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# Subcommittee on the process for appointment to the Federal Judiciary of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness

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**EVIDENCE**

## Tuesday, November 1, 2005

## Chair

**Mr. Richard Marceau**

# Subcommittee on the process for appointment to the Federal Judiciary of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness

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● (1530)

[*Translation*]

**The Chair (Mr. Richard Marceau (Charlesbourg—Haute-Saint-Charles, BQ)):** Good afternoon and welcome to this 7th meeting of the Subcommittee on the process for appointment to the Federal Judiciary of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness.

Today, we welcome witnesses Carl Baar, who is a professor appearing as an individual, and Brian Tabor of the Canadian Bar Association, who is accompanied by Tamra Thomson, Director, Legislation and Law Reform.

In accordance with an agreement reached, I believe, by our witnesses, the first ones to speak will be the representatives of the Canadian Bar Association, for a period of 10 minutes, followed by a period of questions and comments of about seven minutes.

You have the floor.

[*English*]

**Mr. Brian Tabor (President, Canadian Bar Association):** Mr. Chair and honourable members, thank you for the invitation to address you today concerning the federal judicial appointment process.

The Canadian Bar Association's approach to judicial appointments is anchored in the principles of judicial independence, transparency, and merit. We have espoused this approach for nearly 50 years, beginning with a 1957 resolution stating that judges should be appointed from the leaders of the bar, without regard for political affiliation. The publication of the CBA's McKelvey report on judicial appointments in 1985 provided a road map as to how political influence in the judicial appointment process may be curtailed. It's a landmark report that has informed many of the improvements in place today. Despite being 20 years old, it remains a surprisingly relevant response to the current challenges in the process.

The CBA believes that, overall, the judicial appointment process is running well. It does not require major bodywork or a complete replacement. However, the system does require a tune-up, with specific attention to three particular areas of concern. Number one is a cooling-off period for those actively involved in politics. Number two is a rigorous application of the standards applied by judicial advisory committees. Third is recognition of diversity as an element of merit. Addressing these concerns will reassure the Canadian public that the best possible judicial appointments are being made in an impartial and transparent manner. Allow me to briefly address each of these issues in turn.

Our first major recommendation is the institution of a two-year cooling-off period before any individual who has been actively involved in politics may apply for a judicial appointment. Canadians are entitled to judges who not only are highly qualified, but also are independent of political influence. When judicial candidates are intimately involved in the political sphere contemporaneous with their appointment, the public may well perceive the hand of patronage at work. This is why we suggest a cooling-off period between the political activity and the judicial appointment.

We recommend that the cooling-off period apply only to a threshold of active political involvement. We define that in our written submission. We recommend that the cooling-off period be two years. It would not be fair or practical to institute a lifetime judicial ban on those actively involved in politics. This would achieve a balance between removing the public perception of patronage in the appointment process, on the one hand, and issues of fairness and practicality for judicial candidates, on the other.

Our second set of recommendations is aimed at strengthening the role of judicial advisory committees in the appointment process. Canada's inclusion of judicial advisory committees in the process of selecting judges has been internationally praised. Other countries have followed Canada's lead. Candidates considered by judicial advisory committees receive one of three designations—recommended, highly recommended, or unable to recommend. The CBA calls on government to formally commit, publicly and in writing, to the position that absolutely no person will be appointed to the bench unless an advisory committee has recommended that person on the basis of identified merit criteria.

We also think the standards by which the advisory committees classify the candidates before them should be applied rigorously. Only the very best candidates ought to receive the “recommended” and “highly recommended” designations. Only the best and brightest should have the privilege of sitting on Canada's benches.

Appointment standards, to be meaningful, should assess how the candidate appears compared to other candidates under consideration, rather than to all others in the legal community. If the pool of recommended and highly recommended candidates is too large, then insufficient guidance is provided to the minister, and the risk of political pressure being brought to bear in appointments increases.

● (1535)

Accordingly, the CBA urges the Minister of Justice to make it clear to the advisory committees that recommended is a very high threshold and highly recommended is reserved for candidates who are so far beyond this threshold that they are truly exceptional.

Our third recommendation relates to diversity in appointments. A diverse nation requires a diverse judiciary. This recommendation is to the effect that the skills of candidates with diverse backgrounds be given appropriate recognition as matters of merit in judicial appointments.

Some commentators present merit and diversity as either/or propositions. We wish to be perfectly clear that ensuring diversity in judicial appointments does not mean sacrificing merit, it means recognizing it. It means ensuring that the judiciary as a whole is nourished by appointees' experience and skills relating to issues of gender, religion, race, language, and the three legal systems of Canada. It means enhancing the legitimacy of the bench. A judiciary fully informed by a variety of perspectives gives litigants faith that they are being heard and understood.

I'd like to focus on two of the challenges with respect to diversity. The first is the paucity of French-speaking judges. Our written submission cites evidence showing this as one reason francophones outside of Quebec are disadvantaged in the judicial system. More bilingual judges can ensure access to justice for litigants in the official language of their choice. This means that a judge is competent to conduct a trial in either official language.

Second, there is a serious lack of judges with experience in indigenous law. There are fewer than two dozen aboriginal judges across Canada. There are only four on superior courts, and one on a court of appeal. Canada's Constitution recognizes indigenous law as a third system of law that applies throughout the country.

In conclusion, justice thrives only when it is administered in an open and transparent fashion. Today's judges are confronted with fundamental questions, hard questions, relating to privacy, security, and equality, and how to resolve conflicts among this principles. It's critical the judicial appointment process is open and understandable to Canadians, maintains a high quality of judicial appointments, and protects judicial independence. It is only then that the legitimacy of such decisions is ensured.

Thank you.

[*Translation*]

**The Chair:** Thank you very much, Mr. Tabor.

We will now go to Professor Baar. You have 10 minutes.

[*English*]

**Professor Carl Baar (As an Individual):** Thank you very much, and thank you for the invitation to join you this afternoon.

I'd first like to associate myself with the emerging consensus of witnesses over your hearings in the past weeks who have supported limits on the discretion of government in making judicial appointments to provincial superior courts and to federal courts. I agree with that, and for that matter, it was 20 years ago when I was asked by the Canadian Association of Law Teachers to present some ideas and findings from the experience in the U.S. with judicial nominating commissions. I'll leave this article with you for your use.

In relation to the area of affirmative action and diversity that Mr. Tabor mentioned, one of the findings that American researchers reported at the time was that diversity reduced the importance of political patronage. I think appointing authorities found that one of the ways to winnow down the list of white males was to focus on those with political experience. When they went looking for women and representatives of various racial and aboriginal groups...which doesn't apply in the U.S., unfortunately, but in terms of racial representation, those individuals had less political experience, and so you actually reduce the impact of patronage by attention to diversity.

Today, however, I'd like to add two more dimensions to the discussion as well as sharing some ideas from other jurisdictions that might help to strengthen the appointments process. The two areas I want to deal with are outside of judicial appointments per se but I think colour their effectiveness and lead to difficulties that need to be addressed by Parliament.

The first point is that the underlying purpose of improving the judicial appointments process is not only to improve the quality of our judges, but to produce better judging and improve the quality of adjudication. But better judges do not automatically lead to better judging. On the contrary, bright and able judges may be frustrated by the daily round of cases and the uneven administration of court processes.

This takes me back to one of the greatest opportunities in my professional career, to 25 years ago when I had the opportunity to work with Jules Deschênes, who was then the chief justice of the Superior Court of Quebec. He had indicated to me he was first appointed in 1971 as a judge of the Quebec Court of Appeal and the following year he was named chief justice of the Superior Court. He told me at that time that if he had not been named chief justice he probably would have resigned his judgeship on the Court of Appeal because, he said, he spent all day dealing with cases that he gave to his juniors in his law firm. They weren't the interesting cases. Of course, he made a real mark over 20 years on the bench, and I'd say he's probably one of half a dozen of the best judges in Canada not to be appointed to the Supreme Court of Canada.

But it drove home to me the notion that we have to be able to have an adjudication process that can effectively use these high-quality appointees we're trying to obtain. In that light, one of the ways I've discussed this is in a more recent article in *Criminal Law Quarterly* in which I've argued for the integration of trial courts so that you can enhance the diversity of cases available to judges. It will give them the opportunity to have the richest experience and not find themselves sitting continuously year after year in one area of law, and the courts will be open jurisdictionally to a greater variety of cases.

● (1540)

I illustrated this in relation to criminal law because criminal law has increasingly become the responsibility of provincially appointed judges to the exclusion of the federally appointed judges whose appointment process you've been considering in this committee.

These are things I can elaborate on further, but the second contextual point is that because of the focus on judicial appointments and the use of screening committees, Parliament's intervention and our reform efforts have placed limits on the most irresponsible uses of political patronage by federal governments. But political patronage has persisted in other forms that directly affect the practice of law and that create an atmosphere or climate of partisanship in the delivery of legal services and eventually in the appointment of judges. Here I'm referring to something that I guess I'd refer to as legal patronage, as the use of private agents by the federal government to provide legal services.

The most notorious example throughout the 1980s and 1990s was the designation of part-time drug prosecutors under the Narcotic Control Act by the federal Ministry of Justice, and in fact there were lists that were kept. When the Conservatives were in power, there was a list of Conservative lawyer supporters. When the Liberals came to power, there was a Liberal list. Allan Rock, when he became Minister of Justice, tried to eliminate this form of patronage, but I understand that cooler heads prevailed within the Liberal caucus, including that of Herb Gray, who said, look, we need this; this is one of the ways we generate campaign contributions. I've seen the lists with the dollars from lawyers in the community in which I've lived for many years.

So I would recommend that if you want to reduce the importance of political patronage in the appointment of judges, you begin a step earlier by making sure that you reduce the impact of political patronage in the kind of legal agent work that's done. I'd go further and recommend that drug prosecutions, like all other criminal prosecutions under federal law, be the responsibility of provincial governments rather than the federal government. I think that would produce a more effective way of dealing with those cases as well.

In the time that's remaining, I'd like to mention some other process ideas that may be relevant to your consideration of modifications in the current system of appointments and screening committees. I noted in the June debate on the floor of the House that questions were raised about the fact that governments appoint three of the seven members of the various screening committees. The practice was defended as a way of mobilizing public and non-professional input into the process. I think this is valuable input, but there are other ways of providing this.

For example, I learned last year that in Ireland the courts are now administered broadly by the Irish court service, and it's governed by a 16-member board made up equally of judges and non-judges. But there was a concern that government might have too much discretion in appointing the non-judges and so the statute constrained the ability of government to exercise that discretion. For example, on that board, there are three public members designated to represent business, labour, and consumers. The first two are appointed by a representative national business association and a representative national labour group, and they sit on this committee. In Ireland the economic differences are the ones that are emphasized. The country is less diverse racially, ethnically, and by religion.

So we might want to choose a different basis for designating some representatives from other segments of society, but it is possible to represent the public and represent the diversity of the public without the government having the discretion to name whomever they please.

● (1545)

If you want to move a step further, the State of Washington has a state judicial commission, and it has public members selected at random from the voters list. That's a little bit more adventurous than I think I would be ready to be, but they've done it. I haven't talked to them in some years, but in the 1990s when I was out there and learned about this and expressed my surprise, they indicated it had really done very well. They just got members of public picked out at random; they wound up contributing to the committee and taking their work seriously, and they certainly weren't picked because of political connections or because somebody knew them in the government.

Another issue raised was that of input from the bar. I think that's been dealt with effectively in terms of bar representation on committees, but I should bring to your attention other ways to get this input.

One that I found most intriguing was done in Illinois. The State of Illinois is hardly a model for non-political judging, but what they did was unify their courts so that they have a single trial court in each county—a circuit court—and a set of circuit judges who are elected by the voters on a political party ticket, but this means they can find themselves without the ability to handle some fairly difficult cases, so they designated a set of associate circuit judges. It means that if a Republican can't get elected in Cook County and the people who do get elected can't handle difficult commercial cases, the judges will actually put out applications asking who wants to be an associate circuit judge, and you can apply.

Then they can designate these associate circuit judges. What they do is ask the bar for input. They ask the state bar to conduct a confidential poll of all the lawyers practising within the counties for which these vacancies exist; they compile all the results statistically and turn the statistics over to the local judges, who can then see how the applicants are rated by their legal colleagues.

The irony is that in one case they appointed the person who was number one on the list as an associate circuit judge. There was a fellow who finished third on the list; he ran in the next election and was elected, so he became a full circuit judge and actually made more money than the one who was ranked higher on merit.

● (1550)

**The Chair:** Do you have any conclusion, Professor?

**Prof. Carl Baar:** Sorry, I get too involved in some of the examples.

**The Chair:** Wait for the questions to be posed.

**Prof. Carl Baar:** I will.

One of the last things I'd like to mention is that I'd like to propose as well that we consider removing the appointments of chief judges, associate chief judges, and regional senior judges from government and placing their appointments in the hands of their fellow judges.

In conclusion, I've tried to raise with you some new issues that I think ought to be considered as part of creating an atmosphere and a system in which the appointment of well-qualified and able judges can also produce a more effective and higher quality of judging and can promote the kind of judicial system of which I think we can be rightly proud.

[*Translation*]

**The Chair:** Thank you very much, Professor Baar.

Mr. Moore, you have seven minutes.

[*English*]

**Mr. Rob Moore (Fundy Royal, CPC):** Thank you, Mr. Chair, and thanks to all the witnesses for their interesting testimony.

We've heard from a number of witnesses so far, and I don't know if in Canada it's like a dirty secret or something, but why would we even be looking at this issue if every judge, once appointed, acted in the same way? There seems to be a reluctance, in Canada at least, to acknowledge that people's backgrounds, whatever baggage we pick up along the way in life, whatever our political affiliations might be, have an impact on the outcomes.

I noticed, Mr. Tabor, you said that overall things are running well. That might be true from the perspective of how the legal body and the legal players feel things are going, but there are all these ingredients that go into our justice system. At the end of the day we have these decisions that are the outcomes, and many Canadians feel things aren't going well, whether it's in the area of criminal justice, and so on.

I'd like your comments. I asked this before to another panel. Why is there reluctance in Canada to acknowledge that one's political affiliation plays a role? I know some people are quite open and they'll say, the Liberals are in, and if the Liberals have a majority, that means the Canadian people voted Liberal. They want the Liberal vision for Canada, and they have the right to appoint judges who share that vision; likewise if there was a Conservative government or an NDP government.

I don't personally share that opinion, but I know there are some people who feel that way and are more open about it. In the U.S. we see an openness. There are people who are Republican, there are people who are Democrat, and there's an openness about where people stand on the separation of church and state and where they stand on corporate issues. These judges' political leanings, if you will, are open game in the U.S. But in Canada some of those decisions and opinions.... Someone may say he's tough on crime, this particular judge is pro-choice, or something like that. Sometimes these judges will even come out and say that, and it's not in the context of any legal rationale; that's where they politically stand, and that's kind of how their appointments are framed.

So I'm wondering why in Canada there's reluctance to acknowledge that. You mentioned twice that the public may perceive the hand of patronage. But I think we're in this committee now because it's actually beyond a perception of patronage; there have been incidents where people were appointed because of their political affiliations.

Could you comment on why this is kind of like a dirty secret?

● (1555)

**Mr. Brian Tabor:** First of all, let me back it up. I think we're advantaged by bringing a multiplicity of experiences to the table in arriving at the decision-making process. Canadians have problems and they're looking for judges to arbitrate those issues. To the extent that we can have a multiplicity of experiences or perspectives brought to the table to help inform the decision-making process in the context of the law, I think we're advantaged.

On the other issue, we have said that participation in political activity should not be a qualifying requirement, nor should it be a disqualifying requirement. Political activity is an engagement in society, an engagement in the broader community. You like to have candidates who look outside their insular community so they can bring a broader perspective to the decision-making process.

**Mr. Rob Moore:** I haven't heard anyone suggest that just because someone was once a member of the Conservative Party or Liberal Party they should never be a judge. I certainly don't hold that, but how do we recognize when something is patronage?

We saw the stories in the Montreal *Gazette*, and they cited that 60% or 70% of the recent federal appointees in Quebec had recently made donations to the Liberal Party—unless that was some huge coincidence. I looked it up, and only 1/20th of one percent of the Canadian public donates to any political party, so when 70% of the appointees donated to one party, I think that raises the issue that those were patronage appointments.

Would you agree that is evidence that those appointments were made based on those individuals' political affiliation? If they were based on that political affiliation, are we going beyond perception there with the Canadian public?

**Mr. Brian Tabor:** There's no suggestion that these individuals who were appointed to the bench were not meritorious candidates. I haven't heard that. In the context of all of these appointees, there has been no suggestion that these individuals were not meritorious. These individuals would have been identified through the judicial advisory committee process. These committees would have looked at their qualifications and made recommendations as to their qualifications and suitability for appointment. That's the tempering influence.

**Mr. Rob Moore:** I didn't make the allegation either that they're not meritorious, that they don't deserve to be judges. But the question I put to you is this. If 70% of the appointees were recent donors to the Liberal Party, is that evidence of patronage? Would that lead to a perception of patronage in the eyes of the Canadian public? What do you chalk that up to if you don't think it's patronage? I'm not casting any judgment now in terms of whether they're valid or invalid, good judges or bad judges. But at some point, do you think someone looked at a list of Liberal donors before they made those appointments, or was it some grand coincidence?

● (1600)

**Mr. Brian Tabor:** Our consistent recommendation is that we need to look to the judicial advisory committees to give us direction on the candidate for appointment, look at the relative merits and qualifications of the candidate, and identify that individual as falling within the pool of available candidates for appointment. This is what we come back to: a rigorous application of qualification standards to ensure that political patronage is not a factor.

**The Chair:** Professor Baar.

**Prof. Carl Baar:** In response to your statements, I'd say there are two aspects to this.

First of all, there's absolutely no doubt that political patronage plays a major role. I'm hoping it plays less of a role now than it did twenty years ago, for example, when I was a professor at Brock University and the local court in St. Catharines had parachuted in as a judge, before there were screening committees, a gentleman who had been the president of John Munro's constituency association. The local bar in Hamilton refused to accept him as a judge in Hamilton, so he received an appointment in St. Catharines. Frankly, I raised that with that member of Parliament at the time, and he saw political patronage as a way of life. I'm glad to see it no longer is considered to be that by many members in many areas of the country.

One of the reasons I think patronage is so dangerous is that it's not the same as looking for people who bring various backgrounds and perspectives to the bench. I've worked with judges throughout the country. I'll tell you that in terms of reforming the courts and responding to changes, one of the judges in Ontario who I find to be the most conservative is someone who was clearly identified with the Liberal Party. I very often find judges who might be identified with the Conservative Party as being much more committed to trying innovative ways of judging, efforts to try to deal with problem solving, and other approaches.

Years ago, a study was done of the enforcement of child support in a family court in Ontario. The people who worked hardest to enforce child support were not the women judges or those who could be defined as feminist judges. They were those who were among the more conservative male judges on that court.

So to the extent that background influences outcomes, I think we have to take into account an effort to have a diversity of people on the bench. We have to recognize that they have different approaches and attitudes. But we can't equate those with which political party they donate money to.

[*Translation*]

**The Chair:** Thank you very much, Professor Baar.

Mr. Lemay, you have seven minutes.

**Mr. Marc Lemay (Abitibi—Témiscamingue, BQ):** First of all, I wish to say thank you to our distinguished guests.

My first question is directed to the Canadian Bar Association.

To whom was the McKelvey report submitted? To whom did you make these recommendations? We're talking about a report that dates from 1985. Where did this report go?

[*English*]

**Mr. Brian Tabor:** It was the Canadian Bar Association report that was adopted by our council and provided to the Minister of Justice of the day, at that time, circa 1985.

[*Translation*]

**Mr. Marc Lemay:** Who was, at that time, Conservative. Was there any response to this report?

[*English*]

**Mr. Brian Tabor:** He was a Conservative member.

[*Translation*]

**Mr. Marc Lemay:** Did you get any responses? Were there any improvements as a result of your recommendations?

● (1605)

[*English*]

**Ms. Tamra Thomson (Director, Legislation and Law Reform, Canadian Bar Association):** In fact, many of the changes that were made in the process between 1986 through 1989, and subsequent to that, flow from the recommendations of the McKelvey report.

[*Translation*]

**Mr. Marc Lemay:** My second question is further to my first one. Since the amendments that were made up to 1988-1989, do you see today, before our Committee, any essential recommendations that have not been implemented?

[*English*]

**Mr. Brian Tabor:** One of the recommendations not advanced or not implemented was the cooling-off period. One of the recommendations that we made back then was that we have a two-year cooling-off period to create separation between active political engagement and capacity to stand. That recommendation has not been implemented, and it forms one of the key recommendations of our report today.

The other observation that my colleague has shared with me is that we thought the application of the criteria would be a more rigorous process. That's the other recommendation that we're advancing today. When candidates qualify as recommended or highly recommended candidates, they really should be top candidates. In our estimation, that will reduce the pool of candidates available to the minister to draw upon, and that should reduce political influence.

[*Translation*]

**Mr. Marc Lemay:** Would you be in favour of potential candidates having a hearing? Would you be in favour of, when someone becomes a candidate, the Committee, regardless of its composition, meeting him? There would be obligatory hearings to find out about the candidates' qualifications.

My question is directed to our three guests, obviously. I'm sorry, Mr. Baar, but you can also respond to it. Would you be in favour of recommending that there be obligatory hearings so that we could get to know the candidates?

[*English*]

**Mr. Brian Tabor:** Our position is that there not be an obligatory hearing. The judicial advisory committee may, in evaluating the candidate, determine that there may be, in the circumstances of that candidate, a need to meet with him or her to canvass, if you will, that candidate's acceptability for the position. But our recommendation is that such a decision remain with the committee, as opposed to making it obligatory.

**Prof. Carl Baar:** I would argue, sir, that it would be valuable to have it. What other witnesses have referred to in English as an interview, I would see as a hearing. It's what you would do with anybody—

[*Translation*]

**Mr. Marc Lemay:** It's like "distinct society," it's not clear. I will clarify. Thank you, Mr. Baar.

I'm not talking about a public committee hearing, as they have in the United States. For me, this would actually be a confidential interview, but an obligatory one, in order to identify any individuals who have no business being there. Do you understand what I mean?

What do you think, Mr. Baar?

[*English*]

**Prof. Carl Baar:** That's what I would support. I believe this is what has been recommended by a number of witnesses who have come before you over the last few weeks. Whether it's something that should be required by statute I would want to discuss further with my colleague, but if you are preparing a short list, it would in principle be valuable to interview the individuals.

In a way, that would be most effective if the committee planned to recommend one individual, which is the practice in some provinces, such as Quebec and Ontario. In that case, if a committee wanted to recommend a single individual, then interviews of all of them on the short list would be essential. If you are preparing a longer list, then it may not be essential, but I know that in British Columbia, where they did have screening and a longer list, every candidate was interviewed. It created the opportunity for them to deal with issues they had difficulty with.

If I can use one example, they had a vacancy some years ago on the provincial court in the far north of British Columbia, and an African Canadian gentleman from the Lower Mainland of Vancouver applied. The committee really wanted to ask him how he thought he might function in an entirely different part of the province, where there was no one of his racial background. They finally got around to asking him this very delicately. The individual looked at them, smiled and said, well, I can think of one advantage if I sat in that district. They said, what would that be? He said, I'd never get lost in the snow. At that point, he showed the kind of sense of humour that, they realized, would be a good quality in a judge. He then had a long and distinguished career on the bench in the Provincial Court of British Columbia, and a few years ago the Liberal government appointed him to the Supreme Court of British Columbia, where he sits today and is very well respected by his colleagues.

So I think an interview process can be extremely valuable.

● (1610)

[*Translation*]

**Mr. Marc Lemay:** Could the Canadian Bar position be modified a bit, if we talked about interviews?

[*English*]

**Mr. Brian Tabor:** We have no objection to the interview process, by the judicial advisory committee, of the candidate.

[*Translation*]

**Mr. Marc Lemay:** Thank you.

**The Chair:** Thank you, Mr. Lemay.

Mr. Comartin, it's your turn.

**M. Joe Comartin (Windsor—Tecumseh, NPD):** Thank you, Mr. Chair.

[*English*]

Thank you all for being here.

Mr. Tabor, the suggestion by Professor Baar of having the appeal courts choose the head of....

Professor Baar, I wasn't sure if you were also suggesting the same at the trial division, so that the chief justice at the trial division would also be picked by the existing panel of justices.

So it would be both?

**Prof. Carl Baar:** Yes, both.

**Mr. Joe Comartin:** Do you have comments? That's the first time we've heard that suggestion.

**Mr. Brian Tabor:** Our recommendation and position is that these appointments rest with the judicial advisory committee.

One of the concerns is that you would want to ensure that the appointment of the chief justice received an endorsement and a round of support beyond the judges. So by having the bar represented and having lay persons on the committee, you can bring their perspective to bear as to whether he or she should serve as a chief judge of the court. So we look to have that perspective brought in the evaluation of that appointment as well.

**Mr. Joe Comartin:** In terms of the role of the Canadian Bar Association on the diversity issue, you have been recommending for some time, at least for a decade, the importance of aboriginal or first nations people being appointed to the various levels, in particular to the superior courts, the appeals court, and even to the Supreme Court. Other than those recommendations you've made, I'm trying to think if you've been more active in pressing the government to do that, because of the shortage we have at the present time.

**Mr. Brian Tabor:** These recommendations flow from resolutions from the Canadian Bar Association. One of the matters that flows from these resolutions is to bring the resolutions to the attention of government and to speak to government about the implementation of those resolutions. So when we have a resolution calling for an increased capacity of bilingual judges to ensure that francophones outside Quebec can be heard in their own official language, we actually write to the minister and ask him to implement that as one of the merit criteria in the appointment of future judges.

● (1615)

**Mr. Joe Comartin:** Is there anything further that the Canadian Bar Association could be doing?

**Mr. Brian Tabor:** We are appearing before this committee today.

**Mr. Joe Comartin:** Okay, maybe we can pick up the torch.

Those are all my questions.

[*Translation*]

**The Chair:** Thank you very much.

It's Mr. Macklin's turn.

[*English*]

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

To Professor Baar first, you say it's not only to improve the quality of judges but to develop better judging. What tests or criteria do you think we should be using in choosing our judges that would lead us to that goal?

**Prof. Carl Baar:** You need judges who have some expertise in the matters that are actually handled in the courts on a daily basis. In a lot of cases, these are not the matters that are part of the daily work of some of the most distinguished counsel, who tend to focus on corporate and commercial law, in the country. A lot of the work of the courts on a daily basis requires somebody dedicated to resolving family disputes, to handling criminal matters, and to handling civil disputes. Most of them involve motor vehicle accidents, the payment of debts, and a whole variety of routine matters. So you have to make sure that you have someone who is willing, over a long period of time, to give his sustained and devoted attention to those matters.

It's the same sort of thing.... For years, I taught at Brock University, which gave a lot of attention to teaching. I dedicated a lot of my effort to it. My colleagues at the University of Toronto would opt for smaller classes, graduate students only, and they would spend a lot of time on research. They weren't spending time teaching the sons and daughters of working-class parents who were the first generation in their families to go to university.

You require dedication and interest in doing that kind of work. I think if they were honest about it, some of the best lawyers in the country would not want to be judges, because they know the kind of work they get day in and day out would not be the kind of work they would want during their private practice.

We have to think about matching the needs to the qualities and the interests of the individuals, to make sure there is sustained attention that they can give and, as I've recommended in other writing, that they get an opportunity to change and move around from one area of law to another. You require a certain degree of specialization on a day-to-day basis, but it shouldn't be something that's required over a 10- to 20-year period. It is something you sustain over a few years, and then you have the opportunity to move into different areas of law and develop different interests within the context of the jurisdiction of your court.

**Hon. Paul Harold Macklin:** I'm not sure that was an answer that meets my expectation. I say that in the sense that when I think of better judging I don't necessarily think.... When I think of a judge, I think of maybe an art. The ability to judge is something that I think is very special and unique. But you seem to tie the ability of a judge to be a high-quality judge to having had some education in a specific area or to having practised his profession in a particular area.

Am I missing the point, then, in terms of trying to determine who makes a good judge? You're saying we should look at his professional background as it relates to a specific area of law. For example, we've heard from witnesses who have suggested that there are actually now courses being given. My reflection is that in Israel, I think it is, in fact those who are candidates for judges are taken away for a few weeks' course. Then they test them as to their ability to judge or their ability to handle problems. It's not because of the area of specialization where they've spent their career.

I'm trying to segregate these two: the quality and ability of a person to judge, and on the other hand, what professional background did you have. You're suggesting they're linked to get better judging. I would have thought they would be separate. In other words, the characteristics that constitute a judge would be well defined outside of whatever professional area he had worked in in his professional legal career.

● (1620)

**Prof. Carl Baar:** You're right, I've been emphasizing the type of work they do rather than their personal qualities. As you described it and as you talked about what they do Israel, I thought about being in Bhopal, India, this past March at India's National Judicial Academy, which is headed by a brilliant law dean, an exceptional individual. And he described their curriculum.

One-third of their curriculum is related to personal growth. He has all those judges doing yoga because he feels that's something that opens your consciousness. It creates self-awareness. It makes you a better person.

Obviously, within our culture there might be different things that we would do. Frankly, I think a lot of the language training the judges did over the years in Canada was designed to promote a certain sense of national pride and understanding. I remember a judge from Alberta spending time in Quebec City learning French. Then I remember having a conversation with him. He got into a vigorous argument with his wife about whether a particular candidate for the Conservative leadership in the eighties should have been a candidate if he was unilingual and wasn't bilingual. I thought, my God, this is a guy whose own understanding of the country changed because of language training.

So I think there are a variety of things that we do to open people's minds and to get them to build their personal qualities. That's essential. We all assume that judges are going to have integrity and be honest. In most countries in the world, and in the ones I've worked in, you have no idea whether that's going to occur, and you know that about one out of every three or four judges is likely to be taking bribes.

So there are some things we assume that we want to have. One of the reasons I was emphasizing the subject-matter expertise is that one of the things that have happened in the jurisdiction of courts in recent years, as a result of the way they've been reorganized, is that trial court judging in superior courts is largely in the civil area. For example, in New Brunswick there's only a handful of criminal trials every year, and some of those judges find themselves having to sit as judges in criminal jury trials without feeling that they have an adequate knowledge of the law to be able to do that. In turn, we're finding that the provincial courts are becoming almost exclusively criminal courts. Our family courts are now primarily federal, but there's still a mix of federally appointed judges and provincially appointed judges. They're all provincial family courts, but they become increasingly specialized, in part, because someone who's appointed to a section 96 judgeship in a superior court doesn't want to sit in family matters.

**Hon. Paul Harold Macklin:** I'll take you back for a second, because I'm trying to figure out something.

When we do the classification through the advisory committee, what are we striving to achieve? I would think we're trying to find out who has the most merit, in terms of the characteristics they have exhibited during their professional careers, to make judicial decisions, but not necessarily in the areas in which they practised. The area of practice may well turn out in the end to have a distinguishing characteristic between A and B, because the chief judge has a shortage of people who have some basic knowledge in that area and would ask for someone of that character. But when we're doing our advisory system recommendations, shouldn't we be trying to find out who has the capacity to judge, rather than linking it to their professional background so tightly?

I haven't asked the Canadian Bar Association whether they have any comments on this.

● (1625)

**Prof. Carl Baar:** Let me just wrap up my sense of it.

I think it depends on how you structure those advisory bodies. If what you're doing is developing a list of people who would be excellent or very good judges, then that list would focus on those personal qualities because they would be available to choose among for the variety of appointments. If you do what's done in some provinces, where they have advisory committees that actually short-list a small number and have identified very particular vacancies, then they would be looking for someone to serve in a family court, a criminal court, or perhaps a court that primarily deals with civil matters. In those cases, I think they would have to take that into account.

I would hope that in an interview stage they might say to somebody, “You're a really brilliant lawyer who's well regarded by your colleagues. Would you get bored if you were doing the kind of work you might have to do on this court?” If I were a member of one of those committees, I'd ask people exactly that question.

**The Chair:** This will be your last question, Paul.

**Hon. Paul Harold Macklin:** Okay. I just wanted the Canadian Bar's comments.

**Mr. Brian Tabor:** Our position is that you have to look at all the characteristics with the goal of arriving at the most meritorious candidate. Intellectual capacity, distinction in an area of law, a capacity to work hard, and empathy are some of the characteristics. There's a whole list of characteristics that go into the bundle of making a judge. We don't agree that you should focus on any one characteristic; rather, look at the whole of that person's qualifications, look at that person in the context of the other applicants, and arrive at the best decision.

[*Translation*]

**The Chair:** Thank you very much, Mr. Tabor.

*M. Warawa.*

[*English*]

**Mr. Mark Warawa (Langley, CPC):** Thank you. I appreciate the witnesses being here today.

My questioning is going to focus on the evaluation process and the makeup of the advisory committee.

Mr. Tabor, you mentioned the three different categories of highly recommended, recommended, and not recommended. What I'm envisioning is a bell curve, where the majority of the candidates who apply to be considered would be in the middle. At the bottom would be those not recommended, and at the extreme end would be those highly recommended.

Previous witnesses before the subcommittee have recommended that only the highly recommended be considered. What I think you said was that recommended and highly recommended are the ones that should be considered. Did I hear you correctly? If so, why would we not consider only the highly recommended?

**Mr. Brian Tabor:** You did hear me right. We're advocating a selection of candidates from the highly recommended and recommended categories. If there's a rigorous application of the standards that we're advocating, you're going to have a very small number of highly recommended candidates. You will have a higher number of recommended candidates.

We're trying to strike the balance to arrive at a pool of candidates that can be drawn upon to fill the available vacancy on the court. Just as an example, if the vacancy calls for a criminal law competency, capacity, or specialization but that skill set is not there in the available pool of candidates in the highly recommended category, there may be a need to move to the recommended category in the context of that appointment. Having the two categories and an ability to draw from those categories provides a measure of flexibility to meet the needs of the appointment process and the bench.

● (1630)

**Mr. Mark Warawa:** Just for clarification, then, if the number or pool of highly recommended candidates was large enough to meet the appointments, you would recommend the highly recommended under those conditions. Or would you still like to have the opportunity for both, recommended and highly, if the number or pool of people is adequate or sufficient to meet those appointments?

**Mr. Brian Tabor:** If our selection criteria are rigorously applied, you're actually going to end up with two relatively short lists. That will provide the appropriate balance to give the measure of flexibility required to meet the needs of the appointment.

I'm concerned about creating boxes, if you will. What we're really advocating is identifying meritorious appointments and providing, if you will, a measure of flexibility to draw from that pool to meet the vacancy. But on a rigorous application of these criteria, all the candidates are going to be very strong, very capable. That's going to reduce the pool of candidates, and I think it will address the concern that by having too broad a pool, there's a real potential for political influence.

**Mr. Mark Warawa:** That was the concern expressed: that if you had somebody who was appointed for political reasons and was recommended over somebody who was highly recommended, that would not be in the best interests of the Canadian judicial system. It would open the door for patronage appointments. The previous witnesses had recommended that only highly recommend candidates be considered.

I appreciate your comments.

**Mr. Brian Tabor:** If you use your analogy of a bell curve, what we're really doing is pushing it to the front of the curve, compressing that group of candidates.

**Mr. Mark Warawa:** With limited time, if I could have a response from Professor Baar, what is your opinion: recommended and highly recommended, or highly recommended only?

**Prof. Carl Baar:** This is in terms of who is...?

**Mr. Mark Warawa:** Who the advisory committee will then be recommending.

**Prof. Carl Baar:** The kind of formulation that Mr. Tabor came up with is a good one.

When I think about this, I think about being out in Alberta and talking to the head of their provincial committee and their federal committee many years ago. I asked a much more direct question that a professor might ask. I asked the man who was head of the committee for provincial appointments, what do you need to get on your list; do you need an A, a B, or a C? He said, if you get a C, you get on my list. I then asked the gentleman who chaired the committee for screening candidates for section 96 judgeships what grade you need He said, you need an A to get on my list.

I think Mr. Tabor may be suggesting that you could get a B and still get on the list, but you better not have a C, because that doesn't distinguish you enough to put you there.

We need to have some flexibility, but it should be restricted, because what you found with that provincial list in Alberta, for example, would be that the person who got picked was always the one at the bottom of the list. A minister or somebody else in government would want to get somebody appointed, and they would add that name. That name would be put on the list, and you'd suddenly go through all the other qualified people to get to the person who made the cut on the list but was preferred politically. As a result, you tended to miss a lot of strong people further up on the list.

The idea is to place some constraints on the appointing authority so that they don't get to run through a list of strong candidates who have been recognized for some time in order to pick somebody new that they want to reward for a partisan reason rather than for the qualities they would bring to the job.

● (1635)

**Mr. Mark Warawa:** Do I have time for a short question?

**The Chair:** Quickly.

**Mr. Mark Warawa:** Thank you.

I will quickly go to my last question. It was regarding provincial court judges.

The norm is that they do not apply because they're not considered. They seem to be out of the political loop, so to speak. What would you see as a good way of encouraging people who are sitting as provincial court judges to apply for federal positions? They have that experience, they have a track record, and you can see whether or not they would be good candidates for federal positions.

**Mr. Brian Tabor:** I think the minister has gone some way toward expanding the notification around the process, if they were only apprised. There's an increased publication of vacancies and application criteria, and this is all designed to bring to the attention of those who can qualify for these positions that they do have an opportunity to apply. That's really the encouragement, and it depends on the individual. It's up to them, if they're self-starters, to decide whether they want to make the application.

**Prof. Carl Baar:** The other thing is that this is one of the areas in which you need confidentiality. If the list of all the applicants was made public and somebody found out that someone who was already sitting as a judge was not placed on a short list for another judgeship, that would obviously discourage them. So it's an argument for maintaining confidentiality.

What you describe is a situation in which I think you could encourage applications more, say, in British Columbia, because British Columbia and Quebec are the only provinces now where provincially appointed judges have a full range of jurisdiction and can get the kind of experience and establish the kind of competence needed to encourage a section 96 screening committee to rank them highly. They have a chance to demonstrate their abilities.

I wish one former student of mine on the court in British Columbia would apply for a section 96 position. He says he likes the work on that court better. He could do an excellent job. But I think it's such a well-run court that he'd rather be sitting there than on the Supreme Court in that province, and maybe that's a real plus.

**Mr. Brian Tabor:** If I could just pick up on the analogy regarding A, B, and C and where they would grade the candidates, our submission contemplates two grades, for want of a better term. An A + is what we're looking at from a highly recommended candidate, while an A is recommended. In terms of our submission, this is where we are in terms of qualifying the candidates for the positions.

[*Translation*]

**The Chair:** Thank you very much.

Mr. McGuinty

[*English*]

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

Thank you very much for joining us.

I would just go back and ask all three of you if there has been any recent study, other than the McKelvey report from 21 years ago. I've watched a succession of witnesses appear before us and quote two very authoritative sources. One was the Montreal *Gazette*, and I think the other might have been *The Globe and Mail* or the *Calgary Herald*, all deeply authoritative sources.

As professors, as professionals, as political scientists who are in the evidence-based business, do we have any serious contemporary analyses about politics and the appointments of judges?

**Prof. Carl Baar:** The answer from the academic point of view is no, not since Russell and Ziegel published their study of the first four years of the Mulroney government. No analysis of the Superior Court section 96 or Federal Court appointments and their origins and links has been done by a political scientist, not that I know of. I'm retired now, so I may be out of the loop, but I'm not aware of any more recent study, and it's really a shame. I think there ought to be one.

**Mr. David McGuinty:** So for the three of you, then, despite the protestations otherwise and members asserting something—and when one asserts something, it is not always so—there is no definitive contemporary study on the linkage between politics and the appointment of judges, is that correct?

**Mr. Brian Tabor:** That's correct.

**Prof. Carl Baar:** Yes.

**Mr. David McGuinty:** So we haven't seen anything serious in 21 years in this country on the linkage between politics and the appointment of judges.

**Prof. Carl Baar:** Fifteen years.

**Mr. David McGuinty:** Fifteen years, 1984 to—

● (1640)

**Prof. Carl Baar:** The period 1984 to 1988 was studied, and that was published around 1990.

**Mr. David McGuinty:** Right, so the Canadian Bar Association's is a different study from the one by Russell and Ziegel that was just cited.

**Prof. Carl Baar:** Yes. Now, this is an empirical study in which they—

**Mr. David McGuinty:** So for 15 years, minimum, we haven't seen anything. That's number one. I wanted to just nail that down and make sure we got it on the record.

The second thing has to do with what you call your cooling-off period for politically involved judges. Wouldn't we just avoid all this if we simply moved to a civil system in which judges were trained to become judges and only judges? Second, tell me what you mean by "cooling-off period"—and what does "politically involved" mean?

**Mr. Brian Tabor:** I don't think we'd be advantaged by moving to the civil system. Actually, if you look at what's going on in western Europe, they are actually moving more towards our system in terms of the judicial appointment process. They're looking at judicial appointment commissions, but their system creates two streams at law school—you become a lawyer or you become a judge. That's how it's dealt with in western Europe, but they are looking at our system quite creatively as a real option to arrive at better judicial appointments.

What we're talking about in terms of active engagement in the political process—and we use the term "active engagement"—are cabinet ministers, members of Parliament or the Senate, members of provincial or territorial legislatures, or partisan political employees. We are advocating that this cooling-off period should apply to these individuals.

**Mr. David McGuinty:** That's different, for example, from the story in the *Gazette*, which looked to link political donations and appointment to the bench—right?

**Mr. Brian Tabor:** Right.

**Mr. David McGuinty:** So your cooling-off period wouldn't necessarily apply to any one of, say, 300,000 Canadian donors to the Liberal Party of Canada?

**Mr. Brian Tabor:** No.

**Mr. David McGuinty:** So in your estimation at the Canadian Bar Association, donating is not a politically charged or politically involved relationship with a party?

● (1645)

**Mr. Brian Tabor:** No. It's an engagement in the democratic process, and we've been quite clear that we look for candidates who do have that—an engagement in the community, in society—as one of the rounding characteristics, as a qualifying requirement.

**Mr. David McGuinty:** Mr. Baar, I'd like to go back to some comments you made. I didn't understand some of them—catch some of them—and I apologize.

You referred to a conversation or a dialogue between former Minister of Justice Allan Rock and my constituent—now the head of the International Joint Commission—Herb Gray. Can you just amplify what you had mentioned about Herb Gray's saying something to the effect that you'd be foolish to do away with the politicization of the appointment of judges because the Liberal Party of Canada would suffer financially?

Did he actually say that? Did you hear him say that?

**Prof. Carl Baar:** No. I can't tell you if he had a conversation.

What I can tell you is that many appointments are made.... Very frequently at that time, lawyers were appointed to act on behalf of the federal government—not employees of the justice ministry, because this would be outside of large centres—to do prosecutions in drug cases. At that time they came from people who were identified with the party in power. This is not a partisan statement. When the Conservatives came in, a different list of lawyers received those appointments, and when the Liberals returned, a different list did.

When I queried this and asked why it didn't get changed, I was told that Minister Rock was interested in changing it, but that the Liberal caucus was not ready to move in that direction, and that Mr. Gray was one of the people who defended the existing practice. I would assume he would continue to defend that practice.

Frankly, I was upset about it to the extent that when I was once contacted by the Reform Party and their justice critic, and thought they were interested in reform of government, I thought that might be an ideal thing for them to take up, but they didn't do so. I'm not sure whether the Liberal government under the new Prime Minister has moved to change this, but my sense is that it continues to operate.

I think it is regrettable. I think it creates a sense of the importance of lawyers' political contributions; that then creates the kind of perception that I think we should be legitimately concerned about.

**Mr. David McGuinty:** How is my time, Mr. Chairman?

**The Chair:** You're at seven minutes, but you have three minutes.

**Mr. David McGuinty:** Thank you very much, sir.

Do you have any evidence at all that indicates the source from which judges are appointed, in terms of their backgrounds? For example, in Ontario I think there are approximately 32,000 lawyers. I understand that almost 26,000 or 27,000 of those lawyers are in law firms of five lawyers or less.

Mr. Baar, you suggested the preponderance of appointees were forthcoming from large corporate commercial firms. That would fly in the face of the actual structure of the Ontario bar. Do you have any evidence? Does anybody see anything at all here? Can you help the committee understand how many are coming from academia, small law firms, business, NGOs, and large corporate firms? Do we have anything at all that breaks it down for us?

**Prof. Carl Baar:** I couldn't tell you that off the top of my head. There have been some studies. Ian Greene and Peter McCormick—I know Peter was in front of your committee—did some survey work on judges and their social backgrounds. I'm not sure whether they focused on the type of practice they were involved in or not. I'd have to go back and check both of their work from the 1980s and 1990s. Again, it wouldn't be recent.

I don't think there's any research from the last decade. It's too bad that none of us are still teaching, and it's too bad Professor Manfredi isn't here, because he still has a variety of doctoral students at McGill. If he does come here, I hope you will suggest a research agenda for some of his students, because I think this is research that really ought to be done.

**Mr. David McGuinty:** I think it should be done. I would recommend it to the research team of the committee, because 75% of all jobs in this country are in SMEs of 500 employees or less, and 75% of all new jobs created are in SMEs of 500 or less. Small law firms that deal with working people on a day-in, day-out basis may be a wonderful source.

Maybe we ought to be considering, as part of our deliberations, the source from which we derive our nominees, and we ought to be looking for balance to reflect what Canadian society is. If the preponderance of judges is from the ten largest corporate commercial firms that are mega-merging as quickly as they can, maybe that's a source for concern.

**Ms. Tamra Thomson:** Some of those numbers can be found in the report of the judicial compensation committee from 2003. The recommendations are before the House in a bill right now, which we encourage you to adopt.

**Mr. David McGuinty:** Do any of you see any statutory or constitutional blockage, or reason why we should not cap the terms of judges' appointments? We have thousands of quasi-judicial appointments in the federal government today that are time-capped. In fact we have an explicit policy of not renewing appointees after 10 years, whether it is to the IRB or some other quasi-judicial tribunal. Why should judges be able to stay on the bench until they're 75?

**Prof. Carl Baar:** You would have to amend the Constitution.

**Mr. David McGuinty:** Does the Constitution say they are appointed for life?

**Prof. Carl Baar:** It says they serve during good behaviour.

**Mr. David McGuinty:** I see. Do you know if there's any constitutional provision? I couldn't get a clear answer from the number of experts who have appeared before us.

**Prof. Carl Baar:** To me it's very clear. We had to amend the Constitution to make 75 the retirement age. That had to be done. Frankly, I've been pushing my American colleagues, where they have all this conflict over judicial appointments, to put in a compulsory retirement age. There's an effort right now by some American scholars to argue there should be a fixed term for Supreme Court justices. I disagree with it, but I think you need to cap the retirement age.

**Mr. David McGuinty:** I'm mistaken. I apologize. I heard Professor Ziegel say last week that he couldn't think of such a constitutional restriction, but I guess I'm mistaken.

**Prof. Carl Baar:** He was talking about that in terms of probationary appointments, which he's always advocated be on the English model. Most of us disagree with him on that.

**Mr. David McGuinty:** Thank you.

[*Translation*]

**The Chair:** Before giving the floor to Mr. Lemay, I have a quick question to ask.

One of the issues raised involves knowing whether this Subcommittee would propose operating with a short list, that is, whereby an advisory committee would give a short list to the Minister of Justice, who would be obliged to choose the candidate selected. The Minister of Justice seems to indicate that this would be unconstitutional because it would limit the discretionary power invested in him under section 96 of the Constitution.

Other witnesses have told us that, as long as the final choice is in the hands of the Minister of Justice and he can make a discretionary choice in the end, this way of operating would be constitutional under section 96.

According to you, would a short list be constitutional, yes or now, under section 96 of the Constitution?

Mr. Baar.

● (1650)

[*English*]

**Prof. Carl Baar:** I think it would be constitutional because it would still give an ultimate discretion to the minister to reject the candidates on the short list. But what I would include is a transparency requirement that when the short list is rejected, the public be aware of it and the minister be asked to justify, perhaps on the grounds the candidates aren't suitable for a particular vacancy, or in terms of particular criteria, diversity criteria, or otherwise.

[*Translation*]

**The Chair:** Thank you very much, Mr. Baar.

Mr. Tabor.

[*English*]

**Mr. Brian Tabor:** We have some concerns about the constitutionality. What we've got in Canada is a balance between the legislative exercise of power, the executive exercise of power, and the judicial interface. We think balance needs to be maintained. The Constitution speaks to that balance, and it's best with the executive—the constitutional exercise, if you will.

[*Translation*]

**The Chair:** Mr. Lemay, be brief. I'd like us to end at 5 o'clock, so that we can meet in camera and settle some problems, as I mentioned yesterday.

Mr. Lemay.

**Mr. Marc Lemay:** My comments are for the Canadian Bar. I sat for four years on the board to select judges in Quebec, as the president of the bar in my region. After the interviews, we used to give a list to the Minister. We didn't submit a list of candidates who were not recommended, recommended or highly recommended. We submitted a single list, and from that list one of the candidates was chosen. There's nothing about this in the statutes or anywhere else.

You, from the Canadian Bar, who are involved in this process, wouldn't you be in favour of a single list of highly recommended or recommended candidates being submitted to the Minister, from which he could draw or seek the person selected? There wouldn't be any other lists; there would just be one. What do you think of this?

[*English*]

**Mr. Brian Tabor:** My understanding is there is one list, recommended or highly recommended.

[*Translation*]

**Mr. Marc Lemay:** But there are two lists or, at least, there's a list on which figure the names of candidates who are highly recommended and those of candidates who are recommended. I am talking about a list on which there would only be the names of the recommended candidates. You're recommended, yes or no. There wouldn't be anyone who was highly recommended or whatever. There would only be one list.

[*English*]

**Mr. Brian Tabor:** No, we are advocating the generation of two lists: one list of highly recommended candidates and one list of recommended candidates, from which the minister is then to draw.

[*Translation*]

**Mr. Marc Lemay:** Why do you recommend keeping these two lists? I don't understand.

[*English*]

**Mr. Brian Tabor:** To use our example earlier, the highly recommended candidates are A+ candidates. The recommended candidates are lesser qualified, for want of a better characterization. What we're trying to do is to suggest to the minister, here's a list of individuals in a highly recommended category; these are persons you'll want to look at. But the immediate vacancy on the bench may dictate a look at candidates of the recommended category because the persons in the highly recommended category, for whatever reason, may not meet the requirement that is needed for that bench at that time. In our estimation, this provides some direction to the minister. It also provides a measure of flexibility in the appointment process, as he or she establishes the bench.

● (1655)

[*Translation*]

**The Chair:** Thank you, Mr. Lemay.

Mr. Macklin, you may have the floor by way of dessert and conclusion.

[*English*]

**Hon. Paul Harold Macklin:** Thank you.

I wanted to go the Canadian Bar for a moment and ask, are you advocating some form of affirmative action when we talk about aboriginal judges, in terms of filling positions? Or are you prepared to say, I just want to raise the consciousness of the minister, so that as and when appropriate candidates do appear on meritorious lists at the appropriate time, at least they will be given consideration. What is your view on this?

**Mr. Brian Tabor:** Our position is the latter—to raise the consciousness of the need to look at diversity as one of the qualifying criteria in evaluating the candidate. There's a host of criteria that go into the hopper in identifying an individual for an appointment.

**Hon. Paul Harold Macklin:** I know the minister has said he always wants merit to be the key factor. If other issues that would make the court more diverse could be resolved at the same time, then so be it. One of the obvious things is that slowly but steadily we are getting more aboriginals coming through our law schools, and they are getting into our court system. Hopefully we will see that unfold in due course.

On your second point about indigenous law, simply because someone is an aboriginal lawyer, it doesn't necessarily follow that they will be expert in or capable in an area of indigenous law. How do you think we should be handling that issue?

**Mr. Brian Tabor:** This will percolate through the evaluation process that the advisory committee will go through. But one of the things about indigenous law or aboriginal law is that it's not often written down. This is a culture where history is passed verbally. Laws, traditions, and cultures are garnered through experience in the community. So when we talk about experience in aboriginal law, the nature of the law will in large part dictate that the person is of aboriginal descent.

**Hon. Paul Harold Macklin:** Okay. Thank you.

[*Translation*]

**The Chair:** Thank you to the witnesses for having taken the time to come here.

[*English*]

Thank you very much for coming. We appreciate your time.

[*Translation*]

We look forward to seeing you again.

Dear colleagues, don’t go anywhere, because we’re going to take a couple of minutes to sit in camera.

[*The meeting continued in camera.*]

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