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# Standing Committee on Justice and Human Rights

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## Tuesday, March 20, 2007

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## Chair

**Mr. Art Hanger**

# Standing Committee on Justice and Human Rights

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● (0905)

[*English*]

**The Chair (Mr. Art Hanger (Calgary Northeast, CPC)):** I call the Standing Committee on Justice and Human Rights to order.

It's Tuesday, March 20, 2007. Our agenda is before all the committee members, I believe, as well as the witnesses. It is a continuing study on the judicial appointment process.

I would like to thank you all for being here this morning as witnesses appearing before the committee. We have, from the Office of the Commissioner for Federal Judicial Affairs, Mr. Marc Giroux, acting commissioner; and from the Department of Justice, Judith Bellis, general counsel. As individuals, we have Mr. Sébastien Grammond, a professor at the University of Ottawa, who is not here yet, but I assume that he is on his way; and Mr. Peter Russell, a professor of political science at the University of Toronto. From the Canadian Bar Association, we have J. Parker MacCarthy, president; and Ms. Kerri Froc, legal policy analyst.

I would suggest that we follow the order as noted here on the agenda as far as the speaking order is concerned. I will turn the floor over to Mr. Marc Giroux.

[*Translation*]

**Mr. Marc Giroux (Acting Commissioner, Office of the Commissioner for Federal Judicial Affairs):** Thank you, Mr. Chairman.

Dear committee members,

[*English*]

I am pleased and honoured to have this opportunity today to provide information on the federal judicial appointments process and to answer any questions you may have. My understanding is that I have approximately 10 minutes to make introductory remarks, and I will do my best to keep them brief.

[*Translation*]

First, I would like to give you a brief overview of our office, especially for those of you who may not be so familiar with us. The Office of the Commissioner for Federal Judicial Affairs was created in 1978 pursuant to the Judges Act and its mandate is to safeguard the independence of the judiciary and put federally appointed judges at arm's length from the Department of Justice. In fact, our office is also independent from the Department of Justice.

I do not propose to go into the various services we provide to the 1,066 federally appointed judges, the 400 retired judges and the 350 surviving beneficiaries of judges but I will obviously be pleased to answer any questions about these. I will therefore move right into the topic of judicial appointments.

[*English*]

To give you some history on the federal judicial appointments process and its committees, the whole structure was announced in 1988 by the Honourable Ray Hnatyshyn, Minister of Justice, and was fully implemented in 1989 when the advisory committees created under the process became operational. At that time 12 five-member advisory committees were set up in each province and territory, consisting of one representative each from the Canadian Bar Association, the relevant law society, the chief justice of that jurisdiction, the attorney general of the province or territory, and the federal Minister of Justice. The committees were to advise the minister on whether each applicant was qualified or not qualified for appointment, and the Commissioner for Federal Judicial Affairs was given the responsibility for the administration of the process.

Now, a number of changes to the process were made by subsequent ministers of justice over the years, and I'll mention just a few of them. In 1991, for example, the two “qualified” and “not qualified” designations were replaced by three designations: “highly recommended”, “recommended”, or “unable to recommend”. As well, in 1994 the committee for Ontario was replaced with three regional committees, and the Quebec committee with two. Two other representatives of the Minister of Justice were added to the committees to increase the representation of non-lawyers. The then minister also stated his personal undertaking not to recommend to cabinet any new candidate not previously recommended by a judicial advisory committee. This undertaking confirmed the practice that has continued to this day.

Another notable change occurred in 2005 when a new code of ethics for judicial advisory committee members was drawn up and posted on our website and, along with the names of all committee members, new guidelines for advisory committee members as well as information about the number of applications for judicial office and assessments.

Today, how does this all work? Well, independent judicial advisory committees remain a very important part of the appointments process. It is the committees who have the responsibility of assessing the qualifications for appointment of the lawyers and provincial or territorial court judges who apply.

● (0910)

[*Translation*]

There is at least one committee in each province and territory. Because of their larger population, Ontario has three and Quebec has two. The terms of office of some of the committees have been extended to three years, while the others' terms remain two years. With the addition of one member representing the law enforcement community, each committee now consists of eight members, that is a judge who represents the Chief Justice of the province or territory; one representative of the province or territorial law society; one representative of the provincial or territorial branch of the Canadian Bar Association; one representative of the provincial Attorney General or territorial Minister of Justice; one representative of the law enforcement community; and three representatives of the federal Minister of Justice.

Judicial representatives are now automatically Chairs of the Committees but may only vote when necessary to break a tie, although the committees usually make their recommendations based on a consensus.

There is also a new Judicial Advisory Committee for the Tax Court of Canada which is comprised of five members: one who is a judge of the Tax Court and four others appointed by the Minister of Justice in consultation with the Chief Justice of the Tax Court. This committee has been established as a one-year pilot project.

The Commissioner for Federal Judicial Affairs has the overall responsibility for the administration of the appointments process on behalf of the Minister of Justice. He is expected to carry out his responsibilities in such a way as to ensure that the system treats all candidates for judicial office fairly and equally. The Commissioner or his delegate, the Executive Director, Judicial Appointments, attends every committee meeting as an ex officio member and serves as the link between the Minister and the committees. As well, administrative support for the work of the committees, including information sessions and guidelines concerning confidentiality and other procedures, is provided by the Judicial Appointments Secretariat of our office. All committee proceedings and consultations take place on a confidential basis.

So, with this structure in place, what does someone who wants to be a judge do? Qualified lawyers and provincial or territorial judges who wish to be considered for appointment as a judge of a superior court in a province or territory, or of the Federal Court, Federal Court of Appeal or Tax Court of Canada, must apply to the Commissioner for Federal Judicial Affairs.

[*English*]

Candidates are asked to complete a personal history form, which provides the basic data for assessment by the appropriate committee. In addition to the usual information found in a resumé, the form includes information on the candidate's non-legal work history, other professional responsibilities, community and civic activities, his or her ability to preside in both official languages, a description of the qualifications for appointment, and personal matters such as the candidate's health and financial situation. Candidates are also asked to sign an authorization form, which allows our office to obtain a statement of their current and past standing with the law societies in which they hold membership.

Upon determining that a candidate meets the statutory criteria for a federal judicial appointment—and generally, one must have 10 years at the bar—our office will forward the candidate's file to the appropriate committee for assessment, or for comment only in the case of provincial or territorial court judges who apply.

Once an application is before the judicial advisory committee—professional competence and overall merit are the primary qualifications—committee members are provided with assessment criteria for evaluating fitness for the bench. Without going into all the details, these criteria relate to professional competence and experience, linguistic competency in the other official language, personal characteristics, and any potential impediment to appointment. Committees are encouraged to respect diversity and to give due consideration to all legal experience, including that outside of mainstream legal practice. Extensive and broad consultations in both the legal and non-legal community are undertaken by the committee in respect of every applicant. The committees are asked to assess candidates now on the basis of two categories: “recommended” or “unable to recommend”.

Once the assessment has been completed, candidates are notified of the date they were assessed. Assessments are valid for a period of two years, and the results are kept strictly confidential and are solely for the minister's use. Each candidate's assessment must be certified by the commissioner or his delegate prior to its submission to the minister.

● (0915)

[*Translation*]

Provincial or territorial court judges generally undergo the same process. However, in their case, they are not assessed per se by the advisory committees, but their files are submitted to the appropriate committee for comment.

To conclude, when the minister wishes to fill a vacant seat, our office will prepare the necessary recommendation for the Minister's signature with respect to the appointment of puisne judges, and for the Prime Minister's with respect to the appointment of Chief Justices.

Thank you, Mr. Chairman, I would be pleased later to answer any questions members of the committee may have.

[*English*]

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

From the Department of Justice now, Judith Bellis, please.

**Ms. Judith Bellis (General Counsel, Judicial Affairs, Courts and Tribunal Policy, Department of Justice):** *Merci, monsieur le président.*

As the chair has indicated, I am the director and general counsel of the judicial affairs section of the Department of Justice. To give you a brief overview of the role of my office, the judicial affairs section provides expert legal and policy advice to the Minister of Justice, the deputy minister, as well as all other government officials about any matter touching on the courts and the judiciary in Canada.

On the request of the Commissioner for Federal Judicial Affairs, my section also provides legal advice with respect to the administration of part I of the Judges Act and related matters. Those are the provisions relating to compensation and benefits of the Superior Court judiciary in Canada.

As director of judicial affairs, I support and provide advice to the deputy minister and minister on all major judicial policy and legal issues, particularly as they arise in the parliamentary and cabinet context. The judicial affairs section is responsible for the development and coordination of all legislative policy initiatives, including amendments to the Judges Act. My section develops policy and coordinates all government input into compensation and other issues having financial implications for the government. We prepare all necessary cabinet documentation and supporting materials and we provide legislative drafting instructions on all new and amended legislation.

One of the key roles my section plays for the department and for the government is in relation to the Judicial Compensation and Benefits Commission. I and senior litigation counsel, the deputy ADAG for civil litigation, are responsible for developing the government submission to the quadrennial commission and all aspects of that process before the commission.

Once the commission has reported, my section supports the Minister of Justice in responding and implementing commission recommendations through the cabinet and parliamentary processes, including before the House of Commons committee and Senate committee and, of course, has appeared at this committee a number of times in relation to those issues.

We also fulfill the policy development function with respect to the other acts governing what we refer as the section 101 courts: the Supreme Court of Canada, the Federal Court, the Federal Court of Appeal, Tax Court, Court Martial Appeal Court, and all related subordinate legislation. For example, we were responsible for the development of the policy and implementation of the Courts Administration Service Act in 2003. That services the section 101 courts other than the Supreme Court of Canada.

We have a number of other liaison functions with major judicial organizations, for example. We are involved in all major litigation that involves the judiciary in any way, up to the Supreme Court of Canada, so we would be instructing clients, if you like, to counsel in relation to cases such as the P.E.I. judges case and Bodner, which members are familiar with, I know.

That's a brief snapshot of what my section does, and what I do. I'll now explain what we don't do in the judicial affairs section, and that may help you appreciate why I may not be particularly helpful to the committee today, although I certainly hope I can be in some respects.

As Mr. Giroux has indicated, for reasons of independence—that is, to put judicial appointments at arm's length from appearance of influence by the chief litigator before our courts, the Department of Justice—the appointments process is administered by the commissioner's office. Neither the Deputy Minister of Justice, nor the judicial affairs section, nor any other official in the Department of Justice has any direct involvement in any aspect of the judicial appointments process. We are involved in neither the establishment nor the operations of the judicial appointments committees.

● (0920)

That said, where requested by the Minister of Justice, we do provide policy support for reforms to the judicial appointments process—as I said, if it has been requested. For example, in judicial affairs, we have provided major policy support to two successive governments, the previous government and the current government, in relation to developing options for reforms to the process changes for appointments to the Supreme Court of Canada. In doing so, we have undertaken comparative work that identifies the elements of the various commission models that are in place in Canada. We have charts that describe, on a comparative basis, the various elements of those processes. I also have material that provides a brief overview of the status of judicial appointments processes in a number of Commonwealth jurisdictions. I would be happy to share that with the committee if that were useful to your work.

That's essentially my overview, Mr. Chairman. I would be happy to answer any questions that I'm able.

**The Chair:** Thank you, Ms. Bellis.

Before we go to the next speaker, I want to acknowledge a former member of Parliament, Eric Lowther, and his wife. I know he brought a number of citizens from Calgary to sit in on this particular meeting. I certainly welcome them into the committee room, and I trust that they will find the meeting quite interesting.

Also, I would like to acknowledge that the media is here. The media will be televising the entire process. They have expressed an interest in taping this.

We'll continue on now with Mr. Grammond. You have the floor.

**Prof. Sébastien Grammond (Professor, Faculty of Law, Civil Law Section, University of Ottawa, As an Individual):** Thank you, Mr. Chairman.

[*Translation*]

My name is Sébastien Grammond, and I am a professor at the University of Ottawa. I will be speaking in both languages. I will essentially be summarizing, in two parts, the document that I had translated and that has been distributed to you.

First, the present system, as it has recently been changed, is unsatisfactory. It does not ensure the appearance of judicial independence.

Second, to correct the situation, Parliament should pass an act to provide a framework for the judicial appointment process.

● (0925)

[*English*]

So my first point is whether judicial independence has any role to play at the stage of the appointment of judges. If you look at case law, you will see that most of the framework or the rules dealing with judicial independence is related to judges once appointed; you should not decrease their salaries, and so on. But I think if you look at the basic principles, you will find it is absolutely necessary for the appointment process itself to be, and to be seen as, free from political interference.

On page 4 of my document, I quote from Chief Justice Lamer of the Supreme Court, who said that one of the goals of judicial independence is the maintenance of public confidence in the impartiality of the judiciary. So in my view, the appointment process, and especially the advisory committees, must be designed to make sure the public does not perceive any bias in the process. And the appointment process should not be used as a means to push for any particular public policy.

To illustrate this, I'll give you an example. It may sound funny, but suppose for one moment the government of the day decided to put a representative from unions on these committees. Unions are quite important, as they represent an important proportion of the working population, so it's quite important that a large sector of the population be represented in the judicial appointment process. Now, of course, you would say that's not fair, because unions are usually pushing for one set of interests, and that if one wanted to have a balanced process, management should at least be represented as well. But apart from that, I think the basic problem with such an approach is that you should not view the appointment process as giving specific voice to particular interest groups, such as unions or management or—and you will see where I'm going with this—the police.

So I think it should be made clear that people who sit on the judicial appointment committees are not there to represent any particular constituency.

[*Translation*]

The second point I would like to raise is that it seems to me the judicial appointment process should be provided for by law. As we have seen in recent years, the composition of the committees has been altered without the judicial community being consulted. Among other things, that has given rise to the kind of problems I have just outlined. To afford greater stability and transparency in the process, I believe it would be desirable for an act to state the main parameters of the system, rather than leave that to the minister's discretion, as is currently the case.

You will say that what I am proposing is impossible because of section 96 of the Constitution, which states that judges are appointed by the Governor General, thus by Cabinet. You must clearly understand the exact scope of section 96, which states the level of government that has the power to appoint superior court judges.

Let's look at the history of section 96 to determine the desired aims of the Fathers of Confederation. Those aims are of two types: first, to guarantee judicial independence and, second, to ensure the creation of a unified judicial system based on the British courts model, thus a judicial system that would have authority to rule on matters falling within the purview of federal and provincial statutes. That is not like in the United States, where it is really the state tribunals that decide cases involving state laws and the federal tribunals that have jurisdiction only where a federal act is at issue.

So there is a unified system. Given the unified nature of the system, it was said that the jurisdiction of those courts would be shared, if you will. The establishment of courts and civil procedure are under provincial jurisdiction. Judicial appointments and compensation are under federal jurisdiction. However, there is absolutely nothing in the history of section 96 or in the aims I have just mentioned that specifically states that this is a discretionary authority reserved for Cabinet and that Parliament has no authority to pass framework legislation for the process.

I note that Parliament has, in actual fact, passed such legislation, because section 3 of the Judges Act states that only persons who have 10 years' experience as members of the bar may be appointed judges. However, that limit does not appear in the text of section 96. Either this is invalid, or we must conclude that Parliament does indeed have authority to oversee the appointment process. I would simply add that all this is compatible with our structure of government, in which there is a very distinct separation of powers between the executive and legislative branches, on the one hand, and the judicial branch, on the other, but no separation between Parliament and the executive, at least no constitutional separation.

In our country, unlike the United States and France, where the executive has its own powers which Parliament cannot touch, the executive is generally considered subordinate to Parliament. An act providing a framework for the judicial appointment process would thus violate no constitutional principle and would be compatible with section 96 of the Constitution.

● (0930)

[*English*]

I'll just make some brief remarks now about what this statute should contain. There are models available elsewhere, and I don't want to go into the details, but in my mind there are two main features this statute should contain.

First, the law should set out what the membership of these committees would be. I think we should make sure that not all members are selected by the same appointing authority. At present, it seems to me—if you take into account the fact that the presiding member does not, under most circumstances, have a right to vote—the Minister of Justice has the power to appoint a majority of committee members. I think this should not be the case. You should distribute the authority to appoint, including possibly by ensuring more provincial involvement, to make sure these committees represent a broad cross-section of opinion and are not just a means for the minister to make his or her views known in the process.

The second thing that's crucial is the method of implementation of the recommendations. At present, the work product of the committees, if I may say, is a simple recommendation. The minister is not bound to recommend any particular person, and given the number of people who are recommended, the minister may select from a quite large pool of people.

Contrast this with the process in Ontario, where the law says the committees must give the minister a list of two or more people for each particular position who should be appointed. So that restricts the discretion of the minister much more. And contrast this with the example of the reform of the appointment process in Britain, where the list is very short—it's one name. The Lord Chancellor, who formally appoints the judges, has almost no discretion to refuse. The only case where he can refuse is where he has problems with the merits or competence of the person.

If you adopted a system like that, it would go a great length towards reducing partisan influence over the judicial appointments process.

● (0935)

[*Translation*]

Those, briefly, were my suggestions for the reform of the process.

I am available to answer your questions.

[*English*]

Thank you, Mr. Chairman.

**The Chair:** Thank you, sir.

Mr. Russell.

**Prof. Peter Russell (Professor, Department of Political Science, University of Toronto, As an Individual):** Thank you, Mr. Chairman. I'll speak in English.

I'm a professor who's spent a good part of my life studying how judges are appointed in Canada and elsewhere in the world. I've always been interested in improving a process. I have been following with great interest the discussion of the current government's changes in the federal appointing system. I've come here today to put 10 points before you. I put them in the press earlier, and I'll elaborate on them, because I think they may help clarify what's at issue here today.

My first point is that in terms of patronage appointments to the judiciary, there's nothing to choose between the Mulroney Conservative governments and the Martin and Chrétien Liberal governments. They all gave—wait for it, here it comes—undue influence to political considerations in making judicial appointments. The political considerations of those three governments had more to do with party and personal connections than with ideology.

I think Canadians are very tired of the two parties, Conservatives and Liberals, both saying, "You think we're bad? They were just as bad." I think that is just breeding cynicism among Canadian citizens.

I'm here today—and I support very much my colleague, Professor Grammond—to plead with you not to bring your partisan biting at each other into the consideration of how judges should be selected. There's been far too much partisanship in this process in the past.

My second point is that appointing lawyers who've been involved in politics is not necessarily a bad thing. Just because you've been in politics doesn't mean you won't make a good judge. You might make a terrific judge. It is only when political or ideological considerations outweigh considerations of professional legal ability that it is wrong. That's my second point.

Third, the advisory committee system, which was introduced, as Mr. Giroux told us, in 1988 at the federal level, permitted the undue influence of political favouritism to continue. It was really a camouflage system, and here's how it worked.

The committee received lists of candidates who met the requirements of 10 years' professional experience. They would then indicate—the committees would have a long list—which of the candidates on the list were highly recommended—really good, terrific, the A-list, tops, all-stars, really good—and then they would have others who were simply recommended.

Any person listening to that would say, "Well, surely the government would appoint the highly recommended." No. Very often those who were simply recommended, who weren't as good in terms of the assessment committees—five people and then seven people assessed them as not as good as others on the minister's list—got appointed.

A number of us studied this process very carefully. They went over the highly recommended down to the recommended in order to appoint their political friends, playing politics with who gets to be a judge in the federal system of Canada, the superior courts of the provinces and territories and the federal courts. I think that's just shameful. I'm ashamed of it as a Canadian.

Fourth, in November 2005—not so long ago, just before the last federal election—a subcommittee of this committee that had been working on this very topic for many months and had heard many witnesses' public submissions, that had worked hard on it, had studied it, reached a consensus. Some of you were on that. I recognize some of your faces. The committee reached a consensus that the advisory committee should be reformed. By the way, part of that consensus was from members who are now in the government, including Mr. Toews.

The committee system should be reformed to provide the Minister of Justice with a short list—Professor Grammond's key point—of three to five of the persons assessed to be—and here I quote—"the best suited" for a particular judicial opening. They would send a short list of the very best; that's all. The sin of the long list would be discarded. It's the sin of the long lists that permits political favouritism to have undue influence. Unfortunately, the committee had just got to that point when the election ensued, so it never completed its final report.

● (0940)

Fifth is that the reform called for by the parliamentary committee I just referred to would bring the federal system of appointing judges in line with reforms of provincial appointing systems. Most of the provinces some years ago established—I might add to what Mr. Grammond said—by statute, balanced, independent bodies to assess candidates for judicial office and submit short lists of the best qualified candidates to government. I was the chair of the first of those committees in Ontario.

Ironically, this means that the judges of the so-called lower provincial courts are selected through a more rigorous merit system than judges of the provincial and territorial superior courts, who are appointed by the federal government. Some people who didn't make the cut in our provincial system were appointed federally because of their political ties to government. I'm ashamed of that.

Sixth, the reforms recently introduced by the federal government have weakened an already faulty federal system. The worst thing they have done is remove the advisory committee's function of identifying who are the best candidates, who are the highly qualified. If you have a committee working to advise you on the candidates, surely that's the advice you want. Taking that away renders the committees, whatever their membership, virtually useless.

Seventh, the Conservative government reforms have weakened the capacity of the committees to assess qualifications by taking voting power on the committees away from one judicial member, the judge. In my experience as a layperson chair at one of these committees at the provincial level, the judicial member is very often the very best-informed person on the needs of the court—the kinds of skills and specializations we are looking for, and the professional ability of the candidate.

I was glad to hear from Mr. Giroux that in the case of a tie the judge can cast a deciding vote. But I can tell you, having been on these committees, it's much better when you work hard to get a consensus rather than having a vote of four to three, or four to four. Then you're going to be recommending people who half the committee don't think will make good judges. Do we really need that? Do we really want that in Canada? I hope not.

Eighth, the addition to the committee of persons with police backgrounds, restructuring the committee so that four federal government appointees form the majority, and the Prime Minister's statements that he wants judges who will be “tougher on crime” all point in the direction of transforming the committees into ideological certifying bodies rather than bodies responsible for identifying the most qualified candidates for the judiciary. This shift to ideological assessment is particularly threatening to judicial independence in considering the promotion of judges who might well come to believe that their chances for promotion in the federal judiciary are diminished if they do not apply criminal law in the tough way that the majority on the advisory committees are looking for.

Ninth, what appear to be the Conservative government's main concerns in selecting judges have little relevance to many of the judicial positions that federal government fills; they're mostly about crime. Most of the work of the Federal Court, the Tax Court, and the provincial superior courts involves the conduct of civil trials, requiring high levels of competence in such matters as torts, contracts, intellectual property, taxation, and administrative law. Less than 2% of the criminal cases in Canada are tried in these provincial superior courts, yet that's what the emphasis seems to be on—a very marginal criterion in looking for people who are tough on crime and from the police community.

● (0945)

My final point is that changes made by the Conservative government in appointing the federal judiciary constitute a move to Americanize the Canadian judicial system, without the checks and balances that operate at the federal level in the U.S.

Like American presidents, Prime Minister Harper plans to appoint judges who will serve his party's ideology, but these selections will not be subject to public review and confirmation by a legislative body like the U.S. Senate. The Senate judiciary committee's examination of presidential nominees usually assures that candidates chosen for their political views meet reasonably high standards of political competence. There is no such check, balance, or public accountability in the Canadian federal system of appointing judges.

To sum up, the new system of appointing judges being instituted by the present government abandons consensus proposals for reform recently put forward by a parliamentary subcommittee of this committee and moves us away from a merit selection process toward an American emphasis on ideological considerations without the checks and balances of the U.S. system. Such a change should not proceed further without being carefully examined and approved by Parliament.

I'm very pleased that Mr. Ménard's motion was supported by the justice committee and that the government's changes to the system of selecting the federal judiciary will receive close scrutiny by Parliament, as they should.

Thank you very much.

**The Chair:** Thank you, Professor Russell.

Now, from the Canadian Bar Association, we have Mr. J. Parker MacCarthy.

**Mr. J. Parker MacCarthy (Président, Canadian Bar Association):** Mr. Chair and honourable members, thank you for the invitation to address you today concerning the federal judicial appointment process in my capacity as president of the Canadian Bar Association. I am a practising lawyer. I live and practise on Vancouver Island in British Columbia.

Canadians want to know that when they appear in court, the judge is going to be impartial. That means impartial between the parties and also impartial about any government interest in the case. In other words, the public must have confidence that when its case is decided, judges are not factoring in how the outcome furthers or hinders the agenda of the government of the day.

The Canadian Bar Association's approach to judicial appointments is anchored in the principles of independence, transparency, and merit. We have long espoused this approach. For example, a resolution we adopted in 1957 states that judges should be appointed from leading members of the profession, without regard for political affiliation.

The CBA's McKelvey report on judicial appointments in 1985 provided a road map to how political influence in the judicial appointments process may be curtailed. The landmark report recommended the establishment of a judicial advisory committee process with safeguards to ensure appointments are depoliticized and based on merit. The approach was adopted by the Mulroney government in 1988.

Let me be perfectly clear about the distinction between partisanship in the judicial appointment process and judicial candidates' being involved in political activities. This is a theme that Professor Russell has just touched upon. Involvement in politics should not exclude a person from consideration for appointments. On the contrary, such involvement shows a commitment to community and country. However, recommendations for judicial appointment must not be based on partisan considerations. To this end, the Canadian Bar Association has recommended a two-year cooling-off period before those who have been active in politics are considered for judicial appointment.

The record shows that the CBA has worked with governments of all political persuasions to make improvements to the judicial appointment process. You can understand our extreme disappointment that the changes announced in November came without consulting those familiar with the process. It was all the more surprising as the advisory process has worked reasonably well. It was not perfect, being after all a human endeavour, but the arbitrary fashion in which the recent changes were introduced has serious implications for the way Canadians view the fairness of the system.

Let me turn away from the way the changes were announced to the impact of the changes themselves. First, we agree that the staggered terms for the judicial advisory committees could improve the system, although we believe a better approach would be to stagger the term of individual members of each committee to ensure continuity. Second, we welcome a special advisory committee for appointments to the Tax Court, although we believe the committee should include members nominated by legal organizations with tax expertise. However, the other changes lead to a perception of partisan considerations being brought into the deliberations. This undermines the basic purpose of the committees, namely, to ensure appointment of the best qualified candidates. We believe these changes should be reversed.

Let me outline three serious flaws.

First, our association is concerned about the designation of a representative from any specific community that could be perceived as being more in the interests of the outcome of judicial decisions than in the character of those appointed to the bench. The committee's role is to assess the merit of judicial candidates in an impartial manner. We recognize the importance of including community members on the committees to gain their perspective on the administration of justice. For that same reason, our legal system includes trials by juries of peers. However, members should not be added for the purpose of diluting the voice of lawyers and judges. This makes no more sense than reducing the role of lawyers and judges at trials just because there's a jury. It fundamentally misconceives their role.

● (0950)

On judicial advisory committees, lawyers bring knowledge of the pool of candidates, and judges bring knowledge of the qualities required of judges and the needs of their particular court. Judges and lawyers do not seek candidates who will prejudge particular issues or bring a particular bias to the bench. Including a representative of a special interest group could lead to the conclusion that candidates are assessed on criteria related to that group's interest, rather than solely on merit. In our view, the minister's three at-large appointments provide ample scope for community perspective.

The second flaw is removing the judge's vote except in the case of a tie, combined with the addition of an eighth member to the committee. This appears to stack the deck in favour of the minister and risks politicizing the process and creating the opportunity for patronage appointments.

Third, we recommend that the category of “highly recommended” be reinstated. Our view is that a list of exceptional candidates provided by the committees can be an added check on the influence of partisanship. If the designation is being applied in an inconsistent manner, then guidelines are the appropriate solution.

A 2006 opinion poll by Canada's Leger Marketing showed that in terms of respect, judges ranked near the top of the Canadian professions. Canadian jurisprudence is cited regularly by American, British, South African, Israeli, and Australian courts. I see these as positive signs of respect. They are a tribute to the calibre of the judges now on the bench, their independence, and their commitment to the rule of law. Obviously anything that creates a perception of compromising judicial independence will place the integrity of the Canadian legal system at risk.

Any person appearing before a federally appointed judge deserves to have confidence that the judge is qualified and will be impartial. This is a fundamental tenet of our democracy and a constitutional requirement. Accordingly, relations between the government that appoints the judges and the judges themselves must be depoliticized. This means the government cannot put political pressure upon the judiciary, nor can it be seen to have done so.

In conclusion, the recent changes to the appointment process mostly do not serve Canada well. We urge this committee to recommend that the changes to the appointment process, listed in the letter we have sent to the committee and distributed to you, be reversed.

Thank you. I'd be very pleased to answer any questions the committee members may have.

● (0955)

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

Now to the committee members.

Ms. Jennings, you're first on the list.

**Hon. Marlene Jennings (Notre-Dame-de-Grâce—Lachine, Lib.):** Thank you, Chair, and thank you all for your presentations.

I have to say that as a lawyer I share your preoccupation about the changes that have been brought to the system of selection of judges, both on the side of the process and on the side of the composition of the actual committees. My concerns and those of my party are that with the changes that have been brought, we have actually stepped back in time in terms of ensuring the process, which has been developing for two decades now, of putting into place a system of nomination of judges at the federal level that was as independent, impartial, and transparent as possible so that, as the mores of society evolved and society demanded higher standards, it could bring in changes to meet those higher standards.

Mr. Russell, you talked about the work of the subcommittee of the previous committee of justice under the previous government, and the work that it was going towards, which would have in fact met higher standards.

With that as a base, I'd like to know from you, Mr. Giroux—because you talked about a code of ethics that was put into place in 2005, if I'm not mistaken, for the members—whether under that code of ethics a recent appointment to the JAC for Alberta, appointed in January 2007 by Minister Nicholson, named Gerald Chipeur, a Calgary lawyer....

My understanding is that he represented the Conservative Party just recently in the nomination challenge against member of Parliament Rob Anders; he registered as a lobbyist on February 20, 2007, to represent the Canadian Association of Police Boards for the creation of the centre to address Internet cybercrime; and he has registered to lobby Justice Canada, the PMO, MPs, the Senate of Canada, and a host of government departments like Public Safety and Emergency Preparedness Canada, Foreign Affairs and International Trade, National Defence, and the RCMP.

Would your code of ethics allow for someone who is registered as a lobbyist and who represents the party that is the governing party to sit on a JAC?

● (1000)

**Mr. Marc Giroux:** Thank you, Madame Jennings.

I'll just give a little bit of background on the code of ethics. It was adopted in 2005 following a meeting with the then minister and the chairs of the advisory committees across the country. It was prepared in consultation with the chairs, adopted then, and posted on our website at that time. There are also guidelines for judicial advisory committees, which existed before, and which were also posted in 2005. The minister then asked us to post both documents on the website.

I want to be clear that the code of ethics, which was adopted by the minister and was accepted by the successive ministers since then, does not deal specifically with the issue of the lobbyists. There are a few matters, which I will point to, that are dealt with by code of ethics. One is that a member of committee must show discretion and neutrality, and no questions concerning a candidate's political views or political affiliation are to be raised during committee deliberations. If a candidate for the bench has been active in a political party, no inference, either favourable or unfavourable, should be drawn from that.

**Hon. Marlene Jennings:** I am going to interrupt you. I'm talking about the members of the judicial advisory committees, not candidates for judicial appointment.

**Mr. Marc Giroux:** I'm also referring to the code of ethics for members of the committees.

**Hon. Marlene Jennings:** Okay.

Is there anything in the code of ethics that was adopted by the Minister of Justice in 2005 and by the judicial advisory committees that would require Gerald Chipeur, who is a lawyer and who sits on the JAC...?

Yes?

**The Chair:** There is a point of order, Ms. Jennings.

Go ahead, Mr. Moore.

**Mr. Rob Moore (Fundy Royal, CPC):** I have two points. One is that I don't know if it's appropriate for us to be considering individual cases. And second, if Ms. Jennings wants to go down that road of considering individual cases, and if you think that's appropriate, then we can certainly do that all day long, all week long, on the previous government.

It's up to you, Chair, but I don't think it's appropriate to be asking the panel about specific individuals on the JACs or about appointments or otherwise.

**The Chair:** I would ask the witness to continue his explanation of the specific point that Ms. Jennings just put forward.

**Hon. Marlene Jennings:** My question is about the nature of the code of ethics.

**The Chair:** I think the committee understands, yes.

**Hon. Marlene Jennings:** Yes, thank you.

**The Chair:** Speak to the code of ethics, if you would, Mr. Giroux.

**Mr. Marc Giroux:** I won't make any special reference to the particular member. I will only paraphrase the code of ethics in saying that it was, as I said, adopted then by the minister. We published it.

There are two matters that may interest the members of this committee. One is that generally a member of the judicial advisory committee must remain neutral and not draw any favourable or unfavourable inference from a candidate being active in politics. The other is that a member of the committee shall not receive an advantage or a reward or anything with regard to their participation in the committee work.

● (1005)

**Hon. Marlene Jennings:** Thank you.

My other question is for any of the witnesses.

Given your preoccupation with the changes to the actual composition and role of the JACs by the Conservative government, do you think there is a real chance that challenges could be made by parties in the future, with respect to judges who have been or will be appointed under this new system, concerning the lack of independence and impartiality of those judges, given the process that the current government has put into place? And could that actually call into question the very constitutionality of our judicial system?

**Prof. Sébastien Grammond:** If I may, Mr. Chairman....

**The Chair:** Go ahead, Mr. Grammond.

**Prof. Sébastien Grammond:** Thank you.

This is a topic I've touched upon in my paper, on page five. So I think that, yes, although there is no specific requirement at this time in the case law about the appointment process, it's in the nature of case law to evolve over time to respond to new concerns as they arise.

Here, because we haven't seen this sort of giving voice to specific interest groups in the judicial appointment process before, it is highly probable that the courts will be asked to rule about the constitutionality of that.

In my view, it is probable that they will say, like in 1997 with respect to judicial compensation, that they will give guidelines, and these guidelines will have a constitutional basis. So my answer to that would be yes, it is probable.

**Hon. Marlene Jennings:** Thank you.

**The Chair:** Thank you, Ms. Jennings.

Was there another witness willing to comment on that particular question? That's fine.

We'll go to Monsieur Ménard.

[*Translation*]

**Mr. Réal Ménard (Hochelaga, BQ):** I'm going to start with Professor Grammond, whose erudition and teaching ability I am familiar with since he was my professor not long ago. I hope no one will view that as a conflict of interest, since I have no judicial aspirations.

I am interested in page 9 of your brief. Ultimately, the committee wants to know two things. First, why is it not desirable for a particular interest group to have a reserved seat in the consultation process? You seem to be proposing that Parliament itself could ultimately be involved in the appointment process. I would like you to explain to us what you have in mind. We have nothing against police officers or any professionals whatever. That's not what is in question; you clearly state that in your brief. But why is it not desirable to appoint police officers to these committees?

I'd also like Mr. Russell to return to the subject. What is the meaning of the proposal on page 9 of your brief?

**Prof. Sébastien Grammond:** All right. There are two parts.

First, there is the aspect of giving a specific voice to interest groups. I think that judges must appear to be impartial, must be neutral. So they must be selected based on criteria of competence. However, if you give a specific voice to specific interest groups in the appointment process, you give the public the impression that those groups will be able to push to have the judges who are selected be favourable to their specific interests. I think that this is unacceptable, regardless of whether we're talking about police officers or unions. That is why, in the act I am proposing, it should be very clear that the people who are appointed to those committees are not there to represent specific interests. It is clearly understood that any person who is appointed may have worked for such and such a type of group in the past; that's fine. However, it must be said that they are not there to represent interests, to further interests or to verify the judges' ideological conformity, as Professor Russell said.

The second aspect concerns the way of appointing people who would not be representatives of interest groups. I think we should keep the present system, in which associations of jurists, that is the Canadian Bar Association and the provincial bars, can appoint a representative who becomes the voice of the legal community. The Canadian Bar Association does not exist to defend, for example, the interests of unions or those of lawyers; that is a well-known fact.

It is also desirable for appointment committees to have what are called lay members, that is to say non-jurist members, so that the judicial appointment process does not have the appearance of a phenomenon of self-reproduction among jurists.

What is currently done is that the minister, entirely at his discretion, appoints persons who are supposed to represent society at large. Obviously, as Professor Russell said, this process has not eliminated political partisanship. What I am suggesting here is that the lay members, the non-jurist members, be appointed by a resolution of two-thirds of the members of the House of Commons, which would mean that, in the circumstances—

● (1010)

**Mr. Réal Ménard:** For each of the committees?

**Prof. Sébastien Grammond:** That could be for each of the committees. I understand that that may entail a considerable amount of work, but the basic idea—perhaps you know of a better way to do this—being that no single political party usually holds a two-thirds majority, and that party would not be able to appoint people on which there was not a consensus.

**Mr. Réal Ménard:** Would you be open to the idea of there being a list of people who are respected in their community for their discretion, their judgment, and are not jurists? The Conseil de la magistrature could have a list of people that would be submitted to Parliament. An entire list would be adopted and the Conseil de la magistrature could distribute those individuals.

Obviously, if we had to vote every time a committee was constituted, that might become a little difficult. We understand your idea. There should be a somewhat more centralized mechanism.

**Prof. Sébastien Grammond:** I agree. As I said, you know better than I how to go about it. Perhaps lists of alternate members should be established every three years so that the matter does not have to go before Parliament again until three more years have elapsed.

**Mr. Réal Ménard:** Would you allow us to check with Mr. Giroux to see whether this idea is valid?

We're putting you in the heat of the action without having considered the matter. I understand the spontaneous nature of Professor Grammond's proposal. You no doubt did not have access to his brief. However, do you think that the idea of preparing a list and of you having to distribute the non-legal members among the committees would work?

**Mr. Marc Giroux:** First, I'll start by telling you that we administer the system on the minister's behalf. It is up to the minister to determine how the system should work. We are not really there to make decisions as to how the system should work.

**Mr. Réal Ménard:** —as to composition.

**Mr. Marc Giroux:** That said, that's another idea. I think the purpose of considering where the other representatives the minister appoints to the committees come from is, among other things, to ensure a certain balance within the committees. That is the case, for example, if we don't have enough women on one committee or if, on some committee, the Nova Scotia committee, for example, all members are from Halifax and no one comes from the regions. There's also the matter of language that must be respected, and the matter of minorities. In short, then, all that has to be taken into account.

**Mr. Réal Ménard:** I would have liked Mr. Russell to give his point of view.

[*English*]

**The Chair:** Thank you, Mr. Ménard.

There is one point of clarification that I would like to seek from the witnesses as well as the committee.

Being a former police officer, when I went through my career as an officer, there was in a way an overview of what happens in a courtroom. You have the defence, the prosecution, the police, and the judge working with one goal in mind: to determine the innocence or guilt of a party. Now I hear words like police are "special interest", judges are here, prosecutors are there, and there is this huge division developing amongst the so-called team that should be driven by the purpose to find the guilt or innocence of a person.

So are police now considered the special interests in this whole affair of the justice process? I guess I'm at a loss here as to when that happened, but several times I've heard in this committee that now all of a sudden the police are a special interest.

**Prof. Peter Russell:** I'll catch that.

I wouldn't use that term, but we have barrels of evidence of surveys of police officers, as compared with the rest of the public, that they have a set of attitudes generally that have a special focus. They are more likely to want very severe penalties than the average Canadian. They are more likely to find, in particular, young minority accused less credible than are other Canadians. The problem is in taking that particular group and giving them a position on the committees, and this is the point of Mr. Grammond, that it is loading it in one direction.

Let's take another group, defence lawyers. Or let's take the committee for those who have been falsely convicted of crimes. Those groups, call them what you will, are very concerned about the errors courts have often made in convicting people. If you're going to have the police presence there, you should at least have the others.

But I agree very much with Mr. Grammond that once you start doing that.... And look at the kinds of jobs these judges are doing. Very few of them are in the crime area; they're doing tax, they're doing administrative law, they're doing all kinds of stuff. So what are you going to do? You're going to take tax law, you're going to take people from the poverty community, you're going to take big business—are you going to build all these committees around all the different points of view? I think that's a crazy way to select judges.

● (1015)

**The Chair:** That's an interesting comment, sir.

I'm not going to get into debate with you, although I do have other opinions over the matter. I think that broad, rushed statements, though, really are not effective overall in trying to determine what the best solution is, even for the selection process.

Monsieur Comartin.

**Mr. Joe Comartin (Windsor—Tecumseh, NDP):** Thank you, Mr. Chair, and thanks to all of you for being here, in particular for the written presentations you've made.

Professor Russell, I want to follow up on your final point about the percentage of cases that are in fact in front of these courts that are of a criminal law in nature. You used the percentage of 2%, and Mr. MacCarthy, you used 5%. I'm going to ask both of you where you got that from.

Mr. MacCarthy, in particular, I'm assuming you got yours from your chief justice, who went public with those figures three or four weeks ago. Am I correct on that?

**Mr. J. Parker MacCarthy:** That's correct.

It varies throughout Canada in different jurisdictions. For example, in Prince Edward Island the provincial court does essentially all of the major criminal work. That's where it's done. So each jurisdiction will have variations, and the figures are anywhere from probably 2% to 5%, something in that range. The interesting point, then, again arises of what is the amount of time that it takes. That's what the courts are utilizing. So there is a variation across Canada.

**Prof. Peter Russell:** My figure is from the Canadian Centre for Justice Statistics and an article written by two criminologists, including Cheryl Webster, from your university, and Anthony Doob. It was published in *The Criminal Law Quarterly* some years ago and will be in a book that I have edited, called *The Trial Courts of Canada*, which will be coming out. I've just finished delivering the page proofs. Theirs will be chapter 3, and they show that over 98% of the criminal matters are now dealt with by the provincial courts.

However, to support a point you've just made, Mr. MacCarthy, the criminal work of the superior courts is still important. That work is mostly in homicide cases and jury trials. Outside of Quebec, jury trials and homicide cases must be dealt with in a superior court.

Though they're not a large percentage, they're often long and they're very serious cases. They're cases in which I'm very uncomfortable that those picking the judges are specifically choosing them, from the federal government's point of view, to be tough on crime and to have that point of view. We have had a lot of terrible miscarriages of justice in those criminal murder trials in Canada.

**Mr. Joe Comartin:** Mr. Giroux, on the promotion of provincial court judges to the superior courts, do you have any absolute numbers or percentages? How many of the provincial court judges are moved up to the superior court?

● (1020)

**Mr. Marc Giroux:** Mr. Comartin, I don't have those numbers, but I could get them for you. You are aware of the process by which provincial court judges are assessed. They are not given a rank, if you will, of "recommend" or "unable to recommend", but their candidacies are provided to the minister with comment by the committees.

**Mr. Joe Comartin:** Professor Russell and Professor Grammond, let me put two things to you, and perhaps you as well, Mr. MacCarthy. In terms of the approach taken by this government—that we have to get tough on crime—have any of you seen at the provincial level any other government that has tried to make appointments to the selection committees or the screening committees, in terms of introducing an ideological element to the appointment of those? Has any government of any political stripe done that?

**Prof. Peter Russell:** I have never seen it. As an ideological test, certainly political background has been important, both for the Conservative governments and the Liberal governments. We did an empirical study of the judges appointed under the system, and we found—

**Mr. Joe Comartin:** I'm sorry, Professor, but can I interrupt you? Was that study you're referring to just at the federal level, or did you look at the provincial governments?

**Prof. Peter Russell:** The federal level.

**Mr. Joe Comartin:** Can I ask you to limit it to that? I really want to know if, at the provincial level—

**Prof. Peter Russell:** Oh, I'm sorry.

**Mr. Joe Comartin:** —whether it was the Parti Québécois in Quebec, NDP governments in other provinces, or the Liberals or the Conservatives, any government has tried to introduce ideology into the appointments of their screening committees.

**Prof. Peter Russell:** I can say this. In Ontario it's a 13-person committee. I was its first chair. There was a very careful attempt to balance the committee. We did have lay people. If we had someone from business, we also had someone from the labour area. If we had a defence counsel, we also had maybe someone who had Crown experience.

It was difficult to find people who had no background in any area of life. We were looking at citizens who are involved in Canadian life. They all have perspectives from whatever role they play, but there was a very deliberate effort to balance the membership of the committee.

**Mr. J. Parker MacCarthy:** I would say that has probably been the British Columbia experience. The committee is much larger and it does in fact interview candidates, which is different, of course, from the federal appointment system.

**Mr. Joe Comartin:** Again, you hear the comments from the Prime Minister that he is appointing these people, whether they're from victims' rights groups or police representatives, because he wants to be sure that our judges get tough on crime. Have you seen that kind of approach from anybody else, from any premier of any political stripe at the provincial level?

**Mr. J. Parker MacCarthy:** I'm not aware of those types of comments being made. There have been, at times, issues taken in various provinces, where issues have arisen concerning the selection process and concerns expressed about overactivity, let's say, by the Minister of Justice, but I would suggest that it's not a common experience.

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

Mr. Moore.

**Mr. Rob Moore:** Thank you, Mr. Chair.

I'm certainly more convinced at this point that the government made the right decision on this than I was at the start of this meeting.

To the Canadian Bar Association, you've said that the process in the past has worked reasonably well. Maybe those around the table would agree that it would work reasonably well, and I would suggest that in the future, with the changes that were made to the advisory committee, it will continue to work at least reasonably well.

On that, it's interesting to note that all judicial appointments that have been made so far by the government have been made under the system that was in place under the previous government. I think that's an important point at this point, but I think it's going to be an improved system with a broader spectrum of input. But one of the things that I see developing—and I've never heard this expressed before today, actually—is that the police are somehow a special interest group. I don't think the police are any more of a special interest group than some of the representatives who are already on the judicial advisory committee.

I guess I'll address this to the Canadian Bar Association. The Canadian Bar Association is here today saying that there should not be a police representative. Yet there is a representative from the provincial bodies of the Canadian Bar Association on the judicial advisory committees. Professor Russell has said that the police have a set of attitudes. I would tend to say that it's too broad to put every police officer into one boat.

The comparison was made by Professor Grammond on not having a unionist on here. Well, the people who are on these judicial advisory committees, except those who are selected at large, have an interest in the working of an effective justice system, that Canadians are served by a justice system that they are all participants in.

Where I draw the distinction with the analogy you made is that the police are a part of the justice system, and I think they have an interest in quality judges being selected. I think they have the same interest as the Canadian Bar Association, or the law society, or anyone else has.

I'll use this as an example. I've sat here on the justice committee many times dealing with legislation that previous governments have brought in and dealing with legislation that this government has brought in. The Canadian Bar Association has appeared as a witness and sometimes has given testimony, purporting to represent all lawyers in Canada, that ran counter certainly to my opinion on the legislation—very much behaving, as I would see it, as a special interest group, bringing forward a perspective on a piece of legislation, certainly not being neutral on a piece of legislation. We've also heard representations from police groups.

So I don't think it's fair just to say that the police are somehow a narrow special interest. I see them as players in the justice system, the same as lawyers, the same as judges are, who have a real interest in quality judicial appointments, the same as we all do. Ms. Jennings said that as a lawyer she's concerned. I know the Liberals are mostly concerned because they're not in government, not making these judicial appointments.

I raised the objection to using specific examples. We could do that all day with previous actions of the previous government. But I'm also a lawyer and I'm pleased with this direction.

I'd like to put this to the Canadian Bar Association. Do you honestly see that the police are somehow a special interest group; and if so, are they any more of an interest group than the Canadian Bar Association?

● (1025)

**Mr. J. Parker MacCarthy:** I'd be pleased to respond to that.

First of all, putting it into context, for very good public policy reasons we empower our police forces with a whole host of different rights and duties—arrest, seizure, things of that nature. So the court system often oversees the police in terms of the exercise of those duties and responsibilities. So the police are in a very unique position in terms of their relationship with the courts. I think Canadians as a group, respecting police as they do, also want to know there are reasonable limitations being placed on the exercise of those duties and responsibilities. So the relationship of the police with the courts is very unique in Canadian society.

In terms of the Canadian Bar Association's approach, what we do is represent a broad base of lawyers and a broad base of views. When we make submissions to this committee or to any other committee, we are doing that on the basis of policy and consultation with a wide range of people within our organization.

As a former Minister of Justice publicly stated within the last couple of years, when we heard from the Canadian Bar Association, we were concerned about whether we were going to be getting a pat on the back or a slap on the head. We do try to bring a balanced approach, an informed approach, to any submissions we make. We also make sure that we are hearing from a broad base of constituents within our organization before bringing forward recommendations on legislation, whether it be the Competition Act or criminal justice reform.

● (1030)

**Mr. Rob Moore:** Thank you for that.

I thank all of the witnesses we have here today for what I think are thoughtful submissions. I agree with you that the police play a unique role in the justice system, and that's part of the reason this government has decided that the police should play a role on the judicial advisory committees. To suggest, as some members opposite have, that this is somehow earth-shattering, I certainly don't see that.

I see in your submission, Mr. Giroux, that you've made mention of some of the changes that have taken place over the years, from "qualified" and "not qualified" to "highly recommended", "recommended", and "unable to recommend". Now it's going to be "recommended" and "not recommended". There have been other changes made. So this is certainly not the first time that the judicial advisory committees' composition has in fact been changed. I would suggest it's probably not the last time that they'll be changed. I think if they were working reasonably well before, they'll continue to work reasonably well in the future.

Any one of you may want to comment on the fact that, as I see it, the police play a role in the justice system that some of the other parties that were named as special interest groups do not play. The police have a unique role, as has already been mentioned, and it is for that reason we feel they should be included.

At the end of the day, the decision remains, as it always has been, with the minister and with the Governor in Council on the appointment. Now we're hearing from a broader spectrum of individuals who are interested in the justice system and in fact have a vested interest in the working and the success of our justice system.

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

I don't know if there's any comment. Monsieur Grammond, go ahead.

**Prof. Sébastien Grammond:** On that point, if there's some time left, we have an adversarial justice system, and the function of a court, of course, is to find the truth. How we go about doing that is that we have two teams, if you will, presenting both sides of the issue—and presenting them in the most vigorous way they can. Believe me, as a former litigation lawyer, I know we push hard for our vision of the truth.

So what happens in a criminal trial is this. There are two views put before the judge, and invariably the police line up behind crown counsel. So from the perspective of the accuser, from the perspective of any member of the public, in the context of the criminal trial the police would not be seen as impartial. They would be seen as part of one of those two teams.

So that's why I said that the police are a special interest group. Perhaps it's not the most accurate description, but I think the idea is there. They push for one vision of the truth, and in that sense they are not impartial.

**The Chair:** Thank you, Mr. Drummond. I guess it would be up to the judge then to decide what the truth was.

Mr. Murphy.

**Mr. Brian Murphy (Moncton—Riverview—Dieppe, Lib.):** Thank you, Mr. Chairman.

As a preamble, I'm a bit shocked—dismayed, really—that the parliamentary secretary to the government for justice and the chairman of the justice committee would not realize that there are separate roles for the prosecution, the police officers, the defence lawyers, and the judge. I might recommend to them the learned preamble to the show *Law & Order*, which says that the criminal justice system is served by two separate and important entities, the police who investigate the crimes.... Anyway, I could write that script. The point is, since we're on television, Mr. Chairman, I thought I'd allude to that.

More seriously, on the question Mr. Moore raised to Mr. MacCarthy about the CBA, I've been a lawyer for 21 years and one month—sitting here, I calculated that—and I've always paid my dues, by the way. I've always been very proud of the CBA. I thought it was an advocacy group; I thought it was a membership group—until I got here. Not that I'm not proud.

What I'm saying is that there have been aspersions cast upon the CBA at this committee on several occasions due to the fact—and I'll be quite blunt with you—that there are section chairs and subsection chairs who often write letters under the same letterhead as yours, the CBA's, who purport, I suppose, if you don't read how it's signed, to represent all the members. Well, they don't. They signed it very clearly as a member of the criminal law subsection.

Today—and it is very important for everybody to pay attention—Mr. MacCarthy is writing a letter and making a submission on behalf of the CBA. So I must ask you, when you make the comments that this does not serve Canada well, to underline briefly for me how it is that you represent the views of the CBA, if you didn't call Mr. Moore to ask him his view on this.

● (1035)

**Mr. J. Parker MacCarthy:** We are a democratic organization, but we use a representative system. The highest policy group within our organization is our national council. For lack of a better analogy, it's our Parliament. It has 244 voting members who are elected by the membership from across Canada, and they serve to consider, debate, and pass resolutions that deal with a whole host of topics, including the issue of judicial appointments.

The Canadian Bar Association has been concerned about the judicial appointment process going back to actually the turn of the 20th century. If you read through the McKelvey report—in which Professor Russell had a very big hand, in terms of some of the work that went into that particular report—you can see that we are not latecomers to the process.

In terms of my comfort level in being able to say that what I am doing is representing the views of the Canadian Bar Association, this is through a very diligent process by which we seek consultation and input. Like Parliament, we do not have referenda of all the members on every issue that comes before us, but the record is pretty clear over the years that the view of the Canadian Bar Association is to support transparency in the selection process, and a merit base.

**Mr. Brian Murphy:** Thank you very much.

Professor Russell, you said you have “barrels of evidence” that suggest police officers have a certain perspective. I might ask, in light of your recommendation number 8, I believe it is, in your brief, whether you are suggesting you're anti-police officer.

I'll expand this to Mr. MacCarthy if there is time.

It has been suggested on the floor of the House of Commons by the Minister of Justice—a Queen's Counsel, an honourable man, in fact—Mr. Nicholson, that anybody who is against this step is anti-police officer. Are you, Professor Russell, anti-police officer?

**Prof. Peter Russell:** Not at all, and I would think police officers make good members of these committees. But to say that is the one group we have to get on these committees and just zero in on them is very foolish. These committees have to assess judges for all kinds of roles. A police officer will certainly bring something valuable to it.

By the way, this “special interest” group talk is just cheap rhetoric. All groups are interest groups. What's special about any of them? That's just a way of insulting all kinds of groups, including police officers and crown counsel. Let's just get that rhetoric out. There are just groups in society. There are no special groups; there are no non-special groups.

Of course police officers could make a contribution, and so could many other kinds of people. It's just that when you zero in on them you seem to be trying to get one general perspective.

And I know there is diversity among police officers. Some of my finest students are police officers, and they have very different attitudes from a lot of the men and women they supervise. But we still know that there's a general pattern. To just stock up these committees with that point of view is a mistake.

**Mr. Brian Murphy:** Again, Mr. Russell, this is on a different point, but an important one. You said there have been a lot of miscarriages of justice by superior court justices. We know the famous ones, but is it empirically true that because of a lack of perhaps background research on the nominees, there's a connection with the miscarriages of justice? Is the number that large, really?

● (1040)

**Prof. Peter Russell:** I don't know that, but five people spending years and years in jail for crimes they didn't do is five too many. And what it underlines is how important it is to find the very best. That's what I don't hear anyone talking about.

Why do you throw out the role of a committee to advise the government on who is highly qualified? Would you do that anywhere else? Would you do that when you were advising a bank on who should be the president, or a university on who should be professors? In any business, would you say, sure, go out and look at some candidates, and as long as they're okay, then you can recommend them, but don't tell us who the best are? Say you were doing sports, and you were picking your Olympic team, would you say, well, of all the athletes, of all the runners, don't tell us who are best, just have the ones who can run reasonably well?

I think it is really an insult to the Canadian people to say we don't want these committees to tell the government who we think is best. Until you address that, that's way more important than the composition of the committees, because committees are virtually useless—I said that—if they're not advising government on who they think are the best candidates.

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

Ms. Freeman.

[*Translation*]

**Mrs. Carole Freeman (Châteauguay—Saint-Constant, BQ):** I would like to thank every member of this committee for the presentation. We know that we are all here to try to see that the judicial appointment process ensures judicial independence.

I have a question for Messrs. Russell and MacCarthy.

How do you interpret the fact that the government is withdrawing the right to vote from judicial representatives on the committees? Because, unless there is a tie, the only person who would not have a right to vote would be the judge.

[*English*]

**Prof. Peter Russell:** What I said I'm very unhappy about is the whole idea that these advisory committees are going to be kind of partisan, adversarial things in which a vote of four to three.... Imagine a vote of four federal government appointments against three. There won't be any role for the judge at all. He can't make a tie. So there you have a person being recommended for judicial appointment because four governmental appointees on the advisory committee think the person's all right, when the other three, including the provincial representative—and remember, most of these judges are going to serve in the provincial superior courts—don't think this person should be a judge.

To have a four to three vote.... I can tell you, having chaired the Ontario advisory committee through a number of years, that we just struggled and struggled to get consensus. By the way, that took a lot of work, and it also meant interviewing and discussing what we learned in the interviews, and all kinds of references. We took the job very seriously. I just think it's a pity to reduce this to saying, they've got all these names, and four people vote this way, and three vote the other way, and if there's a tie—I guess someone's sick or away and it's three-three—the judge can throw in the judge's vote. I think that's a travesty of how these committees should appoint them.

You don't have to reinvent any wheels. The provinces have been doing this for over a decade, and the results are tremendous. They are producing very fine provincial judiciaries. If Canadians hear that they can't have the same merit system at the federal level for the higher courts as they have at the provincial level—and they never will, because for most of them, their eyes just glaze over on this topic—I think they'll be disgusted.

**Mr. J. Parker MacCarthy:** I've spoken with several people who have served on the judicial advisory committees, and I don't think I've been told by any of them that the model utilized in the selection process is based on anything other than consensus. So the committees do struggle to come up with a consensus approach, or that has been the historical format.

I think that perhaps the difficult message, or perhaps the unsettling message, that is being given by putting emphasis on voting or on the removal of a vote from a judicial member is that what we are moving towards is a system in which voting will trump consensus. That is not the type of system that will see the best qualified candidates being recommended to the minister for appointment.

● (1045)

[*Translation*]

**Mrs. Carole Freeman:** Thank you. How do you interpret the fact that the Conservative Party has changed the procedure without consulting you in any way?

[*English*]

**Mr. J. Parker MacCarthy:** The protocol has always been a broad-based consensus amongst those who have invested a great deal of time and resources into the process. That's the judiciary, the Canadian Bar Association's branches, the law societies, and also the ministers of justice or attorneys general in each province.

We were not consulted on this matter in a timely or meaningful manner. That is unfortunate, because we had some ideas and I think we could have brought a perspective to the process before the decision was announced.

**The Chair:** Go ahead, Mr. Russell.

**Prof. Peter Russell:** To me it's very unfortunate. The subcommittee worked on this for many months. They had submissions, not just from lawyers and judges—they certainly had that—but from people who aren't lawyers and judges but have a lot of experience and interest in how to choose good judges. The committee worked very hard. It considered a whole lot of ideas. It developed an approach. To just say, well, forget about all that, we're just going to do it this way, I think is not respectful of the parliamentary process.

I'm so pleased this committee is back and it is seized of the matter. I hope you will look at the report, from November 2005, of the previous subcommittee. I think it has a lot of merit.

**The Chair:** Thank you, Ms. Freeman.

Mr. Brown.

**Mr. Patrick Brown (Barrie, CPC):** Thank you, Mr. Chairman.

I have given some thought to this, and I was discussing it with some constituents last week. I had a group from our local MADD chapter come in to discuss the topic of the judicial advisory committees. They had always assumed that police would have a role in the selection process. They were shocked to hear this balance wasn't there. That was the word they used: “balance”. They're certainly supportive of the new initiatives. I think that's what these changes bring: a sense of balance.

I also heard, why a representative of police and not unions? Well, if you're putting together a hockey team, you're going to involve hockey players; you probably wouldn't pick a basketball player, a football player, or a politician for that matter. When we're dealing with justice issues, we should involve those people who deal with the administration of justice. It could be lawyers; it could be judges. It should certainly be police officers. To suggest they do not have a role in justice, I think, is short-sighted.

I too was a bit surprised in hearing comments today that the judicial advisory process was merit-based, was taken seriously, because the inference there is that it's not going to be merit-based, that it's not going to be taken seriously. I think those comments would certainly be degrading to the representatives of police who are going to be involved in this process, because I am certain they would take it seriously and that it would be merit-based.

I have a few other things to go through, but that's something I'd like to get some comment on. How, in any fashion, would involving a police representative take away from it being merit-based? Would you seriously suggest to this committee that a police officer wouldn't make his advice on a merit-based process?

There was some reference—and I'm glad Mr. Russell clarified it—that a police representative would not be a special interest. I appreciate that. I thought we went down the wrong track when we began this hearing by suggesting that. We're always going to get different perspectives. I think all the groups involved in the judicial advisory committee bring good things to it. You can always look for small faults, but at the end of the day they all represent different sides of the justice system and they provide valuable advice.

I agree with the assessment of Mr. Moore that there's no difference in getting input from a representative of police than there would be from the Canadian Bar Association. There are obviously going to be different perspectives.

Mr. MacCarthy, I have a quick question for you. You mentioned the cooling-off period. Would you suggest a similar cooling-off period for members of the Canadian Bar Association who have a role in this process?

● (1050)

**Mr. J. Parker MacCarthy:** Under the code for the committees, they have a one-year period whereby, if you are serving on the committee, you cannot then be a candidate and be considered by the committee.

**Mr. Patrick Brown:** That's good, because I looked at the different groups when I was preparing for the meeting today. I looked at the Canadian Bar Association website and noticed that on December 18 there was a press release, issued by you, bringing in Kevin Carroll as second vice-president. Certainly it's good to have him in the leadership of the Canadian Bar Association, but he's very active within a political party and has a set of beliefs that would be different from a police representative.

In the different leaderships and the different dynamics involved in the various groups, you're going to get different perspectives. I would never hold it against the Canadian Bar Association. Certainly no one should hold it against the police union that they have different viewpoints, but there are different viewpoints. Mr. Russell has made it clear that there are some different overall generalities.

I think we lose the balance if we say we're only going to get input from the Canadian Bar Association and we're not going to get input from police representatives. It would be like putting together a hockey team without a goalie. You need all parts. It would be like throwing a football player a net and saying.... That would be a tangible analogy to saying you should have a representative of a union, but not of police. The police are part of the administration of justice.

Perhaps I could get some comment on why they would not take it seriously and make merit-based selections—or if that was not what was meant when it was suggested.

**Mr. J. Parker MacCarthy:** I think we have to be very concerned about the messaging or perception that Canadians will hold when we move to people such as the police in what the committees are now looking for. The risk is undermining the credibility of the system, where you may have a perception of some bias coming into the process.

I can tell you that the people who are recommended and serve from the Canadian Bar Association are not tied to the Canadian Bar Association. We simply put forward names for the minister to select from, and these people then consult broadly with the profession about candidates on a confidential basis. They don't come back to the Canadian Bar Association, as an organization, asking for direction on who should be appointed; that's not the process.

We have to be careful in the balancing and structure of these committees that we give a sense that they are adhering to a higher calling that puts ideology, partisanship, or a specific interest in outcomes at trial aside to make sure the best possible candidates are recommended for appointment by the Minister of Justice.

**The Chair:** Mr. Bagnell.

**Hon. Larry Bagnell (Yukon, Lib.):** Mr. Giroux, can you confirm that under the old system, before these dramatic changes, police could be appointed to any of the three positions the minister had the ability to appoint?

**Mr. Marc Giroux:** They were the minister's nominees, and the minister could appoint whoever he or she deemed—

**Hon. Larry Bagnell:** Right. So they could have appointed three police officers under the old system.

Thanks to everyone for coming.

For the press, I think Mr. Russell and Mr. MacCarthy really outlined comprehensively the reasons that this side of the House, the majority of parliamentarians, and many of the press and legal experts in Canada condemn these changes to the system.

To Ms. Bellis, in the justice committee we've had other examples of bills from this government. In the normal process of coming up with bills and policy changes, the department quite often recommends these changes. We had bills that, much to our astonishment, the Department of Justice couldn't even recommend. They didn't come from them; they came from the top down. I assume this is the same, and none of these dramatic changes were recommended by the Department of Justice to the minister.

● (1055)

**Ms. Judith Bellis:** I can't say what advice the minister may or may not have received about these changes. My section was not asked to provide advice.

**Hon. Larry Bagnell:** Okay. That's what we assumed.

Mr. Grammond, although I think we all believe this affects the independence of the judiciary, you've said it was more traditionally other things that were important in keeping the judiciary independent, including wages. But we had a case in which an independent committee recommended wages. The government had decided that judges were going to get the wages, and all of a sudden a new government came in and retracted that. So I would assume that this would be a movement against the independence of the judiciary and it would not give confidence to the public about the independence of the judiciary.

**Prof. Sébastien Grammond:** Oh, you mean the fact that the recommendations of the wages committee were not put in place or were not implemented.

**Hon. Larry Bagnell:** That was what the government had originally recommended. A new government came in and actually reduced the wages of judges.

**Prof. Sébastien Grammond:** Yes.

I have not inquired into this matter fully, but I can tell you that under the guidelines set by the Supreme Court in the P.E.I. reference, the idea is that the government should implement the recommendations of the committee, unless it gives reasons for not doing so or for doing so partially, and then this decision can be contested. For example, in Quebec courts, decisions of the government not to give effect to wage recommendations have been contested and in some cases have been found to be inconsistent with judicial independence.

So that's the way it works.

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

We'll go to Mr. Thompson.

**Mr. Myron Thompson (Wild Rose, CPC):** Thanks for being here.

Mr. Russell, you and I will probably have a conversation, and taking a look at you, I think you and I have bounced around this world for about the same amount of time and have experienced a lot of different things.

I'll quickly relate something to you. There was a board of eight people—two farmers, a bar owner, a hotel manager, an auto mechanic, an auto dealership owner, an ex-school teacher, and a retired police officer. They interviewed this guy to find out how he would manage a situation that required a lot of judging and a lot of controlling and looking after a situation. They wanted this individual to run a tight ship—in other words, to be tough on crime.

Being tough on crime isn't a bad thing. Crime is a bad thing. I think we should be tough on bad things. That statement doesn't bother me. I think that could come from people from most any walk of life. In fact, if you look around the country of Canada, you'll find citizens all over who are saying, for Pete's sake, get tough on these guys.

I've talked to a lot of lawyers who tell me that they actually have had clients who judge-shop. They know who tends to be more lenient and who tends to be more difficult, or harder, so they judge-shop. They postpone hearings to wait for the right judge.

I think all that's a bunch of nonsense. I think you have to get some consistency in fighting crime. And that aspect of sitting on the bench and making decisions has to come, in my view and I believe in the view of millions of Canadians, in a system that says that crime is bad and has to be dealt with—crimes at all levels.

This guy went through his interview, and he proposed the 4-F system: if you give me this position I'll be fair, I'll be fast—I won't waste time, I won't take forever to deal with the situation—I'll be firm, and the decision will be final. That individual convinced these board members that he should be the man for the job. That was me, when they appointed me principal of a high school.

Believe it or not, when you're a principal of a high school, you sit in a judging position. You have to make decisions. You have to be firm. You have to be fair. At the end of a year, checks and balances, which you mentioned, were always there. How did you perform? How are you doing? I guess I did okay, because I was there for 15 years. And I agree with checks and balances.

Now, in the States, you've said, there is a system of checks and balances that runs through the Senate committees and what not. Would a system of checks and balances, in your view, be an answer to the judges, who have a responsibility to run a system for the benefit of our society, and would that require some serious democratic reforms?

● (1100)

**Prof. Peter Russell:** I'll just deal with your final question.

I'd be in favour of a legislative confirmation at the highest level, the Supreme Court. I might even be interested in it possibly for courts of appeal. I know that's anathema to a lot of the legal community, but I think those are such important positions, Mr. Thompson, that they should be reviewed, as they are in other countries, by a balanced legislative committee.

But for the trial judges—there are 50 or 60 of those appointments a year, and they're often, for many, first appointments—my experience is that you don't want a lot of exposure to those who are being considered for judicial appointment. If they don't get it, their careers can be badly hurt, their partners can be annoyed, and so on.

When I was chairing the provincial committee that was selecting trial judges, we went out of our way to be absolutely confidential about who had said they would be considered for a judicial appointment. We didn't want to ruin people's careers. We wanted to protect their good names.

That's what most of these positions are about. They're mostly first appointments for lawyers who are in practice. I think a U.S. Senate-style confirmation hearing would not be a good idea for that reason, sir.

**The Chair:** Thank you, Mr. Thompson. I'm sorry, this meeting is concluded. It's actually over by five minutes, Mr. Thompson.

I would like to thank the witnesses for appearing today. I believe we've had a pretty thorough discussion. I would like it to continue, and I know the other committee members would. But thank you for your input. It's very much appreciated.

The meeting is adjourned.

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