



HOUSE OF COMMONS
CANADA

**PROCESS FOR APPOINTMENT
TO THE FEDERAL JUDICIARY**

**Interim Report of the Standing Committee on
Justice, Human Rights, Public Safety
and Emergency Preparedness**

**John Maloney, M.P.
Chair**

Subcommittee on the process for appointment to the Federal Judiciary

**Richard Marceau, M.P.
Chair**

November 2005

**STANDING COMMITTEE ON JUSTICE, HUMAN RIGHTS,
PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

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APPOINTMENT TO THE FEDERAL JUDICIARY**

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OTHER MEMBERS WHO PARTICIPATED IN THIS STUDY

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Hon. Ed Broadbent

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**THE STANDING COMMITTEE ON JUSTICE, HUMAN RIGHTS,
PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

has the honour to present its

EIGHTEENTH REPORT

In accordance with the Orders of Reference from the House of Commons of June 7 and June 27, 2005 and its mandate under Standing Order 108(1), your Committee established a Subcommittee with the mandate to examine the process for appointment to the federal judiciary and make recommendations for reform, with the primary goal of eliminating political partisanship from the process.

ORDER OF REFERENCE

Extract from the Journals of the House of Commons of June 7, 2005

Pursuant to Order made Friday, June 3, 2005, the House proceeded to the taking of the deferred recorded division on the motion of Mr. Marceau (Charlesbourg—Haute-Saint-Charles), seconded by Mr. Côté (Portneuf—Jacques-Cartier), — That the House denounce the recent remarks made by Mr. Justice Michel Robert stating that it is acceptable to discriminate on the basis of political opinion when appointing candidates to the federal judiciary and that it call on the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness to create a special subcommittee with the mandate to examine the process for appointments to the federal judiciary and make recommendations for reform, with the primary goal of eliminating political partisanship from the process, by October 31, 2005.

The question was put on the motion and it was agreed to on the following division:
YEAS: 157, NAYS: 124

ATTEST

WILLIAM C. CORBETT
Clerk of the House of Commons

Extract from the Journals of the House of Commons of June 27, 2005

By unanimous consent, it was ordered, — That the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness be authorized to continue its deliberations relating to the study of the process for appointments to the federal judiciary beyond October 31, 2005, and to present its final report no later than December 15, 2005.

ATTEST

AUDREY O'BRIEN
Acting Clerk of the House of Commons

Many excellent appointments have been made to the provincial superior courts, the courts of appeal and the federal courts in the last several decades. The work of Canada's courts is, in general, widely respected both at home and abroad. The Sub-Committee does not want to interfere with, or disparage in any way, the high regard in which Canadian courts are held.

There is, however, an issue that must be addressed in such a way as to reinforce the esteem in which many hold the judiciary in Canada. The process by which judges are appointed by the federal government is largely unknown and, therefore, subject to the perception that it may be open to misuse. The Sub-Committee was asked to address the issue of the role political orientation or partisanship may play in the judicial appointments process. It was asked to develop proposals to render the appointments process more transparent so as to ensure that political partisanship does not play an inappropriate role and the judiciary in Canada is of the highest possible quality. In this regard, the Sub-Committee welcomes the making public of the identity of appointing committee members as well as the Code of Conduct and Guidelines by which they operate.

Unfortunately, the Sub-Committee did not have sufficient time to develop comprehensive proposals for reforming the judicial appointments process. A number of important issues were not fully discussed. In addition, a number of key witnesses had yet to be heard. The Sub-Committee would have liked to hear, in particular, from witnesses to discuss how the judicial appointments process worked in the provinces in Canada and from those able to discuss the changes that have been made to the appointments process in England and South Africa.

While the Sub-Committee was not able to complete a final report, its members did come to a consensus on a number of issues. It is accepted by the Sub-committee that merit-based appointments should be paramount over all other considerations.

We agreed on the need for change. No witness heard, or brief received, argued that Canada should continue with the *status quo*. While prescriptions for reforming the system varied, the feeling that some type of change was needed was universal.

The members of the Sub-Committee also agreed upon the need to limit the recommendations for judicial postings possibly to a short list of three to five candidates, but further study needs to be done. This is in contrast to the current system whereby the government may choose from a large pool of candidates. A short list will provide a more considered recommendation to the Minister of Justice of the persons who would be best suited for a particular judicial opening. It would also serve to limit the very wide discretion currently exercised by the Minister of Justice and thereby reduce any impression that judicial appointments were influenced by political considerations.

There was also a consensus on the desirability of conducting interviews of candidates for judicial office. There appeared to be no convincing rationale as to why candidates for such an important position would not be interviewed. The interviews would be conducted in a confidential manner to ensure a full and frank exchange of views. It is felt that interviews would be a good means of determining the character of a potential judge, as well as his or her professional expertise. Interviews would also provide candidates with an opportunity to respond to any adverse commentary that had been offered about their candidacy.

The Sub-Committee members also agreed that the Minister of Justice should consult the Chief Justice of the jurisdiction in question on the needs of his or her court. The Sub-Committee heard evidence on the difficulty of conducting trials in the official language of a litigant's choice in all parts of Canada. There was also discussion of the need, at times, to appoint judges with a particular expertise. Both of these concerns may be addressed by a Minister of Justice suggesting to an appointing committee the preferred criteria for a new judge. Thus, a Minister may indicate that there is a need for a bilingual judge in a particular area so that the obligation to furnish legal services in both official languages can be met. While gender and ethno-cultural diversity are important considerations, these considerations should always be subject to the merit principle. Outside of this context, it would be exceptional that a Minister of Justice would express a preference for a particular type of judge.

Finally, a consensus was reached upon the need for a more open and transparent system of advertising of judicial vacancies. It is anticipated that these advertisements would specify the jurisdiction in which a judge will be required to sit as well as any specific requirements of the position. A public advertisement should generate the broadest possible pool of candidates willing to fulfill a specific post. From the response to such advertising a short list of candidates may be developed.

RECOMMENDATION 1

The Sub-Committee recommends that the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness be authorized by the House of Commons in the First Session of the 39th Parliament to study as a priority the process for appointment to the federal judiciary.

RECOMMENDATION 2

The Sub-Committee recommends that the evidence and documentation received by the Sub-Committee during the First Session of the 38th Parliament in relation to its study of the process of appointment to the federal judiciary (Meetings Nos. 2-13) be deemed received by the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness in the First Session of the 39th Parliament.

RESPECTFULLY SUBMITTED

John Maloney, M.P.
Chair

Witnesses List

Study on the process for appointment to the Federal Judiciary

<i>Organizations and Individuals</i>	<i>Date</i>	<i>Meeting</i>
Department of Justice Judith Bellis General Counsel Courts and Tribunal Policy	03/10/2005	2
Department of Justice Richard Ellis Counsel Judicial Affairs, Courts and Tribunal Policy		
Department of Justice Catherine McKinnon Counsel Judicial Affairs, Courts and Tribunal Policy		
Office of the Commissioner for Federal Judicial Affairs David Gourdeau Commissioner for Federal Judicial Affairs		
Office of the Commissioner for Federal Judicial Affairs Margaret-Rose Jamieson Executive Director Judicial Appointments and Legal Counsel		
Canadian Council of Criminal Defence Lawyers William Trudell Chair	24/10/2005	3
Peter McCormick Professor Chair, Department of Political Science, University of Lethbridge		
House of Commons Irwin Cotler Minister of Justice	25/10/2005	4
Office of the Minister of Justice François Giroux Judicial Affairs Advisor		
Criminal Lawyers Association Joseph Di Luca Director	25/10/2005	5
Allan C. Hutchinson Professor Osgoode Hall Law School, York University		

The Advocates' Society
Paul Monahan
Vice-Chair
Task Force, Judicial Appointments

The Advocates' Society
Linda Rothstein
President

Jacob Ziegel
Professor Emeritus of Law
University of Toronto

Mary Eberts
Lawyer

31/10/2005

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Pierre Michaud
Former Chief Justice in Quebec

Peter Russell
Professor
Political Science, University of Toronto

Carl Baar
Professor
Political Science, York University

01/11/2005

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Canadian Bar Association
Brian Tabor
President

Canadian Bar Association
Tamra Thomson
Director
Legislation and Law Reform

Office of the Commissioner of Official Languages
Dyane Adam
Commissioner of Official Languages

14/11/2005

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Office of the Commissioner of Official Languages
Johane Tremblay
Director
Legal Affairs Branch

Constance Glube
Former Chief Justice of Nova Scotia

15/11/2005

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Patrick Monahan
Dean
Osgoode Hall Law School, York University

Itzhak (Isaac) Zamir
Former Justice of the Supreme Court of Israel
Former Attorney General of Israel

21/11/2005

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Alan Paterson
Director
Centre for Professional Legal Studies
University of Strathclyde

22/11/2005

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Fédération des associations de juristes d'expression française de
Common Law Inc.
Rénald Rémillard
Executive Director

22/11/2005

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Fédération des communautés francophones et acadienne du Canada
Diane Côté
Director
Community and Government Liaison

Indigenous Bar Association
Jeffery Hewitt
President

Briefs Received

Study on the process for appointment to the Federal Judiciary

Organization

Brun, Henri

Canadian Bar Association

Department of Justice (Quebec)

Eberts, Mary

Fédération des associations de juristes d'expression française de Common Law Inc.

Indigenous Bar Association

McCormick, Peter

Morrissey, John

Office of the Commissioner for Federal Judicial Affairs

Russell, Peter

The Advocates' Society

Ziegel, Jacob S.