's bring it out in the open. But my wish would be that we never, never reach the stage in Canada where our societies are so deeply divided that we're busy tearing each other and our system of judicial administration apart. It hasn't happened in the past; there's no reason it should happen in the future. The fact that we are willing to ask questions in appropriate circumstances about a candidate's general ideology is, I think, not a cause for embarrassment, not a cause for defeatism; it is a growing sign of our maturity in addressing the role of judges and addressing the role of ideology in the moving of decisions.

● (1620)

[*Translation*]

The Chair: Professor Hutchinson, please be brief.

[*English*]

Prof. Allan Hutchinson: I can be very brief. I clearly think, as I said, that judges do what they do because of their values, not in spite of them.

If I can come at this in a slightly different way, there is something that I actually admire about George Bush and his appointment of Harriet Miers, or at least the process. There's nothing hidden—Bush wants to appoint people who share his values. We may not like the values he has. I don't like the values he has. But at least there's something candid about what goes on.

To take a step further than Professor Ziegel, I think it's a simple matter: it's the devil you know or the devil you don't know. And Canadians are very happy to have the devils they don't know. I don't think that's the sign of a mature democracy. Insofar as judges are involved in values, the only choice is whether we choose to know them or not know them, and to acknowledge them.

Of course, it's unlikely that people in government will describe what they do as patronage. It's unlikely that thieves describe what they do as theft. But it seems to me that we need to recognize that values are there, and we should not recoil from that fact. We should accept the fact and look to the values that people have.

To me this isn't a denial of our democracy or its aspirations. This is in fact a celebration of our democracy. Therefore, it's all the more important that we know the people we appoint—who they are and what they think.

The most significant decision made in the last while, admittedly by the Supreme Court, was the Chaoulli decision, which was about health care, which I'm sure people know. Nobody could read the decision in that case and pretend this was about professionalism, about integrity. There was all that there. It was the mere fact that the minority and the majority completely disagreed over the nature of health care.

The sooner we bring those disputes out of the shadows and into the light and have a process that admits that, the better we will be and the better we will serve our democratic society.

[*Translation*]

The Chair: Thank you very much, professor.

Mr. Lemay, it's your turn.

Mr. Marc Lemay (Abitibi—Témiscamingue, BQ): I apologize for bringing you back to earth, but I'm down here on the ground. For 30 years, I pleaded as far as the Supreme Court before being elected as a member a few months ago. I'm not the person who will defend the justice system in Canada. However, someone here today will say that the Liberals won't continue appointing Liberals, that the Conservatives won't continue appointing Conservatives and that neither my colleague Mr. Marceau nor I have the slightest chance of rising to the Superior Court. That's clear; that's settled.

There is indeed a certain form of politics, but it must be limited as much as possible. In that respect, I agree with Ms. Rothstein's remarks. What interests me personally is the process for appointing judges to the Superior Court, the Federal Court, Trial and Appeal divisions, and the provincial courts of appeal. On this matter, I'd like us to go into the field.

But how do we reconcile the process so that it is as transparent as possible and, at the same time, guarantees confidentiality for those who apply to be judges? It's false to say that we're going to have public hearings to appoint a judge to the Supreme Court, as there are in the United States. In any case, I definitely wouldn't stay in this country. I hope we never do that. It's false to say that we're going to have public hearings to appoint judges to the Superior Court in which a citizen, a lawyer who has more than 10 years' experience will be screened. That makes no sense. I hope we're not like that in Canada.

We also have to ensure that the process is transparent. I'd like to hear you speak on that subject. As President of the Barreau in Quebec, I sat, over the past four years, on a committee that made recommendations for the minister to select the most appropriate candidate from a short list. But that doesn't happen at the federal level.

In fact, there is an advisory committee that meets to suggest candidates who will be part of a large pool from which the minister draws. Stop trying to make me believe that procedure is democratic.

Could you tell us how our committee could go about making recommendations to the minister so that the process is transparent, that is to say so that candidates know that they need three photographs, a curriculum vitae and so on? How do we go about ensuring that transparency so that the position is open? At the same time, do you believe there has to be an interview in order to make a recommendation to the Minister of Justice and Attorney General of Canada for naming candidates? Can that process apply both for provincial Superior Court judges, for example, and for judges of the court of appeal, where we know the rules are different. I'm not talking about the Supreme Court, but rather about the Federal Court. How do we go about appointing to the Federal Court someone who will have to deal with immigration cases, certificates?

As you can see, I'm very practical. I've done a lot of criminal law. So I'd like to hear what you have to say on the subject.

● (1625)

[*English*]

Mr. Joseph Di Luca: I'm happy to start.

I would say having a transparent system is the seed for public trust in the process. This isn't instantaneous. It's not like the first week that the process is transparent or public that the public will gain confidence in the impartiality or lack of partisanship in the appointment process. It will build over time.

The need for confidentiality, in my view, is required in order to permit the most qualified and the most interested candidates to come forward and put their name in the hat, to speak, without fear of either letting colleagues, co-workers, or other institutional sides know that is in fact the move they are contemplating. As you can imagine, having a job and turning to your employer and saying that, by the way, you're putting your name in a hat for another job and having it made public can be precarious to your current employment position. A judicial appointment is not a guarantee. It's a privilege and it's an honour bestowed on, as Ms. Rothstein said, those who should be the best of the best. So I think confidentiality is necessary, but confidentiality can survive if there is public trust in the way the system works.

Ultimately, if you take a look at the Ontario judicial appointment system right now, many people who have been appointed judges in Ontario recently would be categorized as either apolitical or non-political, in the sense that their politics did not match the politics of the party in power. Ultimately, once people start to see that a judicial appointment is advertised, that the process is public, that the committee members are non-partisan to an extent—or at least their partisanship is known—that the process works, and that the minister is appointing from the list that is vetted, approved, and recommended by the committee, a trust will build around the system. The confidentiality issue will be respected as part of the workings of the system, and ultimately the fear of partisanship in the appointment will be lessened.

It's working in Ontario right now. There are a great number of judges, all of whom are of excellent calibre and about very few of whom you would have said it was a political connection that put that person there. In fact, when an appointment is announced provincially nowadays, most people respond by saying the person is obviously a very good choice and they're sure that person will make a most competent judge. That takes a while—and the Ontario process has been on the go for a number of years now. I think it is a process that will take some time, but it does work.

● (1630)

[*Translation*]

The Chair: Do you have a final question to ask, Mr. Lemay.

Mr. Marc Lemay: No, I'll let the others answer.

The Chair: Professor Hutchinson.

[*English*]

Prof. Allan Hutchinson: I understand what Joseph has said, but when we say these appointments are all applauded...by whom? By lawyers. This is a very closed system in which we're taking part. It seems to me that it would be ludicrous to imagine that all judges are good judges, just like all professors are good professors and all politicians are good politicians, because they're not.

I worry that Mr. Di Luca has suggested a system that will benefit lawyers immensely. Lawyers can approve of whom they get as judges and they can have their confidentiality protected. There are very few jobs that you can apply for whereby you are assured that you don't have to go on a list and you don't have to be made public.

It's not clear to me why the private interests of lawyers should trump the public interest in transparency. Mr. Di Luca is interested in transparency—he says he is—and it's important to the trustworthiness of the process. I don't have a problem with aspects of it being confidential, but exactly why the names of people involved should remain confidential is entirely unclear to me.

[*Translation*]

The Chair: Professor Ziegel.

[*English*]

Prof. Jacob Ziegel: I must say that I don't quite share Mr. Di Luca's enthusiasm for recent appointees. I don't practise law, but I do speak a great deal to lawyers who are active litigants. Quite recently, a senior litigator in downtown Toronto and I were having some general discussions, and he expressed the view that the quality of the trial bench in Toronto is very uneven. I didn't solicit that view. It was a view that he volunteered, and he had no reason to be anything less than objective.

I have read submissions from lawyers outside Toronto that are very critical about some of the judges there. Now, I don't say this necessarily reflects on the current system of appointment, but there has long been a tendency in Canada to pretend we have only the very best. You hear successive justice ministers extolling the virtues, I suppose because it reflects well on them, but I think there's an element of naïveté.

Since we're talking about transparency, I think there is a consensus, at least at this table, that transparency does not mean the interviews for appointments to the lower courts must be held in public. I myself am not aiming for a perfect system of appointments. It doesn't exist. We're aiming for something that conveys and ensures a greater degree of confidence at the moment.

Let me give you some specific examples and recommendations. First of all, the advisory committee should be required to make annual reports on how many candidates they have seen; what their particular recommendations were; how many were recommended or not recommended; how many were highly recommended; and how many of the highly recommended candidates were actually appointed as compared to those who were recommended.

I would like to see a system of evaluation, post-appointment. That's quite common in the United States, but we regard it as anathema in Canada. You made the suggestion that members of the bar should be asked, perhaps on a voluntary basis, to evaluate sitting judges, regardless of.... You might be cited for contempt of court. Yet this happens regularly. We do it in the universities. We do it in law schools every year. Every law professor is subjected to what sometimes can be a very harsh exercise, but we've come to live with it and we hope we're better for it.

In England, they recently completely revised their system of appointments at all levels. They have a much more demanding system of appointments than we do. For example, they bring in psychologists. They subject candidates to an intensive examination over several days to evaluate not only their legal qualities but also their personal qualities, their psychological qualities, their demeanour and perspective in their handling of the bar. In England, they also have appointed a very senior official to entertain complaints about the judicial appointments, for people who applied for judicial posts—usually at a lower level—and who for some reason or other were not appointed and felt they were not dealt with fairly.

So there are many things, in my view, that can be done and ought to be done to improve the existing system, but—

● (1635)

The Chair: Could you come to a conclusion, Professor?

Prof. Jacob Ziegel: I will just finish this sentence.

I think the starting point, as I attempted to say in my brief and will reiterate, is that we have to get the cabinet out of the court rooms of the nation. If we accept that proposition, then I think everything else ought to move much more smoothly.

The Chair: Ms. Rothstein.

Ms. Linda Rothstein: I don't think Mr. Di Luca was suggesting that all the appointments are terrific or applauded by the bar, because they certainly aren't. I think he was suggesting, and with good reason, that there has been a pervasive view, not just in the bar but amongst the lay communities, that we are well represented in the Ontario provincial process, that there has been a quantum leap in the quality of judges in our provincial courts.

Why do legal organizations instinctively resist the notion that those who apply for judgeships should be advertised widely? We actually believe that it may discourage those very judges we want to attract, the careful, quiet, modest thinkers who have, I think all of us agree, been the most brilliant jurists this country has ever produced. Peter Cory, John Morden, Frank Iacobucci, Bertha Wilson, and Brian Dickson all seemed to espouse a kind of humility and quietness and privacy that we, observers only, all believe—some of us know them well—would be the kinds of personalities that would be discouraged from a very open public process and might not apply. That's why.

[*Translation*]

The Chair: Thank you very much.

Mr. Comartin.

[*English*]

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Thank you, Mr. Chairman. Let me first apologize for being late, to Professor Hutchinson in particular because I didn't catch any of your presentation, and the same with you, Mr. Di Luca. My excuse is that I was meeting with the families of the four slain RCMP officers, and it was not easy to break away. However, I will get the transcripts and review them.

I want to follow up on the Ontario system versus the federal system. Professor Ziegel, it's certainly been my observation—having gone through the system before it was reformed, to my great detriment—that the present system, in my opinion and in all the things I have seen of it, in fact has much more significantly taken the political element out than the federal system has. Would you agree with that?

● (1640)

Mr. Joseph Di Luca: Yes.

Mr. Joe Comartin: Would anybody disagree with that? Okay.

In terms of the interviewing—and, Ms. Rothstein, you touched on this at the end—the fact is that the provincial candidates go through an interview after they've done their written applications. That's done in confidence. So would you be comfortable with an interview process?

Ms. Linda Rothstein: If the committee felt they needed more information by conducting personal interviews, we would have no trouble with that.

Mr. Joe Comartin: And the point you were making about some of the justices you mentioned—that they may have some reservations—would they have the same reservations if they were assured of confidentiality?

Ms. Linda Rothstein: I don't think so. I was really reacting to the suggestion that you advertise broadly those who are contending for the position.

Mr. Joe Comartin: Professor Hutchinson, again I'm sorry, I'm getting some gist of what your presentation was from the couple of comments you made. You obviously want it to be somewhat more public. Let me ask you this specifically. In a situation where you have a lower court judge—whether he's coming out of the provincial courts or coming from the Superior Court, and moving up to appeal—if his name was on a list of failed candidates, would you see some concern over his ability to continue as a judge at his current level? In effect he's been, at least it could be perceived he's been, seen as wanting in the skills to move up to the higher level.

Prof. Allan Hutchinson: I don't think so. We have to avoid the trap of imagining that being a judge is somehow a quantum leap from any other kind of job that has great responsibilities and requirements. I don't believe that judging does. In fact, the more we can get judges off the pedestal, the better it will be.

I understand the position of individuals who would much prefer to be confidential, but I think the public aspect is that people apply for positions and some are unsuccessful. I think that's entirely appropriate. I think as Professor Ziegel said, the idea that we have to cocoon judges—that they're very fragile, or that the people who want to apply will be put off—I don't believe that to be the case. I think the more evaluation we have of our judges, the more they are seen as doing a very hard but typical kind of job, and the better it would be.

My working assumption is always to be against anything that shrouds things in mystery, particularly because they have such protections in their judicial position. I can't imagine a more protected group than judges. So we shouldn't be afraid of subjecting them to fairly rigorous scrutiny.

Mr. Joe Comartin: Let's follow that up. Professor Ziegel, I'd like your comments on this as well.

In terms of the evaluation process on an ongoing basis—and when I was at university, I was part of the group that forced that through the university in all the departments—if there are no consequences, if you have judges year after year failing minimum standards, do we as legislators, as the government, have the right and responsibility to remove them from the bench simply because they're not good enough?

Prof. Jacob Ziegel: Forgive me, but you raise an entirely new question, Mr. Comartin. We were talking previously about appointing candidates to judicial office. The question of removing them subsequently is very different; it's a much more difficult one.

As you know, under the Canadian Constitution, removing a Superior Court judge—that is, one appointed by the federal government—is an extremely difficult process, and rightly so because we want to protect the independence of the judiciary. Although it's not constitutionally entrenched at the provincial level, in fact the provincial legislation is just as demanding in the process for removing a judge on the bench. But they're removed not because of the failings of their professional qualifications; they're removed because of misconduct. On the question you raised of whether there should be some system of evaluating the performance of judges, I favour it, but not with a view to removing them. In fact, I would follow the English. You've given me an excellent opening.

In England, they have a system of probationary judicial appointments. They've had it for over a century. What it involves is that members of the bar who are interested in a judicial career will serve as reporters or deputy reporters or what they call deputy judges on the high court for limited periods of time in a year. There's no obligation on the part of the government to offer them a permanent job. There's no obligation on the part of the candidates to go on and apply for permanent judiciary work. It is simply to give both parties an opportunity to evaluate the prospective judiciary candidate, for the candidate to evaluate whether he likes the judicial life and for the government to evaluate whether the guy is going to make a good judge.

The Brits have had it over the years. The system, I understand, works extremely well, but it's not uncontroversial. Some people believe it leads a candidate, particularly on the criminal side, to render judgments favourable to the Crown. I believe that doesn't happen in practice, but this concern has been expressed.

If we want to ensure not only that a candidate is good on paper and in interviews but also performs once appointed, as we would hope he or she would, then the only system I can think of, short of adopting a civilian system, is to adopt what the British have done. I do not see how, in the absence of such a preliminary probationary system, we can penalize a guy after he's been appointed by saying, well, you didn't come up to our expectations and we're going to force you to resign. That would run totally contrary to our long tradition of judicial independence.

● (1645)

Mr. Joe Comartin: Let me ask you to comment on this. After the NDP government took power in Ontario in 1990, we had six prospective appointees come through, all of them white males. We refused to appoint them, not because they weren't qualified but because we needed to send a message to the committee. We knew there were a number of women and visible minority candidates whose applications were in, and we don't know why, but they simply didn't get through—and it wasn't a question of qualifications. As a government, we were sending the committee a message.

Let me ask you, is it appropriate from time to time for the government to do that? I think we're into values here. But is it appropriate at times to signal that the end result of the screening process, the interviewing, is just not acceptable?

Mr. Joseph Di Luca: I think that may well have been a response to a problem that existed at the time, no doubt. If the advisory committee is constituted with its founding principle, or one of its founding principles, as the fact that the candidates it puts forward for judicial appointment reflect cultural and gender diversity, and the committee is true to its mandate, then there would be no need for a corrective response of that sort. I think if the advisory committee is properly constituted with that as a guiding principle—and it no doubt should be a guiding principle—then there would be no need for that. The strength of the committee would correct the existence of that problem, and I don't think it would then fall to the minister to have to address it.

Mr. Joe Comartin: If I could just respond to that, what you're really saying is that the composition of the committee will assure us of the gender and cultural diversity we're—

Mr. Joseph Di Luca: In part, the composition of the committee, no doubt, should reflect that, just as the candidates it suggests for appointment should. But as a guiding principle, the criteria for selecting judicial appointees or candidates should include as a criteria not only the qualities we would say go into making a great judge, but should include cultural diversity, ethnic diversity, and gender diversity, so that the lists of people who are going up are more representative broadly, quite frankly, of the litigants who are going to appear before the courts seeking judgment.

Ms. Linda Rothstein: We agree with that, Mr. Comartin. We believe that you have to probably spend more time than is spent in ensuring that the selection committee is properly representative, and frankly, skilled at this very difficult job. Very little thought has been given, historically, to how to ensure that the selectors know how to go about their work. It's a very difficult job and not one I would relish myself. Thought needs to be given to how one chooses the selectors, and thought definitely needs to be given to ensuring that they represent the spectrum of Canada. Then the guiding principles have to reflect as well the importance that our judges reflect the spectrum of Canada.

● (1650)

Mr. Joe Comartin: The minister was in front of us this morning. He's considering the seven members on the committee now. Two are judges, two are from the Law Society and the Canadian Bar Association, and three are lay members, although they may be lawyers. He was suggesting that he should maybe stop appointing one of them and have the law deans of the province pick.

I guess I really have two questions.

First, how valid is the neutrality and independence when two of the judges have already been appointed by the system—and oftentimes by the same government—and three of the others in the current system are direct appointments by the government? If we accept that there are some potential biases and conflicts there, and too much politicization of the selectors, do you have any suggestions as to how we compose the committee?

The Chair: We appreciate quick answers.

Mr. Joe Comartin: I would like long answers.

Ms. Linda Rothstein: There is no such thing as bias-free selectors—period, full stop. That's not attainable, nor should we strive for that.

We want fair-minded, open-minded, thoughtful selectors, and we cannot discard the expertise that at least two judicial members bring to the process, because they do, I believe, know better than I about what it takes to be an excellent jurist. So we can't discard that because they achieved their positions through a process that we may now think was in some way defective. I'll leave it to others to fill in, but that can't be a governing principle, in my view.

Mr. Paul Monahan (Vice-Chair, Task Force, Judicial Appointments, The Advocates' Society): I've sat on the Judicial Appointments Advisory Committee in Toronto, the federal committee. If I may suggest, I think what the minister is talking about changing, whether it comes from the law deans or the Law Society, is tinkering, largely.

I would simply say this. Once you've crossed the Rubicon and said you're going to have a short-list system for the Supreme Court of Canada, even though we take issue with exactly how that short-list system works, you've made a great step forward.

You have an advisory committee for Superior Court judges. You have to ask yourself what the point is. Why do we have these advisory committees? Why do we have a short-list system in the Supreme Court of Canada? The answer is that you're trying to, ostensibly, de-politicize the process. But if the process you've set up doesn't de-politicize the process, then you haven't gone far enough. So putting a law dean on the committee I don't think does it for you. I think the way you de-politicize the process is by moving to a short-list system, as we've basically almost unanimously recommended. And Professor Hutchinson is recommending something even further than that.

[*Translation*]

The Chair: Thank you.

Professor Ziegel.

[*English*]

Prof. Jacob Ziegel: I have something I wanted to say.

I hope you're not suggesting that because two members of the committee are judges, that constitutes a political element. I certainly don't understand that.

I think the question was why you have judicial members on the committee. I think Ms. Rothstein said it's because they bring to bear considerable experience and know what is needed on the bench, and therefore they have an important role to play. Whether you should have one judge or two judges, I think is a matter for argument. Generally, in terms of the composition value, obviously one could debate this a long time.

There is a great deal of experience in the common law world and outside the common law world, but remember, we're not the only ones. Canada is not the only one that is struggling with these problems. It's a worldwide problem.

A book is being published very shortly by the University of Toronto Press on the comparative aspects of judicial appointments. It refers to a great variety of methods that are used around the world to appoint judges. It is a matter of regret that our own government has not even produced a serious paper on comparative systems of appointments. We continually have these meetings, this discussion. There is a huge literature, so those who are seriously interested are not starting with a blank page. If they wanted to, they could have the benefit of a vast weight of experience.

[*Translation*]

The Chair: Thank you.

The Honourable Paul Macklin, I turn the floor over to you.

[*English*]

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

Thank you for coming and joining us today on this study, as we try to find our way through this process.

I suppose I reflect on who we are, when sitting here as parliamentarians, and I would say that in many respects we don't necessarily have expertise on the area of the question of the day that comes before us. In a sense, we sit in judgment every day when we hear the groups that come before us. We do our very best by using what I call common sense in our determinations, when listening to those who come in their various professional capacities to give us guidance and to lead us in a particular direction. At the end of the day, we have to make a decision.

I guess I somewhat follow where Mr. Comartin was going. If we're going to put all the pressure on the committee, then how the committee is established and what the criteria are for that committee really seem to me to be fundamental to this whole process.

For example, who makes a selection? It seems that every time it's suggested that the minister appoint someone, the whole committee process is tainted. I don't necessarily share that view. But clearly, if you're trying to put a perception before the public, I think we have to go toward making certain that we've been very clear on what the public would expect and go about establishing what that is.

Let's take a specific suggestion, Mr. Hutchinson, that you brought forward about having something that represents cultural diversity. I ask myself what the public in the city of Toronto would think a culturally diverse committee that would represent the city of Toronto would be. I suspect that our committee would become extraordinarily large.

Give me some guidance and help as to how you think we ought to look at this problem in terms of the selection of the committee and setting the criteria. I understand the goal is excellence, but what criteria should committee members consider in that process?

● (1655)

Prof. Allan Hutchinson: I think it's very important that we don't say there are excellent judges and then there's diversity. While I don't think the two are the same, the two are closely interrelated. We should have learned from our recent history, if not our long history, that the two go together and that excellence is a very contested concept, particularly among lawyers.

In fact, one of the great dangers particularly among lawyers and also perhaps among professional politicians is that we have a cult of expertise that we know best because we're the ones who do it. I think your question is exactly the right one. It is on the legitimacy of the commission or group that sets this up.

It seems to me that we can strive to have representative committees. Of course, they will fall short of that. No committee will ultimately be representative because there are too many different views. But it seems to me an important step is to recognize that we strive to do that, and diversity isn't something separate.

When I hear the debate that goes on at the moment on whether there should be an aboriginal person appointed to the vacant Supreme Court position, there's talk about aboriginal identity, and talk of excellence comes along from somewhere else. It seems to me that these are related.

For so long “excellent” only meant guys who looked like me and you, and we assumed that they had some “corner” on excellence. We now recognize that people who look like us tend to have certain views about the world and different views. We now recognize that the experience of people in our society and where they are situated affects their judgment. So we think that's also part of excellence.

I think we should see diversity as being part of merit and not separate from it. The more diverse and representative the committee will be, the more legitimate their decisions will be.

Prof. Jacob Ziegel: I take a slightly different view. I think Mr. Macklin is absolutely right; if you're constituting a committee to make recommendations with respect to appointments to Ontario courts, there's no chance in heaven that you can expect the community to be truly represented in all its many cultural groups. There are, what, 60 to 70 in metropolitan Toronto, and the same in Montreal? Obviously there's going to be a compromise.

Remember, courts are not deciding in a vacuum. We have precedents. We have written laws. While there's often an element of discretion, and sometimes a great deal of discretion, there is in many cases, as Ms. Rothstein made the point earlier, a very circumscribed degree of discretion in the courts when dealing with issues. Even when they have more discretion, their background often has very little to do with what they decide. If they decide, for example, on whether a doctor was negligent or not, there may be some personal characteristics about the judges that may influence their decision on the issue of negligence. Very unlikely would it have anything to do with whether they were Jewish or Catholic or Protestant, or whether they came from the Middle East or the Far East. It's much more likely to be due to a personal characteristic.

So we mustn't exaggerate. It would do a disservice I think to the judicial profession or to the selection committee to suggest that every candidate is going to raise anew this horrific nightmare of our being balanced in our evaluation of ethnic backgrounds and cultural diversity. In my view, we shouldn't exaggerate the problem. What we are asking for is some degree of honesty in approaching these.

As I have tried to emphasize time and again throughout my involvement in the issue of judicial appointments, we've got to start by taking cabinet out of the quota. Once we do it, then we can address all the other not really secondary issues but the issues that will arise forcefully once the cabinet doesn't have the final word, when the final word then rests elsewhere.

Admittedly, when we come to that point, yes, very important questions are going to be asked about the structure. But let me remind you, this issue arises every day in all kinds of other institutions—every time the university appoints a president, every time the university appoints a dean of a department. These are important questions. We've long had appointments committees. This is not a novel exercise. And yes, it's an imperfect system, but we've learned something about it, and I'd like to think that we could do similarly well in dealing with judicial appointments. We will learn as we go along, and that, after all, is the tried and true common law system.

● (1700)

Hon. Paul Harold Macklin: I don't know that I heard a lot about my request for criteria.

Ms. Linda Rothstein: Let me help you with that, if I may.

If one looks actually at what the Ontario system provides in terms of the criteria for appointment, which we have provided as an appendix to our submission.... This is tab 2 in my volume. I don't know if yours is nicely tabbed, but following the signature page—

Mr. Joe Comartin: Mr. Chair, those are not attached.

Ms. Linda Rothstein: Then let me assist you by giving you the website address: http://www.ontariocourts.on.ca/judicial_appointments/index.htm. If you log on, I'm pretty sure you will find it. They have some lengthy criteria for appointment that, in my view, provide a lot more meat to the equation than perhaps do the current federal guidelines. They make note that one needs a high level of professional achievement, which, believe it or not, is fairly easy to measure; involvement in professional activities that keeps one up to date with changes in the law, which, again, can be measured fairly easily; an aptitude for the administrative aspects of the judge's role, which may be harder; obviously, excellent writing and communication skills; a commitment to public service; and it goes on. They've listed in total about 15 bullet points that they use as their yardstick.

Now, I'm not suggesting that for the purposes of Superior Court appointments we use that template without revision, but if one gives time and thought to it, one can indeed, I believe, set out a long list of criteria that the standard of excellence would require.

Hon. Paul Harold Macklin: Hearing that short list of those criteria, I guess I wonder, to some extent, is there any experience that suggests that having judges and lawyers on this committee in fact skews the committee away from the individual non-practitioner, the non-lawyer, sitting on the committee, such that in fact their input is not as significant or as meaningful? Is there any evidence of that in practice? Because it would be a concern, obviously.

Mr. Paul Monahan: I've sat on the committee, as has the honourable member. In any event, I think anecdotally, without getting into the confidentiality of what goes on in these committees, first of all, there's only one judge on the committees. There are not two judges. There is one judge, three lay people, and three lawyers.

Inevitably, I think the lawyers and the judges tend to influence the assessment more, mostly because they know the person who has applied. They may know them personally, they may have spoken to somebody else who knows them, but they know them. The lay people I think inevitably defer to the lawyers and the judges—not always—and that's not to say the lay people don't make a contribution; I think they do. But it's hard to take a lay person and say we want them to make judicial appointments and put them on a committee with a bunch of judges and lawyers. I think it's difficult. It's imperfect, but that's not to say the lay people don't make a contribution. I think they do.

● (1705)

Hon. Paul Harold Macklin: Can you collectively point to any system that is operating and functioning today—you point to Ontario—in the broader world and say there is a more perfect system out there?

Professor Ziegel, were you suggesting, when you talked about Great Britain, that there are specific systems we should be looking at?

Has any one of you seen a system that is far superior to what we have now in terms of an appointment process?

Prof. Jacob Ziegel: I have no firsthand experience of the British system. I only know what I have been told by various colleagues over there.

Yes, I do believe, with respect to appointments at the lower court level—and I emphasize lower court level—that the British have been much more pioneering than we have, for example, by bringing in psychologists and taking candidates out for a week-long intensive examination of their characteristics. This is not just for judicial appointments; it also applies to appointments of commissions performing quasi-judicial roles.

As I said earlier, if the Department of Justice had done these investigations, had issued a report.... Again I emphasize, we desperately need reports in Canada discussing what's been happening in other countries, openly discussing the criticism of the existing system, and not always being defensive about it, which is what successive justice ministers have done. As long as we go around saying that we have the very best judges in the world, that there is no need to improve what we have now, we are not going to take this comparative investigative view.

I think we have much to learn from British experience. No doubt they have something to learn from our experience, but they have reached the point where they've been much more open, much more explicit and understanding.

There is something I should add. Some months ago, a friend of mine was appointed to the Immigration Appeal Board. He subsequently told me about the kinds of exercises to which he was subjected. I was amazed. He was only being appointed to an appeal board, not as a regular judge, and yet they had all kinds of examinations. He had to write an examination before they would appoint. That's unheard of in the judicial sphere.

Even the question of interviews of candidates to a higher court is regarded as a novelty, as a radicalism, and is unacceptable. I can't begin to understand why there should be an objection to interviewing the candidates. It's inconceivable at the university level that you would appoint a president, a deputy, or even a full professor without the guy being interviewed and without the guy being required to give some sort of presentation.

We accept these requirements as a given, yet somehow in the judicial sphere they're regarded as radical, revolutionary, and as demeaning to future appointees to the bench.

That's why I say we need to be much more open and explicit in our discussion of these issues.

The Chair: Thank you, Professor. Thank you, Mr. Macklin.

Monsieur Warawa.

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

I'd like to thank the witnesses for being here. My apologies for also being a little late. I had a conference call that I was committed to.

I appreciated Ms. Rothstein's comments, and I think I've heard from Mr. Di Luca as a previous witness, so thank you for each being here.

I am a layperson, so my questions will be coming from that perspective. Most Canadians believe it's very important to have a respect for the rule of law for our society to function. I think it's very important that the appointment process also be perceived as being a fair and not a partisan type of patronage appointment.

My first question to you would be this. What's being proposed by the justice minister is that he would first be creating this list, passing this list on to the committee, where it would be shortlisted, and then the final decision would go back to the justice minister. So if he's creating the list initially and ending the list, basically he has ultimate discretion. Could I have comments on that?

Again, from the perception of how the public looks at it, that we want to have the very best of judges, do you feel the plan that's being proposed by the justice minister will meet that need of a non-political perspective?

● (1710)

Mr. Joseph Di Luca: With respect to the minister's position, I think that plan falls short of achieving the stated goal. Our view as an organization is that applications should only be solicited through general, non-specific advertising. It should be a job posting, and publicly the optic of having a job posting that calls for applications to be sent to an arm's-length committee, and then at that point considered, put through a process, and eventually working its way up.

To me, optically, that conveys the requisite degree of detachment from the political process. But if someone is appointed because a month prior they received a tap on the shoulder at a cocktail party and they were told that this would be a good time to put in an application, that to me detracts from the transparency that would be required from the fairness and openness that I think is requisite to build that public confidence and trust.

Prof. Jacob Ziegel: I entirely agree. I wasn't here this morning; I haven't seen or heard what the minister said. I think it's a highly partisan approach and completely incompatible, that system of transparency that they're trying to achieve. It's putting both the initial selection and the final selection in the very hands of the people who in the past have abused it. It gives a preference to the role of the Minister of Justice and the incumbent government, incompatible, in my view, with the rule of law. So I'm totally opposed to it.

Ms. Linda Rothstein: Me too.

My understanding is the plan that you sketched is the minister's—shall I call it—revised plan for Supreme Court of Canada appointments, but the Superior Court plan and other Federal Court appointments are, as I described it, ones where he takes from a list of both recommended and highly recommended, a list that may be very long. And for the reasons I think we've all set out at length, we see both of those plans as defective in depoliticizing this process sufficiently.

Mr. Mark Warawa: Okay. Thank you.

One other question I had—

Prof. Jacob Ziegel: Forgive me, could somebody verify for us, when the minister addressed you this morning, was he talking about the selection method for putting the current vacancy on the Supreme Court, or was he discussing the terms of reference of this committee?

The Chair: No, it was not for the Supreme Court; it was for this committee. So that means for every other federal judgeship, but not for the Supreme Court.

Prof. Jacob Ziegel: But he was actually suggesting that he would compile a short list and send it down?

The Chair: No, he did not.

Prof. Jacob Ziegel: No, I see. I'm sorry. So there's some confusion. You're actually referring then to the system of selection for the Supreme Court. That's quite different, but my own view still stands; I object to that system as well.

Mr. Mark Warawa: I have actually enjoyed visiting courtrooms and listening to arguments being made, and I find it quite fascinating putting oneself in the position of a judge, trying to get at the truth and make a judgment that is just, that is in line with the laws of Canada. It's quite difficult to see, and I really appreciate seeing the wisdom at work there. There are also times where we read in the newspaper of a judgment that communities are quite upset about.

When you're doing your assessment of the different applicants, do you take into account the history of judgments from that applicant if they are a justice?

Ms. Linda Rothstein: I'm going to ask Mr. Monahan to speak to it—actually, I'm not, because he's never had the experience.

The point is, there is no assessment currently of a sitting judge for a higher judgeship. That doesn't happen. As we understand it right now, it's an informal "discretionary" process entirely within the hands and control of the minister and his confidants. So when someone is sitting on the trial court and rendering good or bad decisions, what is looked at in that process we don't know.

What we have argued for is that there be a process in which there's an application and an assessment. I think it's instinctive that if such an assessment process were put in place for sitting judges, by definition one of the things the assessors, or selectors, would look at to satisfy themselves that he or she was appropriate for elevation to a higher court is the weight of their judgments. That would speak to many of the issues that would be of relevance—their writing ability, their decisiveness, and so on. Of course, you get into grey areas as well—whether or not one agrees or disagrees with their views. That's much more difficult; it's not an easy thing to be responsible for assessing. But by definition, one would at least start by reading their judgments.

● (1715)

Mr. Joseph Di Luca: I think reading the judgment is not for its popularity but rather for its weight. If it's an authoritative pronouncement, and if it's accepted provincially or across the country as a restatement of law or principle, that's what makes it a good judgment. The fact that it meets with applause in the press room is not necessarily the hallmark of a good judgment. It may be the most unpopular yet courageous judgment. So we don't judge it by the fact that it meets with popular approval.

Mr. Mark Warawa: I would agree.

This is my last question, Professor Ziegel. You mentioned the psychological assessment being done in Britain. I think that's a very good idea. I would ask for comments from the other witnesses, because it's part of the criteria.

Ms. Linda Rothstein: I don't know anything about it. I'd want to be satisfied that there are some reasonable yardsticks of one's future abilities as a judge, and I'd want to assess whether or not there's any evidence those kinds of tests actually assist. I know there are all kinds of hiring processes where psychological testing is used, and often to not very constructive effect, I'm told.

We don't have a position on it at the moment.

Prof. Jacob Ziegel: I'm no psychologist, and I don't pretend to know anything about the value and effectiveness of psychological testing of judicial candidates. But let me give you one example that's currently before our courts. It involves somebody who was appointed by the Trudeau administration. It turns out, or it's claimed, that he has a heavy bias against the Crown—at least the Ontario Court of Appeal thought so on several occasions. In fact, it had very harsh remarks to make about the conduct of the judge in dealing with this particular murder case. Subsequently, there was such a sense of discomfort by the Ontario Attorney General that he wrote to the Canadian Judicial Council and asked for a review of this particular judge's qualifications to continue sitting on the bench. It's an extreme case. As I say, he was appointed by an earlier administration, before the current system came into play, so it's no reflection on the current system.

The reason I raise this case is because if somebody had looked at the personality of this particular person, it might have brought to light that he had certain strong biases. They might have said, he may be a fine guy, a superb politician, and he may be fine for civil cases, but somehow.... Perhaps there was an earlier experience in his family life and he has this heavy bias against the police or against the Crown. Perhaps we ought to bear this in mind when we are considering his qualifications.

Periodically we hear of someone who is superb, or who has a superbly good mind, but who has a terrible temper, which you see is under control, but occasionally it bursts forth. Now, this may not come to light in an ordinary interview, but perhaps a psychologist may detect it. I'm speculating, but obviously we wouldn't have the profession of psychology if it wasn't able to bring to bear certain qualities that are not existent in other professions.

I was merely reporting on what is happening in England; I wasn't necessarily endorsing it. I was responding to the question asked by one of your colleagues about whether there was something we could learn from other countries. This is why I cited some of the British developments.

The Chair: Thank you, Professor.

● (1720)

[*Translation*]

Thank you, Mr. Warawa.

Mr. McGuinty, you have the floor.

[*English*]

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

How much time is left?

The Chair: Nine minutes.

Mr. David McGuinty: Thanks for coming this afternoon, all of you.

I'd like to ask a couple of short and snappy questions. I don't mean to be overly blunt, but time is short.

Professor Ziegel, I've read, reread, and reread again your submission. In paragraph 8 you cite—and I think if I might characterize it as such, with some outrage—uncontradicted news reports, where you say almost half of 20 lawyers working for the Liberal Party in Quebec for the 2000 election campaign were subsequently appointed to the bench by the Chrétien government; you cite the *Globe and Mail*. That means that more than one-half were not. You say 60% of 93 lawyers appointed as provincial Superior Court judges by the Liberal government since 2000 had made political donations exclusive of the Liberal Party, meaning 40% may have donated to other parties or to none.

I want to talk to you about your comment about biases. You cited a moment ago your colleague who has been appointed to the Immigration and Refugee Board. There's a case where this government has in fact given the IRB chair the authority to examine candidates in writing, interview them in person, and provide a five-person alphabetical listing for the minister to choose from. The minister of immigration is from that point forward precluded from adding names to that list and must choose from that alphabetical listing. I've also heard from people inside the Immigration and Refugee Board that the interview and examination process is beginning to eliminate any individual who may have had any involvement in any political party.

So if we're going to talk about bias, I want to put to you the question of political involvement and bias, because none of us would be here, as I said yesterday to other intervenors, without the support of volunteers and donors and people who knock in lawn signs, help with policy formulation, and raise money. Are you suggesting, or is any panellist here suggesting, today that we ought to eliminate political participation completely? Should we be informing law school graduates, who we pump out at breakneck speed in this province, Ontario, upon arrival that if they are contemplating the bench at one point in their careers, they should avoid all political participation?

Prof. Jacob Ziegel: Absolutely not. I think this issue has been raised many times. I hope my position is abundantly clear. No, past political activity should not be a disqualifier; quite the contrary. What I have said in writing on many occasions is it shouldn't be a preferred reason for appointing someone. This is what we understand by patronage: appointing someone not because he's been politically active or knows a cabinet minister, but appointing him primarily because of his political activities or political connections. That's a huge difference.

I welcome appointees who have had some past political experience. I entirely agree. It can be extremely useful in a particular position, but this is, with respect, not what we're discussing. I quoted from the *Globe and Mail*, mulling over that. I was quoting them; I wasn't necessarily reflecting my views. It was merely designed to show the importance patronage or that candidate's view of the importance of patronage has played in the candidate's own behaviour.

Mr. David McGuinty: Could I put another pointed question to the panel? In provincial interview processes, do any of you know whether or not questions about political participation are raised?

Ms. Linda Rothstein: Regrettably, I don't know, Mr. McGuinty. My guess would be that they don't ask and that they try to be blind to political affiliation. That would be my guess, but I have to say it's nothing more than that, sir.

Mr. David McGuinty: Third question: is there any constitutional impediment to reviewing the length of appointments of judges, for example, and capping it at ten years?

Ms. Linda Rothstein: Arguably, there is. There's a whole jurisprudence of judicial independence that is still evolving that argues in favour of protecting the security of tenure of our jurists, seeing that as absolutely integral to their independence.

I can tell you, having worked a lot with not just judges but other adjudicators in other settings—and by that I mean administrative tribunals—who are subject to limited-term appointments, they unanimously say they believe that one of the biggest intrusions on their ability to establish long-term, successful, and public-serving careers in administrative justice is often the short-term nature of their appointments. They are often very concerned that this effectively results in some lack of independence for them.

So that's a very contentious issue we would have to explore at much greater length.

● (1725)

Mr. David McGuinty: So there are constitutional impediments to considering a term for appointment for judges.

Ms. Linda Rothstein: I believe there are.

Prof. Jacob Ziegel: I take a somewhat different view. First of all, let's talk about what the existing Canadian Constitution provides. It only addresses the tenure of superior court judges; it says their retirement age is 75. There was no retirement age until the 1950s, when the Constitution was amended. Now that's written into the Canadian Constitution.

There are now provisions with respect to guaranteed tenure for law court judges, particularly provincial. Prima facie, I see theoretically in the Constitution no reason why you couldn't have it written saying they shall be appointed for a ten-year period or whatever the period you deem appropriate. Now, whether we should proceed that way is an entirely different question.

Ms. Rothstein has raised the issue of appointments to administrative boards. I think it's very common throughout the common law world to have limited terms of appointment. I see both strengths and weaknesses in the system. I'm not prepared to say out of hand that limited-term appointments have so many weaknesses we ought to abandon them. If anything, I'm inclined to think the other way. In the United States, for example, bankruptcy court judges are only appointed I think for a maximum term of 15 years, and that's been true for many years. It seems to work well; they don't seem to suffer from a shortage of candidates.

But I don't regard a limited-term appointment as a substitute for making the best possible appointments to begin with. That's where the weaknesses arise. Obviously, you can say to yourself, well, I've made a bad appointment, but this person is not going to be sitting on the bench for the next 50 years; we're going to get rid of him after 10 years. I think that's a bad way of going around a system of ensuring that the best possible appointments are made to begin with.

Mr. David McGuinty: Finally, have we anywhere in this country a comprehensive piece of political science assessment of the appointment of judges at the provincial and federal levels and linkages to politics? For example, how long have we had a Progressive Conservative government in Alberta? Fifty years? Do we have any analysis of the appointments process there or the linkages there? What about under the Parti Québécois in Quebec during its reign from 1976 to...? Do we have any analysis there?

I'm just a little fearful of the flashpoints that are put forward as evidence when they're like the flare-ups in a bad barbecue. Is there anything more definitive we can look at as a committee to see where the trends really are here?

Prof. Jacob Ziegel: Yes, there are various studies; they're not as comprehensive as the ones you're looking for. I know there were scholars at the Université de Montréal who did studies in the sixties on appointments in Quebec. Professor Russell and I were collaborators in a study we did in the late 1980s on appointments under the Mulroney administration. That's published; I refer to it in a footnote in my brief.

I know that studies have been made out west. They're not national in scope, because you need a lot of money to do these expansive studies, but there are certainly more restricted studies. They confirm many of the things we've tried to say about the shortcomings and the serious weaknesses of a system of patronage appointments.

Mr. David McGuinty: Thank you very much.

The Chair: Thank you to the witnesses for coming.

Colleagues, I would like you to stay for 30 seconds after they've left. I promise you we'll be brief.

Mr. Richard Marceau: [*Proceedings continue in camera*]

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