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Chair

Mr. Art Hanger

Standing Committee on Justice and Human Rights

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● (1535)

[*English*]

The Chair (Mr. Art Hanger (Calgary Northeast, CPC)): I'd like to call the Standing Committee on Justice and Human Rights to order. This being Wednesday, April 18, 2007, in this committee we'll be finishing our study on the judicial appointment process.

Of course you will note that there are cameras in this session. That was agreed to by the committee some time back.

For our witnesses today, we have two honourable gentlemen. We have Mr. Antonio Lamer, former chief justice of the Supreme Court of Canada. Welcome, sir. And we have Mr. Jacob S. Ziegel, professor emeritus of law, University of Toronto.

Thank you both for attending.

Going in the order that they appear on this agenda, I will ask Mr. Lamer, then, to begin his testimony.

Right Hon. Antonio Lamer (former Chief Justice, Supreme Court of Canada, As an Individual): Thank you, Mr. Chair and honourable members of Parliament and of this committee. I was very pleased to receive an invitation to come here. I never turn them down anyway. I feel it a duty for somebody who has occupied my various positions to make myself available to the elected whenever they want to hear from me or maybe take me to task.

[*Translation*]

I suspect I was invited to meet with you because of the remarks I made in two interviews with the press, one with Janice Tibbetts of CanWest News, and the next day or the day after with Hélène Buzzetti of the daily *Le Devoir*.

The interview with CanWest News lasted approximately an hour and a quarter. It was Janice who contacted me. I've known her for a long time because I gave her a number of interviews during the time when I sat on the Supreme Court of Canada as Chief Justice. It goes without saying that Ms. Tibbetts, as a result of the inevitable space constraints, was unable to reflect all the nuances in my remarks. One of the reasons why I'm very pleased to have been invited is that this will enable me to make them. It is also common knowledge that journalists have no control over titles.

[*English*]

I wish to say immediately that I've never said to Janice Tibbetts, and she never wrote, that I felt that my Prime Minister was trying to muzzle the judges. He was trying to do something else, but not "muzzle". So that title is an inappropriate title. I would never say that of my Prime Minister unless he did it or tried to do it.

[*Translation*]

That is why I was happy to accept your invitation. With your permission, I would like to state what I consider are the criteria that apply to the composition of a committee of the kind that is the subject of this committee's hearings.

[*English*]

Having been out of the country for a while, I was unable to follow the debates in the House and the evolution of the status of the proposed legislation. But that's not today's subject anyway. Upon my return, I was given to understand that the opposition had agreed to some of the government's proposed legislation but is firmly opposed to other portions, such as, I am told, what is coined the "three strikes you're out" legislation.

Now back to the criteria. In staffing a committee, it is a truism to say that you must not lose sight of the committee's purpose and you must seek to have a committee that will best fulfill that purpose, and not staff it in a manner that will serve an ancillary purpose, a fortiori, an improper one.

What is the purpose of these committees? It is to select and put on a list, for the Governor General in Council, names from among lawyers who have expressed in writing a desire to become a judge of one of our superior courts, except the Supreme Court, or the Tax Court—not "except" the Tax Court, but "or" the Tax Court, which is not a superior court—and who meet the qualifications to fulfill such duties.

To fulfill that responsibility, it seems obvious to me that the members of the committee must know what the job requirements are, depending on the court's jurisdiction, and know, or at least know how to find out, if the postulating lawyer has these required qualifications to properly fulfill those duties. Now, it's that simple.

Other kinds of committees are best staffed by people from various walks of life and from different generations whose life experiences are, given the purpose of these committees, precisely what is needed to make meaningful contributions and best decisions if the committee is of a decisional nature, or the best advice if it is an advisory committee. But the committees we are talking about are not of that kind. That is why you need at least an experienced judge and senior lawyers. This is not to say that only judges and lawyers should be on these committees. As I said to the press, clerks of the relevant courts who day after day, over 20 to 25 years, have seen lawyers appearing in court, or journalists who have been covering the courts over the years, can make useful contributions without necessarily being lawyers or judges.

I did a bit of homework. I had to make a few calls because I'm not familiar with the workings of these committees and I've never been on one. They didn't exist when I was appointed to the various courts of this land.

● (1540)

A chief justice told me, because I phoned him, that the judge he or she had appointed to one of the committees reported back that two eminent members of a profession totally unrelated to the dynamics of our court system, at their very first meeting—and apparently they meet twice a year—candidly told the judge and the lawyers that they would have to rely on them to know if the postulant had the qualifications to become a judge of the kind of courts the list was being prepared for—that is, the superior courts; the Federal Court; the Tax Court; and the courts of appeal, including the Federal Court of Appeal. Given their different jurisdictions, which these two professionals were not too familiar with—I mean, they had an idea from reading the press and reading cases, but they did not have a thorough knowledge of the jurisdictional aspects of these courts—in effect they said, "We're going to have to rely on your judgment, because you're the ones who know. You know some of the lawyers, you know the people who have been given as references, you know if they are prominent or if you can rely on their judgment, and finally, you know who to phone to find out".

In all honesty, I must tell you that two nights ago I attended a dinner at University of Ottawa to celebrate the 25th anniversary of the charter. While speaking with a lawyer who had been on one of those committees, I was told that the laypersons did make a contribution. I was told that. Before I had time to inquire as to what manner that contribution was made and what kind of contribution it was—given that I'm stuck in a chair, people come over to speak with me; I can't move around like a butterfly—two persons interrupted me and I never got the answer. So I don't know. I was very curious. I tried to get hold of this person, but there were lots of people at the University of Ottawa and I couldn't see where he was, and I couldn't walk around to find him.

I must tell you that one person I spoke to told me these laypersons can make a contribution without necessarily being my journalist or my court clerk. I was told that. I should add that I don't have any vicious feeling about their presence on these committees, but I don't see them making a meaningful contribution.

In preparing to meet with you, as I said, I had to speak to various people, including chief justices and a professor who testified before you, Professor Ed Ratushny, who is a friend of mine. He is a retired appeal court judge, who was on one of those committees to find out how these committees functioned.

● (1545)

[*Translation*]

They have no statutory or regulatory framework, as a result of which, I suspect, they proceed differently from one end of the country to the other. Some of those differences no doubt depend on their territory of jurisdiction. I should mention that, in my press interviews, I committed the error, out of ignorance, of saying that they could not inquire about the persons appearing on the list as references by the postulant. Without any regulation prohibiting it, they can and do this, and that's a good thing.

[*English*]

Having made my views public with regard to what has triggered your wanting to hear from me, I shall stop here. I am sure some of you will want to take up on what has been reported or ask me other questions unrelated to what I have said. I prefer not to take up my full 10 minutes, and I will turn what's left over to you.

The Chair: Thank you, Mr. Lamer.

There will be a question period. We will get to it right after Mr. Ziegel makes his presentation.

Mr. Ziegel, you have the floor.

[*Translation*]

Prof. Jacob Ziegel (Professor Emeritus of Law, University of Toronto, As an Individual): Mr. Chairman, with your permission, I'll make my address in English because that's easier for me.

[*English*]

Mr. Chairman, I appreciate the invitation to appear before this committee to share with the committee my views on the changes to the judicial appointments advisory committees introduced late last year and early this year by the Harper government, and on the changes that, in my view, are essential if federal judicial appointments are to be based exclusively on a merit basis and not on extraneous and irrelevant factors.

I've read the evidence given before this committee by Professor Sébastien Grammond and Professor Peter Russell. I fully agree with them that the unilateral changes made by the Harper government to the composition of the advisory committees and the assessments to be made by the committees are quite incompatible with the merit-based system of appointments and they will only further diminish public confidence in the integrity of the appointment process.

However, it is a serious mistake to assume that the advisory committee system was working well before the Harper government introduced its changes and that the present government is responsible for all the problems that have arisen. The truth is that the pre-Harper advisory committee system was deeply flawed because of the following reasons.

First, the advisory committee system, introduced in 1985 by the Mulroney government, and continued by the Chrétien and Martin governments, was only a screening system. Contrary to the recommendations of the Canadian Bar Association and the Canadian Association of Law Teachers, the advisory committees were not involved in the actual filling of vacancies and were not entitled or required to provide the federal government with a short list of the best-qualified candidates to fill the vacancies. Consequently, despite the introduction of the advisory committees, political patronage and political favouritism continued much as before.

Second, circumscribed as the roles were, the advisory committees were not involved and are not now involved in any meaningful way in reviewing applications for lateral promotions from provincial courts to provincial superior courts, in promotions from the trial superior courts to appellate courts, and in appointments to the Federal Court of Canada and, at least until very recently, in appointments to the Tax Court of Canada. Just as importantly, the advisory committees play no role in the appointment of chief justices of the provincial superior and appellate courts.

Third is the fact that the advisory committees are not required to interview applicants for appointments and are not required, indeed it seems not permitted, to publish an annual report whether on a provincial or national basis about their work and experiences. Also, it seems applicants for appointments are not advised of the results of their applications and therefore, of course, have no recourse if the advisory committee reviewing the application did not find the candidate of acceptable quality.

In short, Mr. Chairman, there is no more transparency and accountability in the operation of advisory committees than there is in the actual appointments made by the federal government. And if I may add here, I think what the Chief Justice has just told us exactly confirms what I have said about the problems he encountered in trying to ascertain how the committees worked and practised.

One of the ostensible reasons for the appointment of the advisory committees was to eliminate political patronage and to make merit the basic yardstick for the appointment of judges. There is strong, if not conclusive, evidence that this hope has not been realized. The CBA report previously referred to gave its own assessment of the continuing role of political patronage as of 1985. Similarly, Professor Peter Russell and I, in an empirical study we published in 1991 of judicial appointments made by the Mulroney government between 1984 and 1989, found that nearly half of the appointees had political connections to the Conservative Party at the time of their appointment.

Things did not improve during the Chrétien and Mulroney eras—I'm trying to be impartial, Mr. Chairman. Disclosures during the Gomery inquiry prompted several reporters working for the *Ottawa Citizen* to conduct an investigation to determine to what extent federal appointees to the bench had made contributions to political parties. Their findings were that more than 60% of the 93 lawyers who had received judicial appointments in Ontario, Alberta, and Saskatchewan since 2000 had made donations exclusively to the Liberal Party in the three to five years preceding their appointments.

● (1550)

Allow me also, Mr. Chairman, to draw the committee's attention to the important and comprehensive study of donations to political parties during the Mulroney and Chrétien eras made by three political scientists—Professors Riddell, Hausegger, and Hennigar—the results of which will shortly be published in the *University of Toronto Law Journal*. In my written submission I reproduce a table prepared by these authors of political donations made by future judges during the second period of the Mulroney regime and the three terms of office of Prime Minister Chrétien. What they show is that overall, of all the appointments made during this period, 30.6% are probably donors to the appointing government and only 5% of all the appointees had made political contributions to another party.

It's not difficult to see why, from the beginning of Confederation, successive federal governments have valued so highly the political patronage attached to judicial appointments. The Harper government is no different in this respect from its predecessors.

As of March 1 of this year, there were 1,052 active and supernumerary judges appointed by the federal government and 50 vacancies. About 50 federal judicial appointments are made each year. Judicial appointments are much sought after. The pay is very good—much better, I might add, than law professors' pay. The retirement and pension entitlement is probably the best in the public sector, and a federal judgeship is very prestigious. Judicial appointments also offer an attractive career path for a lawyer tired of the demands of private practice or wishing to play a more public role. Is it cynical to suggest that only overwhelming public pressure or a series of disastrous appointments could persuade federal politicians to surrender such valuable patronage plums?

In my view, a two-step solution is essential to put federal judicial appointments solidly on a merit-based footing, free from political interference and ideology. Here again I find myself in full agreement with Professors Grammond and Russell. The first essential step is to enshrine the judicial appointments process in legislation so that it will be transparent and clear for all to see and cannot be changed without parliamentary debate and approval. I cannot sufficiently stress the importance of legislation being adopted. Without it, all other recommendations of this committee will fall on deaf ears, as has happened so often before.

The second step is for the legislation clearly to spell out the composition of the advisory committees and their precise roles. This role should be not merely to screen and evaluate applicants for appointments, but also to provide the federal government with a short list of highly qualified and not just acceptable candidates from which the federal government, absent special circumstances, will be required to choose one when a vacancy needs to be filled.

As a model to be followed on these points, my preference is for the Ontario provincial judicial appointments advisory system, whose structure and operations were well described in Professor Russell's evidence before this committee. Just as important, Mr. Chairman, the mandate of the federally appointed committees must be extended to cross appointments, promotions of judges to a higher court, and the appointments of chief justices, as I previously mentioned. To the best of my knowledge, no rational reasons have ever been advanced as to why the role of the advisory committees should not be extended into these areas.

In his testimony before the committee, Professor Grammond touched on some important constitutional issues. I agree with him that section 96 of the Constitution Act does not preclude the establishment of statutory advisory committees. The same assumption was made by the Canadian Bar Association and CALT committees in making their recommendations in 1985.

I would also argue that in determining how far the federal government's appointing powers can be circumscribed by legislation, attention should be paid to the provisions of the Canadian Charter of Rights and Freedoms, notably the non-discrimination provisions in section 15 of the charter, as well as the long-established doctrines of judicial independence and tenure, as enshrined in section 99 of the Constitution Act and the unwritten principles of the Canadian Constitution.

I agree with Professor Grammond that there is a linkage between these provisions and section 96 that must temper and inform the exercise of the federal appointing powers. If necessary, the federal government should refer these issues to the Supreme Court of Canada for the court's opinion on the constitutionality of the proposed statutory powers of the advisory committees that I have recommended.

Section 96 of the Constitution Act is a carry-over from the pre-Confederation colonial regime and reflects, I believe, an obsolete and unidimensional view of the role of the federal government in the making of judicial appointments. It should not have been adopted in its existing form to begin with.

● (1555)

Regrettably, an important opportunity was missed to democratize the provisions in 1982. However, it is not too late to do so now. Section 44 of the Constitution Act, 1982, grants the federal government the power, subject to sections 41 and 42 of the act, to "make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons."

Section 44 appears to have been used very little so far, and there is some doubt about what falls under the heading of "executive government". Nevertheless, I believe strongly that an amendment to section 96 should be considered and, if necessary, a reference should be made to the Supreme Court for an opinion on the constitutionality of the proposed amendment to section 96.

So much time has been spent, for so many years, debating the system of appointment of judges that other equally important issues have been ignored. To offer just some examples, I point to the desirability of a system of probationary or part-time appointments for future judges, so successfully used in the United Kingdom for more than a century; tracking the performance of judges after their appointment; the merits of specialization among judges; and providing access to the justice system for the great majority of citizens with modest means.

Canada, it seems to me, needs an institute for the study of justice, in order to study these and many other issues important to the effective, fair, and efficient administration of justice. According to my estimate, the federal government spends a quarter of a billion dollars per year on judicial salaries and perquisites. It should therefore also be able to afford a few million dollars per year to sustain the kind of institute that I envisage for the study of these questions.

[*Translation*]

Mr. Chairman, complaints about abuses in the system of federal judicial appointments go back to the earliest days of Confederation. It is time to bring closure to the debate. One hundred and 40 years is long enough. The solution is there for all to see and has been adopted by several of the provinces in their respective spheres and by the United Kingdom in the constitutional reform acts of 2005. I respectfully urge this Committee to be firm in its recommendations that the federal government follow these precedents and that the highest priority be given to adopting the necessary legislation.

● (1600)

[*English*]

The Chair: Thank you very much, Mr. Ziegel. You've certainly given us some things to discuss and to think about thus far.

But I will now turn the questions over to Ms. Jennings.

Hon. Marlene Jennings (Notre-Dame-de-Grâce—Lachine, Lib.): Thank you, Chair.

I thank you both for your presentations today. I do have a question for each one of you.

[*Translation*]

Mr. Justice Lamer, you—

[*English*]

Right Hon. Antonio Lamer: Could I interrupt? In 1950, I gave my ears to the Royal Canadian Artillery. I'm an old gunner, so could you please speak a little louder?

Hon. Marlene Jennings: That's not usually a complaint I receive. In the House I'm usually told I'm too loud.

Right Hon. Antonio Lamer: Well, when people get too loud with me, I just take the both hearing aids out.

Hon. Marlene Jennings: Are you unable to wear the earphones that are on—

Right Hon. Antonio Lamer: No, I can hear you if you speak just a little louder. You have a very smooth voice.

Hon. Marlene Jennings: This is the first time, Judge Lamer, that I'm being told to speak loudly, and I love it! I'm usually being told to take it down a few notches. Wise man. That's why you were the Chief Justice of the Supreme Court of Canada. Good judgment.

You made a couple of points. Two of the points you made were that you were not sure, given the limited amount of study and examination you've had an opportunity to do, of the benefits or meaningful contributions laypersons can bring to the judicial advisory committees; and second, that some of the problems that may exist with regards to the whole process of federal appointment of judges may come from the fact that there is no legislation and no regulation framing or providing a context for the actual work of the judicial advisory committees.

So with regards to the absence of legislation or regulation, are you recommending that this government or this committee look at the idea and possibly make a recommendation that there should be a piece of legislation that actually creates the JACs, clearly explains and describes the composition and the process of appointment of members to the JACs and the qualifications required, whether for laypersons or lawyers—and I won't talk about the judges, because in most of the provinces it is the chief justice of the province or the provincial courts who actually appoints the person, or the provincial chief justice who sits on the provincial equivalent of the JACs—and also provide, at least in a general way, if not necessarily in a very detailed way, the criteria that the JACs must take into consideration, in terms of evaluating the prospective candidates and determining whether or not they meet the merit?

So my question is, are you favourable to that?

Right Hon. Antonio Lamer: I agree with Professor Ziegel, who made that recommendation, that you do so. I raised the matter because I was hoping we would get to that.

They're not even sworn. When do they disqualify themselves? What if one of the members is related to—? There is nothing.

I didn't have time to get into asking various people how they proceeded. I just didn't have time. I was out of the country. But I spoke, at least, with the Chief Justice of Quebec about what he knew about how they proceeded. He said that they had sort of established a few rules, but they were skimpy.

So yes, I think you should recommend that there be a comprehensive book of regulations on how to proceed and on who should be on that and on what the criteria should be. Should they be sworn? I think there's nothing wrong with an oath. It helps out a bit, sometimes. And it should even stipulate how many times they meet each year.

In Quebec, they meet twice a year. Well, maybe that's enough, but I don't know how many postulants there are per year. That's kept secret.

Of course I was addressing the composition of the committees, but the professor went much further in addressing the appointment of judges. I'm postulating that the committees remain, and within those four corners. If there can be improvement moving away from committees, I don't know; but I'm postulating that there are going to be committees and that these committees are going to be staffed in the manner that, as I said, will be efficient.

Where I disagree, respectfully, with the professor is that I think the committees have contributed to setting aside this impression that it's political patronage, to a certain degree. I have confidence in the committees. Actually, I was told a story a few days ago. There is a committee somewhere in Canada on which there is a policeman, and in that province, a crown prosecutor who was known to be pretty demanding and severe on crime.... And there's nothing wrong with that. I'm against crime. And I have expressed that view that I sometimes look at certain sentences, and I figure, “Well, wow!”

● (1605)

I think that plea bargaining is going on a little too much, but I understand the crowns are overburdened, and the temptation is there to knock off a couple of years and then save 10 days of hearings. The temptation is there. They're human; they're overworked; they're underpaid. And I understand them, but it's not good for justice. The very word “bargain” gives the message of what's happening. Somebody is getting a bargain, and that's not justice. Justice has nothing to do with bargains.

● (1610)

This crown prosecutor, who was known to never plea bargain, was turned down. The policeman voted against him and said that the reason was that he was not flexible enough.

So my reaction is to what happened to the committees as a result of the changes that were recently made, and I'm saying that our police officers are capable of rising above any agenda, but I'm against their being on committees for a reason of perception. They are part of the prosecutorial process. It's no different for the president of LEAF or the president of REAL Women, people who have an agenda. And I'm for people who have agendas; they've helped the Supreme Court a great deal by intervening in cases, but they should not be on that kind of committee to try to advance their causes. I think some of them are so enthused by their causes that they might be somewhat biased when it comes to choosing somebody. They might go for the choice that furthers their cause or furthers their intent.

Yes, I completely agree with there being criteria and regulations, because what they're doing is very important.

I would also suggest you recommend that the Governor General in Council remain within the four corners of the list and not go outside. One Minister of Justice—I think it was Mr. Rock—made an undertaking to not go outside the list when choosing appointments. Others didn't make that commitment, and I think I remember one or two appointments—I wasn't watching them, as it's a big country and there are lots of appointments—that were outside the list. I remember that one of the two was criticized because there seemed to have been a political connection in regard to that person's spouse.

I would recommend that the government be limited to the list.

The Chair: Thank you, Mr. Lamer.

Mr. Ménard.

[*Translation*]

Mr. Réal Ménard (Hochelaga, BQ): Thank you, Mr. Chairman.

Thanks to both witnesses for being here today. You are closing our proceedings. Tomorrow we are going to give our research assistants directions for the report that we will table in the House of Commons.

I have three questions. The first is similar to that of Ms. Jennings. The fact that there are laypersons does not trouble me. I don't believe that all the members who are asked to consider the potential qualifications for becoming a Superior Court judge have to come from the legal community. I believe it is possible to have a say and to make a contribution even if you don't come from the legal community. However, you must state—I hope this will appear in our report—that the police officer is in a particular situation. You said that he is part of the prosecutorial system. Very often, he himself will lay the first information.

The government has often given us the argument that the reasoning concerning the police officer was not valid, since lawyers are often both judge and party. Some lawyers sit on the committee and also plead before judges. As honest and deserving as their contribution to society may be—that's not at all what is being called into question—what distinction should be drawn between a police officer and a lawyer from the standpoint of the operation of these committees?

That's my first question. I'll have two more, time permitting.

● (1615)

Right Hon. Antonio Lamer: First of all, we're not sure the police officer meets one of my two criteria, that of knowing the lawyers or knowing exactly whether such and such a lawyer has the desired qualifications. Some police officers never go to court. That may be one of these police officers. That's strike one.

In addition, a police officer goes to court as a witness. He is there to testify. He is examined and cross-examined by lawyers. Sometimes the cross-examinations are not pleasant. Unfortunately, matters cannot be different. There is a danger that that officer will vote against the person because the latter caught him embellishing the facts in a given case.

There's also the public's perception. The public believes that police officers will do what my Prime Minister is doing: try to keep his election promises and be candid about his reasons. I have a lot of respect for Mr. Harper, and I admire him for his candour. Whether one agrees with his reasons or his programs is another matter. But he at least had the merit of having the candour and honesty to reveal to the House—this is in Hansard—that his purpose in appointing police officers and in making the other changes was to bring about a crackdown in criminal law. So the public will get the impression that police officers will say they've been appointed to do that.

Mr. Réal Ménard: May I continue with the second question?

Right Hon. Antonio Lamer: It's not up to me to grant permission; it's the Chairman who grants it.

Mr. Réal Ménard: I'm sure my ministerial colleagues will definitely want you to be quoted in the report on the Prime Minister's qualities.

I'd like to know your opinion on the fact that the judicial representative—the number is being increased from seven to eight—is losing his right to vote.

Right Hon. Antonio Lamer: That's one of the peculiarities I was thinking of when I used it. Why take away the vote of the person who best knows the requirements of a judicial position? He's the one who knows this the best. Ordinarily it's not a recently appointed judge. It's a judge with a certain amount of experience. Why take away his vote? I've never understood why. I'd like someone to tell me. That seems to go against the committee's purpose.

The other peculiarity was to include law enforcement people. These are ordinary police officers. I believe he appointed a police officer.

Mr. Réal Ménard: If I have the time, Mr. Chairman, I'll quickly ask a final question.

Many people have been concerned about the fact that the "highly recommended" designation will be eliminated. Some said it should be maintained. Others said that would result in a certain incoherence within the committee. What do you think of that? Do you think we should still use these types of distinctions?

Right Hon. Antonio Lamer: I think that, if we've gotten to the point where we can't say "highly recommended", that means we're talking about a person who shouldn't be on the list. In my opinion, people who are highly recommended are the only ones who should be on the list.

As regards the categorization—I'm talking about the old committees—I wonder why one should appoint a person who is not highly recommended. If I were the minister, I would wonder what's wrong with that person. Would it be because that person doesn't have much knowledge of the law or because the vote was divided? I don't know how that works. If the votes were divided, perhaps the members of certain committees said that, when the votes are divided, it's recommended, but, if it's unanimous, it's highly recommended.

Personally, the fact that the distinction was removed doesn't trouble me very much. However, I hope you will recommend that there be a regulatory framework and that you ensure that only persons who are prepared to recommended highly are placed on the list.

● (1620)

[*English*]

The Chair: Thank you, Messrs. Ménard and Lamer.

Mr. Ziegel, would you like to comment?

Prof. Jacob Ziegel: Yes, thanks, I'd like that very much.

I'd like to address the last point raised by Mr. Ménard, the alleged reason given by the government for abolishing the highly recommended. I find it quite unpersuasive. It may be perfectly true that different committees apply different criteria in determining what is recommended or highly recommended, but if that's true, that must apply equally to the committee's assessment that the person is acceptable.

It seems to me that at that point, the whole process of assessing candidates falls apart. That surely is another reason why we need both legislation and some mechanism to evaluate the performance of the committees themselves. But this can't be done unless you have at least a minimal degree of transparency about the operations of the committees as well as the operations of the government. At the moment we have neither, as I tried to emphasize in my written submission.

Allow me also to make a small correction. I hope I didn't throw any aspersions on members of the committee. That was not my intention, and I don't think I did. I want to make it very clear for the record that the issue is not the good faith of the members of the committee; I accept that wholeheartedly. My complaints were that the terms of reference of the committee were much more circumscribed. In particular, the committee did not in fact make recommendations, they only screened the candidates, and there's a huge difference between the two.

Allow me also to make some comments on the much-discussed issue of whether or not police officers should be included. I think it's a huge red herring. As my colleague Professor Russell pointed out in the course of his evidence, at best only about 2% of Superior Court judges are ever involved in criminal cases. So I don't know what the fuss is about.

Even if the percentage were higher, how could a police officer, or for that matter anyone, possibly go about determining whether or not an applicant for office is going to be tough in dealing with anything? He never sees the candidates—one of the many problems we have. Are we going to add a question to the questionnaire asking whether this guy, if he's appointed, will be sufficiently tough? What if the guy has never had a criminal case in his lifetime? Then the whole thing falls apart.

So I think it's completely a red herring. I very much hope that the committee, in addressing the issue, will bear this in mind. As the Chief Justice rightly points out, it raises anew the whole question of the function, the purpose, and the effectiveness of having a so-called police representative on the committee, given all the factors that have been raised.

Thank you very much.

● (1625)

The Chair: As a point of clarification—and this may be welcomed by the committee as a whole, I don't know—do you look at this present situation with the advisory committee as strictly a screening mechanism, and nothing more, when it comes to in-depth examination of any applicant who comes before it?

Right Hon. Antonio Lamer: No. No, I hope to God that's not what they're doing.

The Chair: Well, I'm hearing two different positions here, I think.

Right Hon. Antonio Lamer: I'm used to hearing two different things. I spent 30 years hearing two different versions.

No, they must look at the postulant's record, look at the references he has offered, and find out, if they don't know—some people are more known than others, and lawyers don't know all the other lawyers in the province—who to phone to find out about this person's behaviour and whether this person knows the law. This person wants to go to the Tax Court. Is he or she a tax lawyer? What is her or his experience in tax law? They must not only eliminate those who should not be judges; they should seek out those who will be good judges.

The Chair: Given that note, sir, might I have further clarification, for myself? What is the present process, as you understand it, right now? Is it nothing more than a screening process—Mr. Ziegel, I think you made that comment—or is it more in depth?

Right Hon. Antonio Lamer: I don't know. I've never been on a committee. It's not public. They don't put out reports. How can we know?

The Chair: Yes, understood.

Right Hon. Antonio Lamer: I don't know what's going on. That's why I had to talk to a few people, who I'm not going to name, who gave me insight into how they went about things a little bit, but not too much.

The Chair: Mr. Ziegel, your understanding?

Prof. Jacob Ziegel: I think there's a verbal misunderstanding here, Mr. Chair, about what we mean by screening and what we mean by a true advisory function.

By screening, we mean that the committee's current terms of reference are meant to tell the government whether or not candidate A is recommended, highly recommended, or there are no recommendations. It doesn't go beyond that. It's not a question of the depth of the committee's investigation or even of the committee's competence to make an evaluation.

The question is what happens when the committees have made their evaluation? What I say, and what many of my colleagues say, is that the government is given complete discretion in deciding which of the people who have been assessed as being qualified for appointment should be appointed. I say that's a highly subjective exercise, which is often influenced not by questions of merit but by questions of partisan and political considerations. And there is a great deal of evidence to support these allegations.

Let me remind the committee that every year the advisory committees review several hundred applications, at least 200 a year, and probably more, but there are only 50 appointments. That means that in every case the government, when it wants to fill a vacancy, has a great deal of discretion. How does the government go about exercising that? We don't know, and the governments have never told us. This is not a matter of partisanship. It's a matter of record, but what is also record is that in many instances selections are based on political and partisan considerations and have very little to do with the merits of particular candidates.

The Chair: Thank you, Mr. Ziegel.

Mr. Comartin.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Thank you, Mr. Chair, and thank you, Judge Lamer and Professor Ziegel, for being here.

I want to go to the composition of the committee and the point Judge Lamer raised, using the police as one example and LEAF as another.

● (1630)

Right Hon. Antonio Lamer: And REAL Women. You've got to say both.

Mr. Joe Comartin: Well, exactly. Perhaps LEAF and REAL Women would be the better example. Thank you.

Let me use another one. We have a strong feeling that we don't have enough representation on our benches across the country from visible minorities, first nations, the aboriginal community. Should they be on, and how does the government go about deciding who would be able to play a meaningful function without allowing biases to overwhelm their decision-making as to who they're going to recommend?

I'm asking Professor Ziegel, I think, in particular because of the experience we've had at the provincial levels. Do you have any comments to make in that regard, as to how we choose the membership?

Prof. Jacob Ziegel: It depends, of course, on the size of the committee. On the Ontario advisory committee, I think they have 12 or 14 members, the majority of whom are not judges and not lawyers, so that enables them to bring in a broad cross-section of the population, including, I would hope, at least representatives of minority groups. I see it as reasonably easy, if you have a large advisory committee, to include some minority groups.

On the question of whether you should give priority treatment of minority applicants, that's a much more difficult question. I know there was an earlier Attorney General in Ontario who strongly favoured a larger number of women judges—I think an admirable cause—but to say that you're going to prefer a woman over a man, not because she's superior in terms of her qualities but because she's a woman, is, it seems to me, a very controversial issue, much litigated in the United States. It's also had some traction in academia.

My personal view is yes, we should give every possible encouragement to minorities of every description, but appointing someone not on the strength of their intrinsic merits but on the strength that you want to give some equity to minority groups is a much more difficult and sensitive question. We should be cautious not to appoint a person simply on the strength of their minority or other personal characteristics.

In terms of what has happened in Canada, we've had some superb minority appointments. I see absolutely no reason why people, whether of colour or who are aboriginal, shouldn't be every bit as good as other members of the community. We're not doing them justice in saying we're going to prefer them simply on the strength of their minority standing rather than on the strength of their intrinsic merits.

I hope that answers your question.

Mr. Joe Comartin: Yes.

With regards to the legislation, I think I've heard from both the current government and the last government a real reluctance to pursue that on the basis that this type of legislation would be unconstitutional; that the authority they have under the powers given them to appoint justices in the Constitution—that any legislation that would limit their abilities, whether it's, as Justice Minister Rock did, committing publicly to accepting the lists or establishing legislation that set criteria to establish the committees and how the committees would be composed and what their mandate would be—all of that limits their constitutional authority and therefore would be unconstitutional.

So I'd like a comment from both of you as to the constitutionality of the type of legislation that Professor Ziegel has recommended.

Prof. Jacob Ziegel: Well, I've tried to express my views on this. I obviously disagree strongly. Government ministers are appointed, but remember, they're very partisan. They're hardly approaching it from an objective view. Why should they? No government, no minister, is ever going to surrender powers freely or gracefully. The whole history of the political system proves time and again that if changes are going to be made, they have to be done because of popular demand or the sheer persuasiveness of the argument. Usually it's a combination of both. I don't think it should be left up to the government to make the decision.

If I'm right, if my colleagues are right in saying that legislation is a mandatory route in terms of whether we want to achieve results—If this committee is content just to issue yet another report making recommendations, knowing the government is going to ignore them, then nothing will have been accomplished. If we're serious about wanting to move to a truly merit-based system, I think legislation is unavoidable. If the government disagrees about the constitutionality, that's why we have a Supreme Court of Canada, that's why we have litigation all the time.

It's always easy for this party to say this is unconstitutional, contrary to law, but they shouldn't be judges in their own cause. The government, in this case, is very much a judge in its own cause. If the government feels so convinced it is right, all the more reason it should be agreeable to putting the matter before the Supreme Court of Canada.

● (1635)

[*Translation*]

Mr. Joe Comartin: Judge Lamer, do you have a comment?

Right Hon. Antonio Lamer: I agree with what he just said. I would also recommend, as he did, that there be a reference to the Supreme Court to ask the question.

That said, as a former Chief Justice, out of deference to my former colleagues, I will be silent about how I would vote if I were still on the bench.

[*English*]

But I think there should be a reference.

The Chair: Thank you, Mr. Comartin.

Mr. Moore.

Mr. Rob Moore (Fundy Royal, CPC): Thank you, Chair, and thank you to both of the witnesses for being here.

Justice Lamer, you mentioned early on in your comments, and I didn't catch all of it, about feeling that you were misquoted or something in an article. I wanted to get some clarification on that.

Right Hon. Antonio Lamer: It was the title the *Ottawa Citizen* put over Janice Tibbetts' interview. She had no control over the title. I gave her an interview. They said that I was objecting to the Prime Minister wanting to “muzzle” the judges. I never said that, and Janice Tibbetts never wrote that.

I don't think he has been trying to muzzle judges. He has told us very candidly that he wants to have judges who are going to implement the government's policy. I should like to elaborate on that point, if I may, Chair.

In our country, we—laypersons, not people like you—often confuse government and Parliament. The reason is that when you have a majority government that has a policy, the majority government sees to it that the proper legislation is enacted to implement that policy. People then confuse that.

Now, a judge takes an oath of office. The judge's oath of office is to apply the law, not the policy. When the judge applies the law that has been enacted by the majority government—by Parliament—he or she is indirectly implementing the policy behind the law. But the role of the judge is not to implement a policy, unless it has been spelled out in the law.

So when Mr. Harper says that he want judges "who will implement our policy of getting tough on crime"—I don't have the exact words; I did read *Hansard.*—I say, whoa, judges are not there to implement a government's policies; those policies have to go through Parliament. I understand his problem is that part of his policies are not getting through legislation, and so he's turning to the judges to implement them. He was very candid about it. He said "to implement the government's policies". But that's not the role of a judge.

● (1640)

Mr. Rob Moore: We've had a lot of discussion about the question of the police being on the advisory committees and we've seen a lot of witnesses. The examples of LEAF and REAL Women were raised, those being what some would categorize as special interest groups. We, certainly, and I think most people, would see the police as different from that, and not necessarily a special interest group, but as was mentioned, the police are capable of rising above special interest. Even as recently as today, we have examples of the police agreeing or disagreeing with any number of government policies, just as any other citizen can.

On the issue of the police being on the advisory committee, Professor Ziegel, as you know, the advisory committees were introduced to assist the ministers in their constitutional requirements when it comes to appointments, and the advisory committees have been changed in the past. There are those who want to make it sound as though this is some earth-shattering change, when in reality we know that the police can rise above that and that most of the work of the advisory committee is done on the basis of consensus. The minister has said that this will increase his ability to get a broader spectrum of input and advice.

Can you comment a bit on some of the other changes that have been made in the past when it comes to judicial advisory committees, and the relative significance of any changes we're making now?

Prof. Jacob Ziegel: Thank you.

My response would be that the fact that past governments have made changes reflects again what is wrong with the current system. These were unilateral changes: Parliament was not consulted; the public was not consulted. The minister presumably consulted some members of his party, perhaps some members of his office, but it was a process completely lacking in transparency.

I would not be upset if the government were merely implementing a short-term government policy—after all, that's one of the prerogatives of government—but they're not. When we're talking about judicial appointments, we're talking about an appointment until the age of 75. Judges are not appointed in order to implement the policies of a particular government; they are appointed as chief justices. It's emphasized repeatedly that they're there to apply and implement the law of the land—not just the law of the last three years, but the law going back to the earliest days of Confederation.

The judges have much broader terms of reference. They represent, if you will, the totality of the Canadian legal system, which is why, among many other reasons, I think it's completely incompatible for a government to make unilateral changes merely to implement its own policies. It's incompatible with our concept of an independent judiciary, one whose appointments should be based on objective criteria as far as that is possible.

I hope that answers your question.

Mr. Rob Moore: I understand, Professor, that you'd like to see some wholesale change to the whole process, and there's time for debate on that in the future. My point is that this is a relatively minor change, and the chief justice had mentioned that it goes to the perception, perhaps. As for the actual result, when we look, for example, at the appointments made to date under the previous system, there's no reason, we feel, to suggest anyone other than competent judges will continue to be appointed in the future.

While we're interested in hearing what people have to say on future and more wholesale changes, we see this as a progression. Changes have been made in the past and they'll continue to be made in the future, but it is a broadening of the input that the Minister of Justice can receive when it comes time to make these judicial appointments. There are those who see this as some kind of earth-shattering thing. Do you see it that way?

I understand that you'd like to see some major wholesale change. I read your brief, and you've set out some of the reasons you'd like to see that. As for those who would say this is some major change, we don't see it that way. We see it as continuing to appoint competent judges.

I'd like your comments on that.

● (1645)

Prof. Jacob Ziegel: We obviously part, as you rightly say, on some very basic issues of policy. I see it as an urgent task. I don't see it as an issue of whether I disagree with the appointment of police officers as part of the advisory committees. My issue is this: Who's going to decide? Is it going to be individual governments, whether this government or another government, or is it going to be part of the legislative process?

The Harper government made a unilateral decision to make changes to the composition of the committees and changes as to the type of devices the committees would say.... My whole rationale has been that it should not be a prerogative of individual governments; it should be a matter of proper legislation, and the legislation should be transparent, and members of Parliament of all parties should be involved in making the ultimate decisions. The judges themselves are supposed to be part of the law of the land and are not supposed to be just handmaidens of individual governments. I don't see the recommendations as long-term at all; I see them as very much overdue.

As I pointed out right at the end of my submission, we inherited our system of appointments from the United Kingdom, because that was the practice at the time of Confederation. The British have moved way beyond that. In fact, they were never as partisan in their appointments as we have been, at least not over the last century. As a result of profoundly important legislation adopted two years ago in England, all questions of judicial appointments are now decided by a judicial appointments commission, whose powers go considerably further than the recommendations that appear in my submission.

The point I'm making is that if the British, from whom we've inherited our set of judicial appointments, have gone way beyond this precisely because they're concerned about the public perception, because of complaints, even under the enlightened British system, that fairness did not result from the previous system of appointment, then I think, at a minimum, we in Canada should follow the British and the provinces, at least to the extent of having legislation that spells out both the role and the powers of the advisory committees and their relationship with the actual appointments made by the government.

The Chair: Thank you, Mr. Ziegel.

We'll go to Mr. Murphy.

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

I'm very interested in these discussions.

[*Translation*]

Mr. Justice Lamer, it is a greater honour to have you here before us.

Given your experience, it is very important to ask you a question about judicial activism.

[*English*]

I have a question about judicial activism. Professor Grant Huscroft of the University of Western Ontario, which I think you all know was founded by a great Moncton jurist, Ivan Cleveland Rand, said recently that perhaps the reason the Conservative government has turned somewhat on the idea of judicial appointments and why there are, in some quarters, musings about elected judges is that there is a reaction to judicial activism with respect to the interpretation of the charter over these many years. What I would like to ask you, Justice Lamer, is whether you think there has been rampant activism with respect particularly to the Canadian judiciary and its interpretation of the charter over the last 25 years. Is it diminishing? And do you think this has anything to do with what we perceive on this side as an attack on the judiciary?

● (1650)

Right Hon. Antonio Lamer: Do you know how many sections of the law or how many laws have been declared inoperable? Do you have an idea?

Mr. Brian Murphy: No. I get to ask the questions here, Judge.

Right Hon. Antonio Lamer: You can ask your colleagues.

Some hon. members: Oh, oh!

Right Hon. Antonio Lamer: How many is it?

An hon. member: *Cinq.*

Right Hon. Antonio Lamer: Well, I'll go further. Adding sections, it's 17 or 19.

So who's getting nervous about all this? Those who talk about judicial activism do so because they don't agree with the judgment. When they agree with the judgment, they don't talk about judicial activism; they just don't mention it.

We're not talking about many laws that have been struck down, because the very introduction of the charter triggered, throughout the country in the various departments of justice, the creation of committees that would vet any bill before it went to the House—their respective houses—to see whether it was charter-suspect. It was mainly in the field of administrative law, which is full of reverse onus clauses, with a punishment at the end for having violated the law—some of them indictable offences, one of them punishable up to five years—with reverse onus clauses.

So what they did, after a couple of judgments from the Supreme Court—I think it was Chief Justice Brian Dickson who wrote the unanimous judgment—after that judgment, they scrambled and cleaned up a strew of laws doing away with reverse onus clauses where they weren't warranted.

Reverse onus clauses sometimes are okay. I mean to say, the person, the citizen, is the only one who can come up with the explanation and it can be found out.

So I never did get excited about people talking about judicial activism. There were some glaring things that had to be corrected and were corrected. Certain forms of constructive murder were murder to me and to my colleagues—because, let's not forget, you have to get a majority, at least, for it to be a judgment; otherwise, you don't talk about it. Constructive murder was rearranged, because murder is a crime of intent.

I think that's one of the most criticized judgments of those days. There are some that have been criticized lately, the kirpan thing and the gay rights, but there again, these are issues where you can't win. I mean to say that society is split down the middle, practically, and you're bound to have half of society saying they're activists and the other half saying they didn't go far enough. So I don't get excited about people who talk about judicial activism.

What effect, you asked me, has this had on the government's wanting to get tough on crime? What I know about what's being said is that it gets tough on crime. Well, the Criminal Code is there. It can be very vicious. I don't think the fact that the courts have applied the charter and that a few laws were struck down and re-enacted—and some of them were not re-enacted....

● (1655)

Let's not forget one thing, and this is apolitical as a comment. Successive governments have been shovelling to the Supreme Court and have recently shovelled—I've been gone for seven years—their hot potatoes. They want to get the brownie points, if there are brownie points to get, but they don't want to get the blame. The day after a judgment is handed down by the Supreme Court, there is a Gallup poll taken to see if the judgment is popular or not. And the comments of the members in the House will take into account the result of the poll. They'll be for the judgment, or they'll be against it. I call that parliamentary activism.

The Chair: Thank you, Mr. Murphy.

Monsieur Ménard.

[*Translation*]

Mr. Serge Ménard (Marc-Aurèle-Fortin, BQ): For the information of those transcribing this debate, you should know that, since you've been talking about Mr. Ménard, you've been talking about Réal Ménard, a regular member of this committee. My name is Serge Ménard, and I'm sitting on this committee on an exceptional basis.

As I am an assistant, my speaking time is only five minutes. I will ask my two questions first, then hear your answers. That doesn't mean that I didn't appreciate the presentations that were made. On the contrary, I've always appreciated Judge Lamer's presentations, and he knows it.

Professor Ziegel, this is the first time I've seen such an ambitious project. I'm sorry I didn't see it at the end of the last millennium. I hope someone will one day decide to carry it out.

Mr. Justice Lamer, I understand you when you say we shouldn't pursue secondary goals. Ultimately, you've put the finger on what this is about, that is to say including police officers who will have objective to pursue, whatever it might be.

I can answer some of your questions because I've had the benefit of sitting on a lot of selection committees. In 1977, there were the first committees, and the people were appointed by Minister Marc-André Bédard. I even attended the first meeting, chaired by Judge Alan B. Gold, where it had to be decided how we would operate in the context of the new procedure. I appreciated the contribution by members of the public to the meetings of those committees.

The question before us here concerns the appointment of police officers to sit on selection committees for superior court judges. However, in my assessment, and perhaps yours will be similar to mine, the superior court judges appointed by the federal government practise very little criminal law; Mr. Ziegel mentioned 2% of criminal cases. The vast majority of sentences handed down—more than 99%, in my opinion—and of criminal trials conducted are conducted before provincially appointed judges.

Although I'm in favour of keeping public representatives, I wonder why police officers would be systematically selected—and I'm not saying that a police officer wouldn't be a good public representative—to select judges who will mostly hear cases in family law, commercial law, liability law and so on. I think that choice is unjustifiable. So I would like you to address that aspect.

Then, Mr. Ziegel, there is something that intrigues me when I read your presentation, which I respect a great deal. I get the impression you think that political activity doesn't prepare a person well for the judiciary. Could you clarify your thinking?

As a result of the intensity of political activity today, one definitely loses the experience acquired by pleading. Although we are legislators, we have less time to consult, read and analyze case law and the new statutes that are not related to the duties we have been assigned, either as minister or critic of a political party. Can you give us more details on this question, Mr. Ziegel?

Judge Lamer, given your experience on the Superior Court, Court of Appeal and Supreme Court of Canada—and I know you cleaned up all those courts, particularly the Superior Court in Montreal, where there was a great deal to do—can you tell me whether my estimate of 2% is correct?

● (1700)

I would also say that I read an estimate by the Chief Justice of British Columbia, who said that 95% of the cases his judges heard were not Criminal Code cases.

Right Hon. Antonio Lamer: I called the Chief Justice of Quebec and I spoke to him about a number of topics. He told me that, last year, 45 criminal cases had been heard by Superior Court judges across the province. We're talking about 45 cases, whereas I'm convinced that thousands of those cases are heard in the Court of Quebec, Criminal Division. More than 75% of accuseds plead guilty in Provincial Court. I say Provincial Court to cover Canada, provincial courts.

If the goal is to get harsher sentences and to tighten up the criminal law—I said that in my interview, but that wasn't published—the Prime Minister is indeed entitled to have that objective. I might be in favour of it, but I think he is not going about it the right way. That won't get done by appointing police officers who will put on a list the names of judges who practise virtually no criminal law. At the Tax Court of Canada, they practise none at all. The situation is the same at the Federal Court: they do patents. What can you say, they don't do any at all.

At the Superior Court, this is a very small minority of cases. I gave you the figure that the Chief Justice gave me: 45 cases last year across the province.

That's not the way to go about achieving one's ends. At the federal level, the way to have an impact on criminal law is legislation. I understand that he's frustrated because he's the head of a minority government. He can't implement his policy. I'm not giving an opinion on his policy. I won't interfere in that, because I'm neither for nor against it. I have ideas, but I don't know his policy well enough. I understand his approach of wanting to look elsewhere because there are legislative obstacles, but he's looking in the wrong place, in a pointless place. Ultimately, he won't be able to do it by appointing judges to the Superior Court who he thinks will be harsher.

I'd like to say something on that, Mr. Chairman. I've been in the profession for more than 50 years. I knew one Crown attorney who did his job, who was very effective as an attorney and sought sentences that were tougher rather than not tough enough. When he was appointed to the bench, he went to the extreme: he completely changed. Another example is that of Judge Lagarde, who wrote the Criminal Code in French, the annotated code. Police officers didn't want to testify before him because he was merciless with them as witnesses. He never believed them. Perhaps he was right, since he had been a Crown attorney, but I don't think so. He went too far. Judge Lagarde really went too far. You can't predict a judge's conduct.

● (1705)

I knew one judge—I won't name him—who was pickled at 10:00 a.m. He arrived in court completely drunk. He was appointed to the Provincial Court bench. He stopped drinking the day of his appointment, and he became, in my opinion, one of the best judges we had ever had at the criminal court of the time, the Court of the Sessions of the Peace. I won't name him because of my first remarks.

The committee wouldn't have put him on the list of candidates, but nevertheless... So it's impossible to try to predict the conduct of a person who takes a judicial oath. There could be three police officers on the committees, in my view, but that's a matter of perception. I'm not in favour of doing it that way for reasons of perception. I believe that police officers are able, as the saying goes,

[*English*]

to rise up to the occasion, and rise up and do their duty as it should be done. I have confidence in that.

So I'm saying that it's a useless change and it's an unfortunate change, because its purpose has been explained in the House, it will achieve nothing in terms of getting stricter sentences, and it sends out a bad perception to the population. The population might be behind that kind of thing, because I think—and I'm not in the polling business—that if a poll were taken, a majority would say that the judges are not sentencing severely enough. I think the general population.... But when you look at a sentence, you must be very careful before coming to the conclusion that it's too lenient, because unless you've been involved in the case, you get it second-hand through the press and you don't necessarily get all of the facts that the judge got.

But there are sentences, in my opinion, that you don't need to know more of, that were, in my opinion and in my experience, really too lenient. That reveals that some judges should not be sitting in criminal law and should be assigned to other kinds of cases. But in some provinces that's not easy to do as the chief justice, or the chief judge does not have enough judges. He has to use his judges in all kinds of fields. In a large province like Ontario, the chief justice can pick and choose and have people who know their criminal law to sit. In certain other provinces, not only P.E.I., everybody has to do a little bit of everything and has no choice.

But I say that it's the perception in the public that the government is trying to get more severe sentences. As Mr. Ménard has raised, I'm saying he's not trying to influence the list of judges who deal with the criminal law and he will not achieve his goal. I'm not saying I disagree with his goal; I'm not saying that, but I'm just saying that he will not achieve his goal by having done that.

● (1710)

The Chair: Thank you, Mr. Lamer.

Mr. Thompson.

Mr. Myron Thompson (Wild Rose, CPC): Thank you, gentlemen. It's an interesting discussion today.

[*Translation*]

Mr. Serge Ménard: Mr. Chairman, with all due respect, would it be possible to have something other than a nod from Mr. Ziegel? I want to be sure he clearly understood the question I asked. I believe he could provide a few additional explanations that you would appreciate as well.

[*English*]

The Chair: I certainly want to respect your question and the time that you have allotted, but we've run into 15 minutes on your time alone, Monsieur Ménard, so I think I'm going to move to Mr. Thompson.

Monsieur Ziegel, there will be an opportunity for you to respond, but probably through other questions. Thank you.

Mr. Thompson.

Mr. Myron Thompson: Thank you.

We're having interesting discussions on a lot of things going on here today.

I'm still not clear in regards to the question brought up by Mr. Comartin, and maybe he can help me with this. It's the makeup of the JAC committee. Who is that going to be? Wasn't that the gist of your question? That's what's going on in my mind.

I was the principal of a high school, and I had to hire teachers quite often. On the selection committee we had the superintendent of schools and me, two members from the school board, both of whom happened to be farmers—this was over a 15-year period—and three people from the parent advisory committee at large. Sometimes there would be a nurse or a housewife or a policeman—just people at large.

We'd sit on a committee, and we'd have to select somebody to fill the job. When I went to these committees, I knew the superintendent was going to look for the education. How educated are you? What degrees do you have? I knew there were a couple on there who thought that women should be teachers and men should be farmers, and that they would be looking more towards the women. So I knew that given its makeup, that committee had preferences well in advance of beginning any discussions on the selection.

I don't see how anybody could get on any kind of committee and not have some kind of idea in the back of their mind of what they'd like to see for a teacher. Why wouldn't they feel the same way about what kind of a person they'd like to see for a judge? I don't care if it's a police officer or a high school principal. I have a pretty good idea of what I'd like see for a judge, and I think Mr. Comartin would know what that would be. It wouldn't be a softy; it would be a hard man, who would say the punishment's got to fit the crime. And I want to move from there.

Now, I don't know who the best judge would be. A lot of times I didn't even know who I thought would be the best teacher, but a lot of times I had to go by that gut feeling, just knowing that if that person was in front of a group of children I could rely on them to do the best job possible to relate to them. I want the same thing to come out of judges, and I think these JAC committees could do it. The makeup of them, to me, isn't nearly as important as the objective of the judges across this land. What are we trying to achieve here?

The public, the ones who pay the bills, are saying they're not happy. You're right, a poll would show that they're not very happy with some of the decisions.

Last week, a nine-year sentence was handed out in Calgary. Is that correct, Art? They had an appeal, and it was reduced to seven. There was a big flare-up because of the appeal. The judge decided it was too stiff and lowered it. Well, the war was on. Calgary is not even in my riding, but it's close enough that I had people coming into my office demanding that we straighten up this judicial system. What is going on that this is happening?

All I'm saying is that I think we're putting way too much emphasis on the makeup of the committee. These are people of all walks of life. I almost felt as though you were implying that the police were a special interest group, and I really object to that. I hope that's not true, but I felt that way, and I wanted you to know that. They are not a special interest group, nor is anybody on these committees, should that be the case. I don't want anybody there for the purpose of pushing their own agenda, but I'm still looking for an answer as to who's going to decide who goes on these committees and what they should be made up of?

You said something about writing a book of regulations, that there should be a book of regulations to follow. Well, who's going to write the book? That's where I'm getting all confused. We're wandering off into different questions about activism and about this and that. I want to stick with the JAC committees. Who are they made up of? Why are they on there? Why should some be eliminated and some not?

I certainly don't believe they should all be lawyers. We've got all lawyers in this committee, and that drives me nuts. We've got a bunch of special interest groups over there.

● (1715)

The Chair: Okay, Mr. Thompson.

Mr. Ziegel, would you like to begin, in response?

Prof. Jacob Ziegel: Thank you very much.

I think this ties directly into the burden of my written submission, namely, that Parliament should be deciding these questions, not the government of the day. As I strongly emphasized, judges are appointed—until they reach the age of retirement—not to serve the purposes of a single administration, but to serve the country and the people of this country.

In most other areas of the law, Parliament has to be consulted; Parliament has to approve. If Parliament in its wisdom were to decide it wanted the advice of committee members, including police officers and people who are very tough on crime, so be it. I might not agree with that judgment, but at least I would know it's in the legislation and at least a majority of the members of Parliament had approved this direction.

But I strongly resist the notion, under which we've laboured for the last 140 years, that the appointment of judges is the prerogative of the particular administration. I've tried to argue repeatedly—and I'm not the only one—that it has been abused. It's a power that has been abused for 140 years, and that should be the focus of this committee. I think we're becoming too fixated on the issues of the treatment of crime, despite what the Chief Justice said.

Others have said that in fact superior court judges try only a very tiny percentage of the cases. I think we're doing a grave injustice in the whole concept of judicial appointments when we focus on a very tiny percentage of cases that are decided by a tiny minority. Remember also that we have appeal courts, and if the Crown feels that a trial judge has been too lenient, the Crown should appeal—and often does.

I seem to recall some years ago Chief Justice Lamer sat on a series of appeals from Manitoba in which the court said the Manitoba courts were inconsistent in their sentencing policy and many of their sentences were too lenient. I think it's completely misleading to suggest that appeal courts are indifferent to public opinion or the appropriate sentence.

It's not an easy question, and I disagree with you, Judge Lamer, when you say we have to be tough on crime. I don't know what that means. If that means a long jail sentence effects the purpose, I think you'll find a lot of criminologists disagree.

But leaving that issue aside, the point I want to make is that there are ways and means for the public to make known their views. There are appeal courts. Public opinion does influence judges, you may be sure. But the point I come back to—and it's absolutely fundamental to my position—is that we shouldn't get fixated. Our first priority should be to have legislation to get rid of this 140-year obsession with letting the government of the day decide who's going to be appointed a judge and how that appointment is going to be made. Unless we can overcome that, which I perceive to be an enormous hurdle, we will continue to debate this issue time and time again.

As I said in my written submission, I have appeared three times before this committee over the last three years. It's not that I have any misconceptions about my own role, but I don't see that the committee has much of an impact, precisely because they're not willing to move to the legislative stage.

My keen concern is that regardless of what the committee says, the government will ignore it if it disagrees. Obviously if the committee underscores the government's partiality it will feel vindicated, but if the committee disagrees, the government will simply ignore it and proceed on its way.

As I've argued, we need legislation to both reaffirm Parliament's role in this situation and, once and for all, bring to an end this highly subjective, non-merit-based system of appointments that now exists.

● (1720)

The Chair: Thank you, Professor Ziegel.

Mr. Lamer, I know you would like to respond to Mr. Thompson. Please do so quickly.

Right Hon. Antonio Lamer: Yes, I owe it to myself to respond.

I mentioned pressure groups and agendas, and that's one group. I then mentioned the police, but I didn't mention the police as being part of the agenda groups.

Mr. Myron Thompson: Thank you.

Right Hon. Antonio Lamer: Secondly, I said there are other kinds of committees that are best staffed by people of various walks of life and of different generations. I agree with you that the kind of committee you mentioned in support of your position is precisely the kind of committee I was thinking of.

I'm thinking of committees that have to do with municipal stuff. For a while in Montreal, there was a committee composed of various citizens for the development of the Vieux-Montréal. They weren't urbanites only. They were urbanites, but there were all kinds of people. I agree with you. It's precisely the kind of committee I was thinking of.

The police are not a pressure group. I mentioned them because Mr. Harper wants to appoint them, and that's it.

The Chair: Thank you, Mr. Thompson.

Thank you, Mr. Lamer.

Mr. Bagnell, you're next.

Hon. Larry Bagnell (Yukon, Lib.): Thank you.

Thank you for coming.

I want to try to get really quick yes and no answers. I know it's going to be hard.

I want to talk about the changes, the choice between the changes and the existing committee, if that's all we had to do. My understanding is that you probably think these are not the best changes.

Mr. Ziegel, if you could answer yes or no, the fact that we took the vote away from the judge on the committee was a bad change. Is that right?

Prof. Jacob Ziegel: Yes.

Hon. Larry Bagnell: Okay. The fact that we added an extra membership, so that the minister now gets to appoint a majority of the people on the committee, was a bad change. Is that right?

Prof. Jacob Ziegel: Yes. If you want my subjective argument, I again emphasize that it's not my overriding concern.

● (1725)

Hon. Larry Bagnell: I agree with your points, but it's just on this simple point. We took away the category of highly recommended, and it's either “yes” or “recommended”. It was also not an improvement.

Prof. Jacob Ziegel: Agreed.

Hon. Larry Bagnell: We spend all this money in the justice system to improve it. We should have an institute for improving it. Could the Law Reform Commission of Canada perform that function?

Prof. Jacob Ziegel: No, I think they need a separate institute. It should be an ongoing study because of the importance of judges in the administration of justice in our total system of government.

As you know, the Law Reform Commission has been abolished, which is a theoretical issue. Even if it hadn't been abolished, it had such a broad agenda that it couldn't begin to do justice to the importance of studying the judicial system in depth.

Hon. Larry Bagnell: Okay. Thank you.

It wasn't actually abolished. They just took all the money away.

Mr. Lamer, if we could get a yes or no answer, without the rational, do you agree that those changes were not improvements? Would it have been better if they had not been made, if that was the only choice we had?

Right Hon. Antonio Lamer: I don't get excited about the “highly approved”, “not highly approved”, or “recommended”. I don't get excited about that one. I don't get excited either—although I wonder why, but maybe it's because I don't know why—about the change wherein the minister suddenly gets a majority. We elected the government to govern, so I don't know why, but I can't say why not.

But as to taking it away from the judge, I have always expressed my views on that. In regard to the policemen, I think I've expressed my views ad nauseam on that.

Does that answer your question?

Hon. Larry Bagnell: Yes.

Do you think those changes reduce the perception of the public of the independence of the judiciary, those changes that you've both said are not improvements?

Mr. Ziegel.

Prof. Jacob Ziegel: No, but I made it clear, I think, that it would impair. In my view, the public is very skeptical, and this can only increase their perception of a lack of impartiality and the politicization of the judicial appointment process.

Hon. Larry Bagnell: Mr. Lamer.

Right Hon. Antonio Lamer: Given the fact that I don't think it's going to succeed in having any effect, I think the avowed purpose is going to diminish the repute of the judiciary.

The Chair: Thank you, sir.

Mr. Dykstra.

Mr. Rick Dykstra (St. Catharines, CPC): Thank you, Mr. Chair.

Mr. Ziegel, I have a question about your chart. It's not so much a question around the statistics, the plus or minus percentages, but I wondered about the purpose of having the chart in there and showing the probable donors to the appointing party. From your perspective, should it exclude anyone who's made a donation to a party from being an applicant or being a selected individual?

I'm trying to get a clear understanding of the purpose of having this chart in your recommendations. As you go through it, it seems to be the one area that stands out for me that isn't consistent with the rest of your document.

Prof. Jacob Ziegel: No, they shouldn't be disqualified, but neither should they be preferred.

We come back to this question. One of your colleagues asked me earlier whether I am opposed to politicians being appointed judges. The answer is absolutely not. What I am opposed to is giving preferred treatment to a candidate on the grounds that he's a politician, perhaps a retired politician or former cabinet minister, because his cabinet colleagues feel that he deserves some kind of recognition for his years of service to the party or the government.

I'm sure you appreciate that the reason I inserted the table—remember, it's only a table drawn from someone else's paper—is to indicate the correlation between political contribution to the party and the party that made the appointments.

● (1730)

Mr. Rick Dykstra: So to extrapolate that a bit more, you wouldn't necessarily, then, disagree that a police officer sitting on an appointments committee would be a bad individual to make recommendations, to participate and make clear recommendations.

Prof. Jacob Ziegel: No, there's no reason at all. I thought the debate was over the particular choice of a person by reason of his background rather than the experience or his personal qualifications for participating in the evaluation process.

Mr. Rick Dykstra: Thank you.

Mr. Lamer, I just wanted to clarify this. I believe you said that 95% of cases that are heard by judges are not necessarily criminal. You did say that 95% of all cases were—

Right Hon. Antonio Lamer: I didn't say that. Mr. Ménard said that.

But I agree with Mr. Ménard that there's a very small proportion of cases being heard by superior court judges. I hasten to add that we must not overlook then, Mr. Ménard, the fact that judges do sit in appeal of summary convictions.

Mr. Rick Dykstra: The reason I wanted to get that clear, that you do agree with that, is that you also mentioned that a police officer sitting on the committee may have a particular bias, based on a judge he may not like, or a person he worked with before, and therefore may not want to recommend that individual.

Right Hon. Antonio Lamer: It could happen, but I don't think it's.... Look, I'm more concerned about the perception than the actual result of having the police officer there. It's the perception. It can happen that you have a police officer who will vote against a given lawyer because that lawyer took him to task, maybe unfairly.

Mr. Rick Dykstra: The only reason I bring the point up is that in all likelihood, there's a very small percentage and chance of that happening. There's only a 5% chance that would actually exist, because 95% of the decisions that are made are not related to police officers.

Right Hon. Antonio Lamer: Right. I'd say more than 95%, but I can' be sure about that.

Mr. Rick Dykstra: So the chance of a bias is very slim, if at all.

Right Hon. Antonio Lamer: It's minimal, but the perception that there can be a bias is not minimal.

Mr. Rick Dykstra: I agree with you. I certainly would never understand law as well you do, but I thought the understanding of law was to base it in fact, and that politics was actually supposed to be the perception. It's an interesting dichotomy.

The Chair: Thank you, Mr. Dykstra.

I would like to thank you, Mr. Lamer and Mr. Ziegel, for your appearance here. I think you've offered some very valuable information for the committee to look at. We will be examining all of it over the next few days, so your presence here is very much appreciated.

The meeting adjourned.

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