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

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**Chair**

**Mr. Richard Marceau**

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

Monday, October 3, 2005

• (1530)

[Translation]

**The Chair (Mr. Richard Marceau (Charlesbourg—Haute-Saint-Charles, BQ)):** Ladies and gentlemen, good afternoon and welcome to the first meeting of this committee with witnesses.

We have with us today, from the Office of the Commissioner for Federal Judicial Affairs, the Commissioner for Federal Judicial Affairs, Mr. David Gourdeau, and Ms. Margaret Rose Jamieson, Executive Director, Judicial Appointments, and Legal Counsel.

From the Department of Justice, we have Mr. Richard Ellis, Counsel, Ms. Judith Bellis, General Counsel, and Ms. Catherine McKinnon, Counsel. All three work in the Judicial Affairs, Courts and Tribunal Policy Section.

I would point out that the Justice officials are here to discuss the process used outside the federal level, that is, in the provinces and in other countries.

We will begin with the Office of the Commissioner for Federal Judicial Affairs. You know one another, you are all experts and you know the procedure: you will make a presentation and then we will have questions from the subcommittee members.

You have the floor.

**Mr. David Gourdeau (Commissioner for Federal Judicial Affairs, Office of the Commissioner for Federal Judicial Affairs):** Thank you, Mr. Chairman.

Thank you for inviting us here today. I believe that we are your first witnesses. So I hope that your subcommittee's work goes well.

My name is David Gourdeau and I have been the Commissioner for Federal Judicial Affairs since 2001.

I am accompanied today by Ms. Margaret Rose Jamieson, who has been Executive Director, Judicial Appointments and legal counsel with our office since August 2003.

[English]

We are pleased and honoured to have this opportunity to inform you on the mandate of our office, to make a short presentation, and to answer your questions.

[Translation]

Our office, as stipulated in section 74 of the Judges Act, has three missions. The goal of these missions is to ensure the independence of the federal judiciary and make sure it deals at arm's length with the Department of Justice.

To begin with, we ensure implementation of part I of the Judges Act, which deals with the administration of salaries and benefits for federally appointed judges.

Second, the office sets the budget and takes all the necessary administrative measures for our office as well as the Canadian Judicial Council.

Finally, the office carries out missions within its mandate that are conferred on it by the minister to ensure proper administration of justice in Canada.

[English]

We will concentrate on the federal judicial appointment process. The current federal judicial appointment process was announced by the Minister of Justice in 1988 and was fully implemented in 1989, when the advisory committees created under the process became operational. The process was designed to enable all interested and qualified individuals to be considered for appointment and to provide a means by which the Minister of Justice could receive broadly based and objective advice about their qualification for appointment.

Between July 1, 2004, and September 28, 2005, 663 applications for the bench were received, 41 advisory committee meetings were held to assess these applicants across the country, and 52 applicants were appointed to a provincial superior court, the Federal Court, the Federal Court of Appeal, or the Tax Court of Canada. Between July 1, 2002, and June 30, 2004, we received 962 applications and there were 117 meetings and 93 appointments. Over the years, roughly between 40% and 50% of applications received will be either highly recommended or recommended for appointment.

•(1535)

[*Translation*]

The independent advisory committees are at the very heart of the appointment system. Their role is to assess the competence of lawyers who apply for judicial appointments. There is at least one committee in each province and territory, except for Ontario, where there are three regional committees, and Quebec, where there are two, given the larger populations of these two provinces.

Candidates are assessed by the regional committee responsible for the judicial district in which the candidate is exercising his or her profession or by the committee that the commissioner feels is most appropriate to do the assessment.

Every committee is composed of seven members representing the bench, the bar and the public.

There is one representative of the provincial or territorial law society, one representative of the provincial or territorial branch of the Canadian Bar Association, one representative of the Chief Justice of the province or the Senior Judge of the territory, one representative of the provincial Attorney General or territorial Minister of Justice, and three representatives of the federal Minister of Justice.

The Minister of Justice invites these persons and organizations to submit a list of potential committee members.

Based on the selection by the Commissioner for Federal Judicial Affairs and the executive director, Judicial Appointments, the minister appoints the committee members.

The minister takes into account factors appropriate to each jurisdiction, including geography, gender, language and multiculturalism. Committee members are appointed for a two-year term and their term of office may be renewed once.

The minister meets periodically with the chairs of all committees for an exchange of views concerning the operations of the judicial appointments process. Such a meeting took place in June of this year.

[*English*]

Role of the judicial appointment secretariat. As commissioner for federal judicial affairs, I have overall responsibility for the administration of the appointment process on behalf of the Minister of Justice. My responsibility is to ensure that the system treats all candidates for judicial office fairly and equally. I have delegated that responsibility to the executive director, judicial appointments.

It is the commissioner's or the executive director's particular responsibility, on behalf of the minister, to ensure that all assessments are completed expeditiously and thoroughly. The executive director must attend every committee meeting as an ex officio member and serves as a link between the minister and the committees. All communications between the minister and the committees are effected through the commissioner or the executive director.

In short, administrative support for the work of the committees, including information sessions and guidelines concerning confidentiality and other committee procedures, is provided by the secretariat

of our office. All committee proceedings and consultations take place on a confidential basis.

[*Translation*]

Qualified lawyers and provincial or territorial court judges who wish to be considered for appointment as a judge of a superior court in a province or territory or of the Federal Court of Appeal, the Federal Court or Tax Court of Canada must apply to the Commissioner for Federal Judicial Affairs. In addition to candidates themselves, members of the legal community and all other interested persons and organizations are invited to nominate persons they consider qualified for judicial office.

Candidates should complete a Personal History Form which provides the basic data for the assessment. In addition to the usual information found in a resume, this form describes the candidate's professional experience outside the legal profession, other professional responsibilities, community and civic activities, factors that support an appointment, personal issues such as health and financial circumstances, and the ability to hear and preside over a trial in both official languages. Moreover, candidates are asked to provide any other information that could help the committee in its assessment.

[*English*]

The statutory qualifications for appointment are set out in the Judges Act, the Federal Courts Act, and the Tax Court of Canada Act. Generally, they require 10 years at the bar of a province or territory or a combination of 10 years at the bar and the subsequent exercise of powers and duties of a judicial nature on a full-time basis in a position held pursuant to a law of Canada or of a province or territory. Appointments to a provincial superior court are made only from the members of the bar of that province, as required by the Constitution Act of 1867. Appointments to the superior courts of the three territories are open to all persons who meet the qualifications for appointment within their own province or territory.

Candidates are asked to sign an authorization form that allows the commissioner to obtain a statement of their current and past standing with the law societies in which they hold or have held membership. Upon determining that a candidate meets the threshold of constitutional and statutory criteria for a federal judicial appointment, the executive director will forward the candidate's file to the appropriate committee for assessment or for comment only. The assessment is for lawyers; the comment only covers provincial or territorial court judges. This file also includes the law society reports concerning the candidate's current or past standing.

[*Translation*]

Only candidates who are lawyers are assessed by the committees. Committees carry out detailed consultations inside and outside the legal community with respect to each candidate.

Professional competence and overall merit are the primary qualifications for appointment. For the purpose of assessing candidates for the bench, committee members use a set of assessment criteria. These criteria cover professional ability and experience, bilingual ability, personal characteristics and potential impediments to appointment. Committees are encouraged to respect diversity and take into account experience in all areas of law, including non-traditional areas. The consultations that take place are an essential aspect of the appointment process.

The committees are asked to assess candidates on the basis of three categories: “recommended”, “highly recommended” and “unable to recommend”. These categories reflect the advisory nature of the committee process. Candidates are notified of the day they were assessed by the committee, but they are not provided with the result of the assessment, which are confidential and solely for the minister's view. Each assessment must be certified by the commissioner or the executive director prior to submission to the Minister of Justice.

● (1540)

[*English*]

The files of all candidates are maintained in a separate and confidential data bank with the Judicial Appointments Secretariat in our office, for the sole use of the Minister of Justice. Lawyer candidates are notified of the date they were assessed by the committee, and assessments are valid for a period of two years from that date. During that period of time, a recommended or highly recommended candidate remains on the list of those available for judicial appointment by the Minister of Justice. A request may be made in the three-month period prior to the date of expiration of the two-year validity period, or at any time thereafter, in order to renew an application for appointment.

Provincial or territorial court judges who wish to be candidates must also complete a personal history form for judges. These candidates are not assessed by the advisory committees, but their files are submitted to the appropriate committee for comments, which are then provided to the Minister of Justice, including the results of any confidential consultations undertaken by the committee. These comments are strictly confidential and are provided to the Minister of Justice only. They are not binding on the minister, and the names of these candidates are automatically placed on the list of those available for appointment. They must, however, renew their expression of interest every five years, failing which, their names will be withdrawn from the list.

Committees are masters of their agenda and review proposed candidacies, depending on the number of applications received and the judicial vacancies to be filled by the Minister of Justice.

[*Translation*]

The following list of criteria is intended to provide a basis for assessing the suitability of candidates for judicial appointment. The list is not exhaustive, as indicated in the assessment criteria list published on our website.

Professional competence and experience.

While courtroom experience is an asset, it is only one of many factors which may be considered in assessing a candidate's

suitability for the role of judge. The committee takes into account general competency in the law, intellectual ability, analytical skills, ability to listen, ability to maintain an open mind while hearing all sides of an argument, ability to make decisions, capacity to exercise sound judgment, reputation among professional peers and in the general community, areas of professional specialization, specialized experience or special skills, ability to manage time and workload without supervision, capacity to handle heavy workload, capacity to handle stress and pressures of the isolation of the judicial role, interpersonal skills with peers and the general public, awareness of racial and gender issues, and bilingual ability.

● (1545)

[*English*]

I'll point out some of the main potential impediments to appointment. These would be any debilitating physical or mental condition, including drug or alcohol dependency, that would likely impair the candidate's ability to perform the duties of a judge; any past or current disciplinary actions or matters against the candidate; any current or past civil or criminal actions involving the candidate; financial difficulties, including bankruptcy, tax arrears, or arrears of child support payments—and that's about it.

I think that gives you a broad overview of how these committees work. I'm open to questions. My understanding was that the Department of Justice would make their presentations, and then we'd be available for questions.

[*Translation*]

**The Chair:** Exactly. Thank you. Mr. Gourdeau.

Who would like to speak on behalf of the Department of Justice? Ms. Bellis, we will be very pleased to hear from you.

**Ms. Judith Bellis (General Counsel, Courts and Tribunal Policy, Department of Justice):** Thank you, Mr. Chairman. As you said, I am the director of Judicial Affairs at the Department of Justice.

[*English*]

I was honoured to hear you refer to my colleagues and I as experts in relation to judicial appointments committees in other jurisdictions, but I do think I need to clarify for the committee the limits of what we're going to be able to offer here today. I think committee members are aware that for reasons of independence, the commissioner's office, rather than the Department of Justice, has been tasked with the responsibility of the administration of the federal judicial appointments process. My colleagues and I, as legal policy advisers to the minister, are responsible when asked by the minister to provide comparative analysis and information, as we have done, I think you will recall, in the context of the Supreme Court of Canada appointments process.

As part of our work in relation to the minister's expression of interest as early as last year about the possible exploration of reform to the appointments process more generally, I asked my colleagues to undertake a comparative look at other Canadian jurisdictions—the provincial and territorial processes. What we have provided to the committee is the product of that exercise, and I hope it will be of use to you. My colleagues and I would be happy to take you through that in general terms and answer whatever questions we can on that point.

I can advise you that the way in which that information was gathered was a two-step process. We looked, obviously, at the statutory and regulatory framework that governed the appointment processes in the various Canadian jurisdictions. We also made virtual e-mail contact with responsible officials in each of the jurisdictions, who essentially confirmed our understanding of the processes, based on the information we had found. It seemed to us—and this was long before we thought we would be able to offer it to you—for the minister's use and his advisers' use, we thought it would be useful to prepare the chart you have. It is done, as you see, province by province and by territory. Then we have disaggregated, if you like, the elements of each of the processes. We provided that to the clerk, and I hope you've had the benefit of receiving it.

The other information we have provided is really some background information we have gathered in the course of comparative work in relation to other processes in other jurisdictions that may be relevant.

Essentially, at this stage this is the bulk of the work we have done. We're certainly prepared to respond as best we can to any questions the committee may have.

• (1550)

[Translation]

That was my presentation. Thank you.

[English]

We are available to take questions.

[Translation]

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

As you know, we have decided to have seven-minute rounds. We will start with Mr. Toews, from the Conservative Party.

[English]

**Mr. Vic Toews (Provencher, CPC):** Thank you.

Thank you, Mr. Gourdeau and Madam Bellis, for your comments.

First, I'd like to direct some comments to Mr. Gourdeau. I'm sorry I came in a little late, so I might have missed some of your presentation, but of course all of these applications for judgeships are voluntary. You've basically got to make that decision, you have to file the necessary paperwork yourself, you aren't in any way...well, you could be dragooned into it, but ultimately you have to sign off on it. You're a volunteer for the position. That's correct, isn't it?

**Mr. David Gourdeau:** Yes.

**Mr. Vic Toews:** The list of applicants, then, is considered and then broken down into essentially three categories: the highly recommended, the recommended, and the not recommended.

**Mr. David Gourdeau:** Unable to recommend. In English it's "unable to recommend", and in French it's "*sans recommandation*".

**Mr. Vic Toews:** Okay, unable to recommend.

Let's say the highly recommended, the recommended, and the unable to recommend stay on those respective lists for two years. Then they can be renewed by application. Is that correct?

**Mr. David Gourdeau:** Yes.

**Mr. Vic Toews:** All right.

How many, in total, are there on this highly recommended list today?

**Mr. David Gourdeau:** I don't know the exact number.

**Mr. Vic Toews:** Roughly.

**Mr. David Gourdeau:** Historically, I think it might be between 15% and 20% of the total number of applications we get. I'm saying that off the top of my head. I stand to be corrected on that.

**Mr. Vic Toews:** In terms of real numbers, how many highly recommended people are kicking around Canada waiting for that golden moment?

**Mr. David Gourdeau:** We have a total of 394 highly recommended and recommended. Of that number, 111 are highly recommended. Out of a total of 394, you have 283 recommended and 111 highly recommended.

**Mr. Vic Toews:** Okay. So basically we appoint, or you appoint—

**Mr. David Gourdeau:** I don't appoint; the minister appoints. I want to make that quite clear today. Our office doesn't appoint; the Minister of Justice appoints.

**Mr. Vic Toews:** And the Governor General appoints.

**Mr. David Gourdeau:** After the evaluations leave our office, it's out of our hands. I'm being quite clear on that point.

**Mr. Vic Toews:** But there have been people appointed from the recommended list as well as from the highly recommended list. Is that not correct?

**Mr. David Gourdeau:** I would imagine so.

**Mr. Vic Toews:** Well, in fact you would know that to be so.

**Mr. David Gourdeau:** To be quite honest with you, once people are appointed I personally don't go back and check if they were highly recommended or recommended. I don't have that curiosity. Once they're appointed, they take care of themselves.

**Mr. Vic Toews:** I think your colleague can confirm that in fact there are people on that recommended list who have been appointed judges. It's not uncommon.

**Mr. David Gourdeau:** Yes, I would think so.

**Mr. Vic Toews:** I imagine there are highly recommended and recommended people all across Canada.

• (1555)

**Mr. David Gourdeau:** Yes.

**Mr. Vic Toews:** It would be safe to say that there are highly recommended people in every province and territory today.

**Mr. David Gourdeau:** And I would say that the committees vary in their evaluation of highly recommended across the country. I think some committees may be a bit more strict with the highly recommended anointment and others might be less generous with it. That can vary over different periods of time. You might have one committee in one province that might be very strict on that score, and two years later it could be another committee with a different configuration.

**Mr. Vic Toews:** But succinctly, we have highly recommended people in every province right now who have not yet been appointed judges and may never be appointed judges.

**Mr. David Gourdeau:** I'll answer you in French.

[*Translation*]

Many are called, but few are chosen.

[*English*]

Many are called; few are elected or appointed.

**Mr. Vic Toews:** Okay. So how many vacancies are there right now across Canada?

**Mr. David Gourdeau:** Twenty-two, if my memory serves me right.

**Mr. Vic Toews:** So we've got 22 vacancies, and we've got about—

**Mr. David Gourdeau:** Sorry, 23.

**Mr. Vic Toews:** Twenty-three, and we've got about 394 highly recommended—

**Mr. David Gourdeau:** No, 111 highly recommended.

**Mr. Vic Toews:** Yes, 111 highly recommended and two hundred and some recommended. So we aren't scrambling to say that we don't have a highly recommended person in one particular jurisdiction.

**Mr. David Gourdeau:** No. It might be based on the requirements of a particular court, though. I think in some cases you might have, let's say, highly recommended people who are criminal law practitioners, but the needs of that particular court would be in civil litigation. I'm just saying it's based on the needs of the court.

**Mr. Vic Toews:** But my understanding was that when you're called to serve in the high court, whether it's on the Queen's bench or in Superior Court, you're all judges. A family court lawyer could be assigned to a criminal court the next day. In my experience, that has happened.

**Mr. David Gourdeau:** Yes, I know your experience. You would know about that.

**Mr. Vic Toews:** I'm just saying that I'm not making this up as I go along.

What's the present salary for puisne judges and chief justices?

**Mr. David Gourdeau:** It's \$224,000 and change.

**Mr. Vic Toews:** Have there been any bankruptcies of sitting judges in the last five years? You would know something like that, given that it's a requirement.

**Mr. David Gourdeau:** I've been commissioner for just under four years, and in that period of time, no.

**Mr. Vic Toews:** That would be highly unusual.

**Mr. David Gourdeau:** Actually, when you look at the application form—that's one of the points I mentioned before—they ask the potential candidates about their financial situation, tax arrears, arrears for child support, things of that nature.

**Mr. Vic Toews:** So you look at that thoroughly—

**Mr. David Gourdeau:** The committees do.

**Mr. Vic Toews:**—and as a result of the thorough look by the committee, you haven't heard of anybody going bankrupt after being appointed in the last four years.

**Mr. David Gourdeau:** To my knowledge, no.

**Mr. Vic Toews:** Okay. Those are all my questions for now.

[*Translation*]

**The Chair:** Mr. Lemay, you have seven minutes.

**Mr. Marc Lemay (Abitibi—Témiscamingue, BQ):** I was very involved in judicial appointments in Quebec over the past four years. I was the head of the Quebec Bar for my region and I sat on the general council for the Quebec Bar for a number of years.

I must admit that I have learned more today than I did over the five years that I was responsible for the bar in my region and in Quebec. How federal judicial appointments were made was always considered a well-guarded secret. That view has been expressed by a number of bar presidents.

My questions are for both Mr. Gourdeau and the justice department officials. If I understood correctly, anyone could decide that Marc Lemay, that is, me, is a very good criminal lawyer and could send my name in to be put on the list for a judicial appointment.

**Mr. David Gourdeau:** Yes. It happens that members of the public write to the Chief Justice to say that a given person would make an excellent judge.

**Mr. Marc Lemay:** Okay.

**Mr. David Gourdeau:** We sometimes get letters of that kind at our office. In that case, we send a form to the person who was identified, and that is all.

**Mr. Marc Lemay:** It is to the person...

**Mr. David Gourdeau:** The person is a lawyer. For example, suppose that your successor in the bar society recommends you. He would write to the Chief Justice of Quebec and say that Mr. Lemay would make an excellent Superior Court judge.

**Mr. Marc Lemay:** I am the one who would have to apply.

**Mr. David Gourdeau:** However, if you do not take any action, nothing will happen.

● (1600)

**Mr. Marc Lemay:** Very well. So I apply. In fact, that is not true. I ask to be identified as someone suitable to be appointed as a judge.

**Mr. David Gourdeau:** That is correct.

**Mr. Marc Lemay:** That does not mean that a position is available.

**Mr. David Gourdeau:** True. You are right.

**Mr. Marc Lemay:** There is a problem here. The process creates a bank of people who could be potentially appointed as judges.

**Mr. David Gourdeau:** The committees create a bank that is submitted to the minister for his use.

**Mr. Marc Lemay:** Just a minute, I am getting to my point. You will see where I am going.

**Mr. David Gourdeau:** I hope so.

**Mr. Marc Lemay:** I am a good lawyer. In criminal law, if I ask you a question, it is because I know the answer.

**Mr. David Gourdeau:** I have no doubt.

**Mr. Marc Lemay:** I want to know something. Does Quebec have one committee or two?

**Mr. David Gourdeau:** There are two: one in Quebec City and one in Montreal.

**Mr. Marc Lemay:** In Quebec City and Montreal.

**Mr. David Gourdeau:** To match the judicial appeal districts in Quebec.

**Mr. Marc Lemay:** Are the committees based on the districts?

**Mr. David Gourdeau:** Yes.

**Mr. Marc Lemay:** If there is a vacant position in Rouyn-Noranda or Amos, since there will soon be an opening in one of those two places...

**Mr. David Gourdeau:** You are better informed than I am.

**Mr. Marc Lemay:** There we go! Someone from Quebec City will be assessing the candidates for those positions.

**Mr. David Gourdeau:** It is a long time since I practised in Quebec, but it seems to me that they would come under the Quebec City judicial appeal district.

**Mr. Marc Lemay:** All right. It is the Quebec City region.

**Mr. David Gourdeau:** Yes.

**Mr. Marc Lemay:** But those people do not know anything about the region.

**Mr. David Gourdeau:** You would be surprised what people from Quebec City know. If you ask Mr. Marceau, he can tell you.

**Mr. Marc Lemay:** I can tell you that they do not know very much. In any case, that is another debate.

**Mr. David Gourdeau:** You can get into it right away, if you like.

**Mr. Marc Lemay:** I do not understand why you do not wait until there is an opening before creating a bank. There are 23 in Canada right now.

**Mr. David Gourdeau:** Yes.

**Mr. Marc Lemay:** There are 111 names in the bank. Why do you not wait until there is a vacancy and then have a competition?

**Mr. David Gourdeau:** We administer the system, but we did not invent it. That might be a question for the current Minister of Justice or one of his predecessors.

The system was set up in 1988. Despite some criticism, it has worked relatively well. There is certainly room for improvement, as there is with any system. In reality, however, if you are asking me why the creation of a bank of candidates is part of the system, I honestly do not know.

**Mr. Marc Lemay:** Very well.

**Mr. David Gourdeau:** I know that the current system is based on creating a candidate bank. But there may be many reasons for that.

**Mr. Marc Lemay:** Why is the Minister of Justice represented by three persons on the committee?

**Mr. David Gourdeau:** Once again, I think that you should address that question to the Minister of Justice.

**Mr. Marc Lemay:** We will ask the minister.

**Mr. David Gourdeau:** Under the existing system, as laid out in the current legislation, there is no legislative or regulatory obligation, to my knowledge, requiring the Minister of Justice to have advisory committees.

These advisory committees were established in 1988-89, at the initiative of the Minister of Justice at that time, to meet a need. To my knowledge, however, they do not exist because of any legislative requirement.

So they were a creation of the minister, if you like. If I remember correctly, and I may be mistaken, I believe that they were set up because the Canadian Bar Association had made certain recommendations in the mid-1980s to the Minister of Justice calling for a form of advisory committee. The committees that exist today arose out of those recommendations, I believe. However, I stand to be corrected, but I think that this is where they came from.

**Mr. Marc Lemay:** Do you not believe that...

**Mr. David Gourdeau:** I have no opinion.

**Mr. Marc Lemay:** You are not entitled to an opinion? Then we are going to ask the justice department officials.

I read the studies you conducted in Australia, Scotland and in other countries. I do not want to go into all the details, but do you not find that the advisory committee in Canada, aside from its role as advisor, serves no real purpose as regards the studies you completed?

[*English*]

**Ms. Judith Bellis:** If your question is do the processes differ significantly, I must agree. There is a range of approaches taken within each of the comparative processes. Indeed, even in the provinces and territories of Canada there is a spectrum of approaches.

For example, on the question you pose with respect to why not a committee established each time a vacancy arises, part of the answer is really one of efficiency and effectiveness. With the sheer volume of turnover of vacancies in the federal and superior courts, given that there are 1,100 sitting judges, in order to have the candidates available so that appointments can be made quickly when vacancies arise is one of the reasons for what you might refer to as an evergreen committee. That is a policy choice, as the commissioner has said, and we do recognize that in many jurisdictions a committee will be established for each vacancy, but the efficiency of that kind of policy choice needs to be balanced with other considerations.

• (1605)

[*Translation*]

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



The Minister of Justice is unable to appear today, as his mother has just passed away. We were hoping to start with him, but since our work must be completed by December 15, we decided to move along. We will have the opportunity to ask the minister the questions Mr. Gourdeau and the justice officials are unable to answer, or on which they have no opinion.

Mr. Macklin, you have seven minutes.

[English]

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

I guess there are many questions that arise through the process. I suppose as lawyers at some point or other we also may have contemplated picking up a package and making an application, so some of what you tell us is also very helpful in understanding—

[Translation]

**The Chair:** Pardon me, Mr. Macklin, your presence threw me off course; in fact, it is Mr. Comartin's turn to ask a question. I apologize.

**Hon. Paul Harold Macklin:** Are you very sorry?

**The Chair:** Yes, very sorry.

Mr. Comartin, please accept my apologies. The floor is yours, and I will give you a few extra minutes if you wish.

[English]

**Mr. Joe Comartin (Windsor—Tecumseh, NDP):** Merci.

I have to say, the rest of the room actually might prefer that I go ahead of Mr. Macklin.

Mr. Gourdeau, are any of the candidates ever interviewed?

**Mr. David Gourdeau:** No.

**Mr. Joe Comartin:** By anyone?

**Mr. David Gourdeau:** No. The committees have the discretion to interview them, but to my knowledge they don't.

**Mr. Joe Comartin:** Where does that discretion lie?

**Mr. David Gourdeau:** I think it's in our guidelines, but the committees, if they want to, could interview them. The practice has not been to interview them.

**Mr. Joe Comartin:** Have we seen those guidelines? Are they public?

**Mr. David Gourdeau:** I think they're on our website, aren't they?

**Ms. Margaret-Rose Jamieson (Executive Director, Judicial Appointments and Legal Counsel, Office of the Commissioner for Federal Judicial Affairs):** Yes, they're on the website.

**Mr. David Gourdeau:** And they're part of the package.

**Ms. Margaret-Rose Jamieson:** No, they're not.

**Mr. David Gourdeau:** I think you have a copy of that, *les lignes directrices*.

**Mr. Joe Comartin:** I have been through it and I didn't see any reference to interviewing.

**Mr. David Gourdeau:** It's not clearly pointed out, but they do have that discretion.

Over time, from when the committee started, I think with the sheer volume and some geographical considerations they decided not to interview the candidates.

The people who are members of the committees do this on a pro bono basis, and because of the length and breadth of the country, I think it would be close to impossible to get through all the applications.

**Mr. Joe Comartin:** Ms. Bellis, do you know from the review you did at the provincial level if any of the provinces have a pattern of interviewing the candidate?

**Ms. Judith Bellis:** Many of the provincial jurisdictions do have not just a discretion but a requirement for interview.

If you go down to the fourth page of the first.... It's the boxes that are entitled, on the side, "Elements of Assessment". As you go through, it starts, as you saw, with B.C., and then the second page goes to New Brunswick. In "Elements of Assessment", it shows that many of the processes have interviews.

**Mr. Joe Comartin:** I believe it's accurate. Each one of the provinces has only one advisory committee?

**Ms. Judith Bellis:** That's my understanding.

**Mr. Joe Comartin:** Do you know if those committees are at the federal level? Do they work pro bono, or are they compensated in some fashion?

**Ms. Judith Bellis:** It was not a question that we asked specifically. It's my understanding that it's pro bono, but I would not give that as a completely definitive statement.

**Mr. Joe Comartin:** So even in a province as large as Ontario or Quebec, where there's only one, I assume the pattern is that they bring the candidates into a central area.

• (1610)

**Ms. Judith Bellis:** That's my understanding. I should just clarify that in Quebec there are two standing committees that may be established—one in Quebec City and one in Montreal. Then outside those cities, as

[Translation]

Mr. Lemay indicated that committees are struck when a position becomes vacant.

[English]

**Mr. Joe Comartin:** I'm sorry, I was asking about the provincial set-up. There are two committees?

**Ms. Judith Bellis:** Yes, there are—

[Translation]

**Mr. Marc Lemay:** Not in Quebec. There is one per position available.

**Ms. Judith Bellis:** Very well, Mr. Lemay, but if I understand correctly, there is a status committee. It is also possible to have a committee for Quebec City, as well as for Montreal...

**Mr. Marc Lemay:** Are you referring to judges of the Superior Court?

**Ms. Judith Bellis:** Not at all.

**Mr. Marc Lemay:** Excuse me, Mr. Chairman.

In Quebec, judges of the Superior Court of Quebec are appointed when a position becomes vacant. In a given judicial district, a committee is struck and all candidates send their candidacies to the committee.

A brief, initial assessment is made, to check if the application is complete, and includes a photo, for example. If it is not, the application is not accepted. Nonetheless, the committee still meets each and every candidate.

[*English*]

**Mr. Joe Comartin:** Has either your group or the department made any recommendations in the last five or ten years to alter the process we've been using since 1988-89?

**Mr. David Gourdeau:** Our office has made some recommendations in the past. Whenever there's what I call a turnover—these committees have a two-year life cycle, and at one point they used to have a three-year life cycle—we make certain recommendations to the minister. Some have been followed, if my memory serves me correctly; others have not. The fact of the matter is, there's also been a turnover in ministers.

**Mr. Joe Comartin:** Are there current recommendations outstanding from you that have not been implemented?

**Mr. David Gourdeau:** I think there was one we made, that rather than have a complete turnover every two years, it be staggered, so the memory of the committee doesn't disappear into the netherworld. I think that one is still under consideration.

The next cycle of these committees will expire at the end of October 2006. We're just about to the end of year one of these committees.

**Mr. Joe Comartin:** Did you notice anything within the department—in terms of outstanding recommendations—that changed the process?

**Ms. Judith Bellis:** We respond when the minister asks us, and we haven't been asked to develop recommendations of that kind.

**Mr. Joe Comartin:** Thank you.

[*Translation*]

**The Chair:** Mr. Gourdeau, if indeed recommendations were made, as Mr. Comartin mentioned, is it possible for the committee to obtain a copy?

**Mr. David Gourdeau:** Normally, exchanges between our office and the minister on this subject are kept confidential.

**The Chair:** Including information on the functioning of...

**Mr. David Gourdeau:** To my knowledge, yes. I think you would have to ask the minister to have it sent to you.

**The Chair:** That will be done.

**Mr. David Gourdeau:** We must understand that our office facilitates the exchange of information between committees and the department. Our work, especially given its current structure, is highly confidential. If you were to compare our relationship to that which binds a lawyer and his or her client, the minister is our client and we are the lawyers.

**The Chair:** Therefore, we will have to ask the minister. That will be done, Mr. Comartin, will it not? Thank you.

Mr. Macklin, you have seven minutes.

[*English*]

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

With respect to my comments earlier, they were a lead-in as to how the individual lawyer feels sometimes in approaching this process. I know that a lot of us find from time to time that there's a great deal of interest in whether or not they are recommended, highly recommended, or not recommended, in order to put their life on hold. Has there been any consideration, as you've gone through this process, that in fact some type of notification would be delivered after the committee had made their decision on a particular candidate, so that they would have some indication as to where they were going as a candidate, as opposed to this blind process?

• (1615)

**Mr. David Gourdeau:** I'm told that initially, or at one point in time—I can't remember when—the results were given to the candidates. This is a consultative process. Lawyers being lawyers, it was about to become a very judicialized process. When the outcome wasn't as certain people thought it should be, they were threatening to sue or to seek redress before the courts as to the recommendation. My understanding is that at one point in time, in view of this and in view of the fact that it was a consultative process—it wasn't a mandated process and it was the minister's process—the results would not be shared with the candidates.

**Hon. Paul Harold Macklin:** Do you ever have any feedback that gives you the same indication that people would like to know? Or do you think that is too risky, as you're suggesting it was?

**Mr. David Gourdeau:** We get feedback that people would like to know. I get questions like, what's happening with my application? We'll send you a letter and tell you when you were evaluated and that's all you will know.

As to how it should be done or how it should be managed, I actually think that it's probably the work of this committee and the minister's decision as to how you want to make it work in the future. I know the drawback with this being a consultative process was that the end result would come out and some people weren't satisfied with it, and then automatically they wanted to go to court, and that wasn't really helping the process function. Faced with that threat of litigation, I think there was also a problem in getting people to volunteer for this kind of pro bono work. It had a bit of a chilling effect on the committee's work. You have to understand that in certain provinces the communities are relatively small. With the result being made public, it may or may not be very comfortable for the people who are members of the committee.

**Hon. Paul Harold Macklin:** Do you have any comments?

**Ms. Judith Bellis:** No. The confidentiality of the ratings has been well established, and, as Mr. Gourdeau said, it really is a policy decision that in fact also protects the applicants as well. The other aspect of applying for judicial office is that many applicants do not want to have the fact that they have applied for judicial office public because it can have a pretty negative effect on their practice if it's known by their clients that they may be seeking to remove themselves.

**Hon. Paul Harold Macklin:** I understand that part. I think I was more concerned about the individual wanting to know whether they should put their life on hold or not.

The second point is this. Going on to your assessment criteria, I'm looking at this sheet from the Federal Court side, and it goes through in quite a bit of detail the analysis that is performed by, I presume, the members of the committee. Is it on an individual basis that the committee members would form this opinion?

**Mr. David Gourdeau:** My understanding of the committee members' work is as follows. The people who make an application give the names of a number of people who recommend them or not, and the committee members then call these—I'll call them sponsors, for lack of a better word, or referees, if you will. They call them to ascertain these qualities and that's how it proceeds. And because the country is so wide and diverse, I think it varies from province to province. I think in huge urban centres the way the checking is done is a bit different, let's say, from a more rural or semi-rural community. But general speaking, they check with the references and that's how it works.

**Hon. Paul Harold Macklin:** So if I were applying, I guess I certainly wouldn't give any references who'd be negative. How does one get the perspective that's the most objective, shall we say? You say they don't normally interview the candidate, they just call the references. Is there any option to go beyond that and just make a blind call, or a cold call, into the community of interest?

To me, I think almost everybody should be highly recommended, or recommended, if in fact I get to choose the ones you're going to check on. And no one goes beyond that at the committee level?

• (1620)

**Ms. Margaret-Rose Jamieson:** If you don't mind, I would like to answer that.

On the application form there are two areas that ask for references. First of all, the candidate is asked to give primary references, about six of them, four of which must be contacted before the assessment can even go ahead. So you've got the one category of primary references, and each committee member who contacts a reference will go through the criteria and discuss it with the reference.

Then there's another section, which I refer to as the "other" sources. The candidate is asked to give the names of references...or they're not really references, they're persons to be contacted who know them, such as opposing counsel, other professional colleagues, partners or associates, people in the business community, people in the general community, judges before whom they've appeared, or administrative tribunals. They list the references there, and those persons are to be checked too. The criteria is gone over with those persons as well.

As the guidelines point out, not only must the committee member contact the primary references, and also the secondary references, if I may say, they are also encouraged to go outside the named references in the application. As you said, primary references 95% of the time are going to give glowing reports—although you'd be surprised; it's not always the fact. The members are encouraged to go outside these sources.

So you have three categories of checks that can give you a much more varied and complete picture of the candidate.

**Hon. Paul Harold Macklin:** Just as a quick little add-on, these look like areas where you'd check off whether or not it's accurate that, say, a person has a sense of ethics. Is there a gradation on any of these, or is it strictly a checkmark, that they do or they don't have a sense of ethics?

**Ms. Margaret-Rose Jamieson:** Although it looks like all you have to do is put a checkmark, that's not in fact how it's actually done. The committee members are given what's called a consultation form, which has the criteria set out. It has more space for them to write down the comments of the references. Some committee members prefer to use a grading system, but when the members are discussing a candidate, it's the comments they get back and the appreciation they get back from the references that are really important.

So it's much more detailed than just either a percentage, or a yes or a no. It wouldn't be very helpful to the minister if he had twenty candidates who, yes, are impartial, or are able to make a decision. How can he distinguish one from the other? The comments are very important to distinguish between candidates.

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

[Translation]

**The Chair:** We now turn to the Conservative Party. Mr. Toews, the floor is yours.

[English]

**Mr. Vic Toews:** Thank you.

So we have the minister's committees making recommendations on the basis of certain criteria that we've spelled out here, more or less, and nowhere in that list of criteria is political affiliation ever mentioned.

**Mr. David Gourdeau:** Correct.

**Mr. Vic Toews:** So we are then, as far as the committee is concerned, approaching it from a totally apolitical basis. Is that correct?

**Mr. David Gourdeau:** That's my understanding.

**Mr. Vic Toews:** All right.

I don't know if you've been involved in any of these discussions. Has the issue of politics ever come up?

**Mr. David Gourdeau:** When I was initially appointed, I attended some committee meetings and acted as secretary for these committee meetings. Political affiliation was never mentioned.

**Mr. Vic Toews:** All right. So that leaves a very interesting issue, as far as I'm concerned. We know, for example, as a result of a report in the *Ottawa Citizen*, that 60% of lawyers appointed to the bench in Quebec by the federal government since the 2000 election had contributed to the Liberal Party of Canada in the years leading up to their appointment; and that of the 29 law firm lawyers appointed for the first time to the Quebec superior court or Quebec Court of Appeal during that period, 21, or 72%, had made individual contributions to the Liberal Party.

Now, in my opinion, that's quite an astounding figure. Whatever measure we take, whether it's polling or seat distribution, we don't see that high a representation of Liberals generally in the province of Quebec, and yet we see this overwhelming number of people who have actually contributed to the Liberal Party. Now we know that your committee isn't involved in any political discussion.

• (1625)

**Mr. David Gourdeau:** To my knowledge, no.

**Mr. Vic Toews:** All right. So this goes to the Minister of Justice and—

**Mr. David Gourdeau:** The committee's reports or recommendations are sent along to the Minister of Justice's office, yes.

**Mr. Vic Toews:** Right. So where does this remarkable coincidence arise then? Does it arise as early as your committee, that it's simply by the luck of the draw that Liberals just make better judges, or is there something else that happens in the minister's office that you're aware of?

**Mr. David Gourdeau:** I would imagine you'd either have to ask the appointees or the appointer.

**Mr. Vic Toews:** All right. Well, that's interesting, because at the same time, of the 100 individual contributions identified in this article, there were less than half a dozen possible contributions to the Bloc and even fewer to the Conservatives. So it seems to me that there's obviously some element of politics involved in the decision somewhere along the way. It's not the committee, and the only other person who you say makes this appointment, according to your testimony, is the minister. So it's got to be in the minister's office.

**Mr. David Gourdeau:** The appointments are made by the minister.

**Mr. Vic Toews:** Yes.

On a different point, one of the concerns that I've had... For example, in Manitoba I think they have a relatively good system of appointing judges—

**Mr. David Gourdeau:** Were you involved in its institution?

**Mr. Vic Toews:** In the actual setting up of the structure, no, but I've had experience with it.

But one of the concerns that I've had—and maybe this is better directed to the Department of Justice...

In the Manitoba situation we have seven individuals, three appointed by the attorney general or the lieutenant-governor in council, the chief judge, and then a judge who is recommended by the chief judge, the law society, and the bar association. So there are four legal members and three lay members.

My concern is with respect to the involvement of the judiciary in the selection of judges. To me, given the very clear separation of powers that the Supreme Court of Canada talked about in the judges' reference case, in terms of their salaries, where it said that the executive should not be involved in the setting of the salaries, in order to maintain judicial independence, the reverse can be asked. What are judges doing exercising an executive function, a function that clearly has been reserved to the executive by our Constitution? Has the justice department ever looked at the constitutional propriety

of involving judges in what is an executive function and not a judicial function?

**Ms. Judith Bellis:** My only answer to that would be that the executive function being exercised here is the appointment recommendation. The judges who are involved in these processes are participating in an advisory capacity, and there are many, many examples of judges participating in advisory capacities of this kind, because of the value and indeed the need for the judicial perspective that will enhance the process.

It's noteworthy that judicial involvement in virtually all of the Canadian jurisdictions, as well as most of the foreign jurisdictions that we've looked at, is consistent. In the new British system, judicial participation is front and centre, and I think that goes to the question of what is the role of the judge in that function.

• (1630)

**Mr. Vic Toews:** All right. That's a good point, because, for example, in the Manitoba situation the Lieutenant Governor in Council is bound by the recommendations that are made. The judges don't simply advise. Of the three potential judges that are recommended, only one can be chosen from that group of three. The judges' involvement there is not simply advisory; it's binding upon the Lieutenant Governor in Council. The Lieutenant Governor in Council can't say, "We don't like these three; we want to pick from a bigger list".

I'm just wondering, if in the Manitoba situation the function of the judge is not merely advising but in fact making three recommendations in respect of which a Lieutenant Governor in Council is absolutely bound to take one of those individuals, has your department ever looked at that kind of role for the judges and at whether it crosses the very clear division of powers we have between the executive and the judiciary, which was made very clear to us in the Supreme Court of Canada decision regarding the payment of judges?

**Ms. Judith Bellis:** Mr. Toews, the answer is no, because at the federal level, as you know, the option is not available without a constitutional amendment, because section 96 requires the Governor in Council to appoint the judiciary. It would not be possible constitutionally to have a system that would provide for someone other than the Governor in Council to have a meaningful appointment power, and to constrain the Minister of Justice to a list from which he had no discretion would be contrary to section 96.

**Mr. Vic Toews:** Thank you very much.

[*Translation*]

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

David McGuinty.

[*English*]

**Mr. David McGuinty (Ottawa South, Lib.):** Thank you, Mr. Chair.

Thank you very much for joining us this afternoon.

I would like to pick up a little bit on Mr. Toews' questioning, and I'd like to examine whether I understand the appointments process. There's a committee that is struck; it follows criteria; it makes recommendations on a list; the list is then made available to the Minister of Justice.

Is that correct?

**Mr. David Gourdeau:** Yes.

**Mr. David McGuinty:** How many names typically go forward on the list?

**Mr. David Gourdeau:** It varies from province to province. The way the information is sent along to the minister.... Let's say the Toronto metro committee has met and has had 30 applications to go through. Of the 30, let's say it follows the regular pattern of 40% to 50% recommended or highly recommended. The minister will be given a summary of the meeting and will also be given a sheet for each applicant as to the recommendation made for that candidate. That's sent along to the minister.

So after each committee meets, the results of their deliberations and their recommendations are sent along to the minister.

**Mr. David McGuinty:** In their entirety? In terms of every individual who may have been approached or who has approached for consideration?

**Mr. David Gourdeau:** Yes, in terms of every individual who was vetted by each committee. The only ones who wouldn't be sent along to the minister would be those who don't meet the statutory requirements. Let's say someone decided he or she wanted to become a judge but is not a lawyer. We wouldn't bother the committee with those applications.

**Mr. David McGuinty:** What about those who had been previously interviewed and who had, for example—

**Mr. David Gourdeau:** If their two-year period has expired, then they can be reviewed once again, and every two years they can come back, if they want.

**Mr. David McGuinty:** If they'd been interviewed within the last two years—

**Mr. David Gourdeau:** Not interviewed, but assessed.

**Mr. David McGuinty:** If they've been assessed within the last two years, are you telling me every name on that list goes forward to the minister?

**Mr. David Gourdeau:** Yes, as to whether they've been recommended or unable to recommend or highly recommended.

**Mr. David McGuinty:** Okay, so it's fairly transparent. In fact, it's quite transparent. The minister receives a list of people who have been recommended or highly recommended or not recommended.

**Mr. David Gourdeau:** Unable to recommend. Yes.

•(1635)

**Mr. David McGuinty:** Okay.

Have you done any assessment of the judiciary in its entirety in terms of affiliation or potential or background affiliation with any political party?

**Mr. David Gourdeau:** No.

**Mr. David McGuinty:** So when Mr. Toews selectively cites a particular report about linkages to the Liberal Party, we don't know, for example, whether these same individuals who have apparently given money to the Liberal Party have given money to the Conservative Party or the Bloc Québécois or any other party, including the Green Party.

**Mr. David Gourdeau:** I wouldn't know.

**Mr. David McGuinty:** So it is the causal connection that is being alleged is perhaps not backstopped with full evidence. Is that right?

**Mr. David Gourdeau:** That's your opinion, and obviously Mr. Toews has another opinion.

**Mr. David McGuinty:** Can I—

**Mr. David Gourdeau:** As I stated, I have no opinion.

**Mr. David McGuinty:** Can I change the questions for a second and talk a little bit about the new process we'll be using in terms of filling Supreme Court of Canada vacancies?

**Mr. David Gourdeau:** Yes.

**Mr. David McGuinty:** If I understand it, Ms. Bellis, you'll be more seized with the responsibility to administer that system. Is that right?

**Ms. Judith Bellis:** No. In fact—

**Mr. David Gourdeau:** We're it till the advisory committee steps.... There are four steps. The second step is the work of the advisory committee, and our office will be giving the same kind of administrative support to this advisory committee.

**Mr. David McGuinty:** Okay. So if I understand the new system, Mr. Gourdeau, now that there are political parties involved through individual representatives, this is a fairly ground-breaking change, given the provincial court appointments process in which no political party is involved anywhere in the country. Is that correct?

**Mr. David Gourdeau:** That's my understanding.

**Mr. David McGuinty:** So that's a pretty important sea change in the way we're examining Supreme Court—

**Mr. David Gourdeau:** It is, and for the appointments process generally, because it's the first time it will be done this way—

**Mr. David McGuinty:** In Canada.

**Mr. David Gourdeau:** In Canada.

**Mr. David McGuinty:** In terms of the working appointments process.

**Mr. David Gourdeau:** Yes.

**Mr. David McGuinty:** Can you tell me, has anyone given any thought to this whole question of extensive consultations with the public? How do you foresee inviting public input in order to identify five to eight candidates to be assessed by the advisory committee?

**Mr. David Gourdeau:** Actually, a solicitation for input from the public was put in certain newspapers, mostly in western Canada and some national publications, such as *The Globe and Mail*. As to what the outcome of these solicitations will be, honestly, I don't know. As you've stated, this is the first time it's being done this way, so there may be a bit of trial and error. At the end of the day, I think the proof will be in the pudding. We'll go through this process, and I've actually asked that once we've been through the process, we debrief the members, including the political members of this committee, to ascertain what has worked or what hasn't worked, or what can be improved, because it will be the first go-round.

**Mr. David McGuinty:** I'm thinking of two. There are many precedents in the federal infrastructure where we solicit public input. I'm thinking, for example, of the NAFTA Commission for Environmental Cooperation. I'm thinking, for example, of the complaints process administered through the Commissioner for Environment and Sustainable Development, where there is statutory authority and a process whereby Canadians are able to complain or raise issues about, for example, the implementation or non-implementation of environmental standards. And it's not working. So I'm wondering, aside from fairly unidirectional *Globe and Mail* articles about Canadian public input—and this is coming down the track fairly quickly—have you given any more detailed thought as to how you intend to engage the public in a meaningful dialogue?

**Mr. David Gourdeau:** Well, it's very hard for me to tell you what the committee's work is going to be because the committee hasn't started its work. My understanding is that the committee will meet and then decide how it wants to go about its work. So I can't really tell you how the committee is going to go about its work. We'll be giving administrative support to the committee, but the committee may well decide to go one way or the other for its work in that regard. So I don't think I'm really in a position to say how that would work, quite honestly.

**Mr. David McGuinty:** Perhaps the last commentary from Ms. Bellis.

**Ms. Judith Bellis:** If I may, Mr. McGuinty, the minister will have the benefit of the response to the request for public input when he makes the first assessment of developing the list that the committee itself will consider. It seems likely that the committee will have the benefit of the input with respect to the candidates the minister has asked the committee to consider and the committee will itself determine with whom they will consult in their assessment. It is open to the committee to undertake consultations with whomever it chooses.

• (1640)

**Mr. David McGuinty:** This is an important point, Mr. Chairman. I've misunderstood this, then. So in terms of sequence, first the committee identifies nominees or identifies—

**Ms. Judith Bellis:** No. The Minister of Justice will provide the committee with from five to eight names.

**Mr. David McGuinty:** Right, and then you go to the public.

**Ms. Judith Bellis:** No.

**Mr. David McGuinty:** To clarify my understanding, the public is a source of genesis of names. Is that correct?

**Ms. Judith Bellis:** That's correct. As I understand it, there have been more than 200 submissions to the Minister of Justice of various kinds, and that is going into his assessment of the five to eight candidates he will ask the committee to assess.

[Translation]

**The Chair:** Thank you.

Normally it would be Mr. Lemay's turn now but I would just like to point out to the committee members that Ms. Jamieson mentioned that she had to leave before the end of the meeting. However her colleague, Mr. Gourdeau, will remain.

Would anyone like to ask Ms. Jamieson any questions before she leaves, questions they would like to put to her specifically? No?

Thank you very much, Ms. Jamieson, you are excused.

Mr. Lemay, you have seven minutes.

**Mr. Marc Lemay:** I was listening to my colleague, the Honourable Mr. Macklin. I would like to tell you about certain events leading up to the appointment of a Superior Court judge. A certain person, who was a colleague of mine at the time and still is, worked in a law firm with four other lawyers. He never raised the fact that he had four associates, because he felt that was confidential and he wanted the process to remain confidential. I was president of the bar at the time and when one of the committee members called me, I pointed out that this person had four associates. The cat was thus let out of the bag. Needless to say, that colleague was never appointed judge of the Superior Court.

You may respond that this is not a part of the criteria, but why are there no interviews with the candidates? I really want to understand why. If you tell me that this is an advisory committee, then my question is the following: shouldn't this committee, this so-called advisory committee, be a recommending committee? It could recommend four, five, ten or twelve candidates, it doesn't matter. The committee would decide. A short list has to be established. You see what I mean: there are currently 23 vacancies in Canada.

**Mr. David Gourdeau:** Yes.

**Mr. Marc Lemay:** At this point, on October 3rd, there are 11 vacancies for the Court of Quebec alone! Furthermore, committees will be established in each judicial district. You may tell me that the situation isn't the same throughout Canada, but what I want to do is make you understand how important this committee is. My colleagues sitting with me on the bar said that they wanted nothing to do with this committee because it had no authority. They said that their role would consist merely of rubber-stamping and going down the checklist.

I can confirm for the benefit of my colleague, Mr. Toews, that in Quebec few Bloc members have been appointed to the Superior Court. In fact, I don't know of any who have been. I've been a lawyer for 30 years and I work in criminal law. In the judicial districts I am familiar with, I haven't seen very many Conservatives either. Over the years there have been perhaps three or four, out of a total of 13, in Abitibi. In any case, I'm not concerned with people's political stripes. What I would like is for this committee to have more authority, even if it is a smaller committee, that is to say even if it has fewer members.

I don't know what your position is on this, nor what the department's position is. I'm familiar with the situation in France because I've been there. Judges there obviously hate lawyers.

**Mr. David Gourdeau:** In France, this is a career, therefore the situation is a little different.

**Mr. Marc Lemay:** Yes. There is the École nationale de la magistrature, for training judges.

• (1645)

**Mr. David Gourdeau:** In my opinion, this is a career choice that takes place at the university level.

**Mr. Marc Lemay:** However, the situation is entirely different in Canada.

Would it not be possible to give this committee more teeth?

**Mr. David Gourdeau:** Currently, these committees are creatures of the department, therefore the department can change the process if it wants to. Are you recommending a legislative change?

**Mr. Marc Lemay:** This isn't an obligation.

**Mr. David Gourdeau:** No, currently this is not a legislative obligation nor a statutory obligation. The authority to appoint is contained within the legislation. To my knowledge, however, establishing committees and determining their mandates is not a statutory obligation.

**Mr. Marc Lemay:** Tomorrow morning, they could decide to dispense with that.

**Mr. David Gourdeau:** Theoretically, yes, but I would not want to give you a legal opinion.

**Mr. Marc Lemay:** Do you not think that it would be...

**Mr. David Gourdeau:** I can think many things. However this applies to any system. There is always room for improvement. For example, the parliamentary committee system could be improved. Any system can be improved. You just need to have the time and the will to do so. If I understood correctly, the mandate of your subcommittee is to propose alternatives and topics of discussion with respect to the appointment process. Have I understood correctly?

**Mr. Marc Lemay:** Yes.

What is the worst thing, the most negative aspect, about advisory committees?

**Mr. David Gourdeau:** I think that the most negative aspect of any appointment process is the fact that it is a subjective exercise—whether that be at the provincial, federal, or foreign level—no matter how objective you try to make it.

As I said earlier, many are called but few are chosen. There are many more excellent candidates than there are positions to fill. You're sort of trying to square the circle, if you will. Ideally, this subjective exercise should be made as objective as possible.

**Mr. Marc Lemay:** How do candidates find out if they have been highly recommended or not recommended at all? I'll take Quebec as an example again. We tell candidates if their names have not been recommended. They are not allowed to put their names forward again for a whole year. It's not the same system.

**Mr. David Gourdeau:** No. As I explained earlier, at one point, well before I was commissioner, the assessment results were

communicated to the candidates. However, because this is a consultative process that some are trying to turn into a judicial process, this is a little counterproductive. It was decided a long time ago, probably at the beginning or the middle of the 1990s, that those results would not be communicated. It was paralyzing the consultative process.

This is important to understand. You may be coming from a rural or a semi-rural community. If the results are disclosed, then pressure can be put on committee members.

**Mr. Marc Lemay:** How does one know if one's name will be on the list for two years?

**Mr. David Gourdeau:** Here's what we do. If, for example, you have applied and your candidacy is assessed this evening, then we will send you a letter over the next few weeks giving you the date your candidacy was assessed on, and that is all.

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

Mr. Macklin, you have the floor.

• (1650)

[English]

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

I wanted to clarify one point with respect to both the Supreme Court process and the Federal Court process. In fact, the advisory committee doesn't in any way take a select list from the candidates and make the recommendation on that, but rather it submits everything to the minister. In effect, all the advisory committee is really doing, although maybe I shouldn't put that in a negative way...

**Mr. David Gourdeau:** It's a lot of work.

**Hon. Paul Harold Macklin:** In fact they're evaluating candidates according to their particular observations and the consultation process.

The minister just gets everything. It all goes. There's no prioritizing whatsoever, in either of those cases, as to the committee's preferred group.

**Mr. David Gourdeau:** No. There's no ranking from one to 10, let's say. It's these are the highly recommended, these are the recommended, these are the ones we are unable to recommend. A committee will say we had 30 applications to evaluate or assess and this is the result of our assessment.

**Hon. Paul Harold Macklin:** Will he get all the material they collected, including all the notes of the committee members?

**Mr. David Gourdeau:** No. The notes of the committee members I think are personal. He gets a report for each candidate. You have to understand that 400 to 500 applications come in every year.

**Hon. Paul Harold Macklin:** Who actually formulates and makes that final assessment for the presentation to the minister? You have seven members on the committee; do they do this by consensus, or is there a vote, or how do you do it?

**Mr. David Gourdeau:** It is usually by consensus. It could vary from committee to committee, but it is usually by consensus, and then a summary of the consensus, with comments, is supplied to the minister by our office.

**Hon. Paul Harold Macklin:** So it's just the summary that goes, not necessarily the individual members' comments?

**Mr. David Gourdeau:** Yes.

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

With the committee process, have you had to deal with any concerns about confidentiality, or breaches of confidentiality, that might give us some concern about access to information, and so forth?

**Mr. David Gourdeau:** Occasionally you'll hear rumblings about people knowing what their assessment is, knowing what the result is, but it's very hard to pin down. You hear comments, but there's never any hard evidence of it.

**Hon. Paul Harold Macklin:** Is there a penalty provision available for those who would breach the confidentiality of the positions they hold as committee members?

**Mr. David Gourdeau:** Yes. The committee members take their work very seriously. I think if someone were found to be sharing confidential information from the committee with anyone other than the minister or our office, the person would probably be kicked off the committee. It's never happened up to now.

**Hon. Paul Harold Macklin:** Kicked off the committee—that's it? There's no sanction beyond that?

**Mr. David Gourdeau:** That's about it.

**Hon. Paul Harold Macklin:** Do you think there ought to be a sanction?

**Mr. David Gourdeau:** I don't have an opinion. That's it. It's a consultative committee.

**Hon. Paul Harold Macklin:** But even in a consultative process, if you're giving personal information, and in fact people are breaching—

**Mr. David Gourdeau:** People undertake to keep this confidential. I don't want to get into a long legal discussion about whether this would be deemed to be a breach of contract or a breach of their undertaking. We've never had to deal with it. I would think the people would be just kicked off the committee. As to what that would do for their personal credibility or their personal standing, I don't know.

**Ms. Judith Bellis:** Mr. Macklin, I would like to remind the committee that as the commissioner has indicated, the appointment process at this time is established administratively in support of the government's prerogative. It has no statutory or regulatory basis, and therefore it would be difficult to see how a penalty—other than what I expect, and about which I agree with the commissioner—would be a very significant one. Someone who was essentially removed from the committee for a breach of an undertaking would be known in the legal community. It would be a significant deterrent, I would expect.

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

[Translation]

**The Chair:** Mr. Comartin, you have seven minutes.

[English]

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

On the committee itself, do the three nominees named by the federal Minister of Justice have to be lawyers?

• (1655)

**Mr. David Gourdeau:** No.

**Mr. Joe Comartin:** What has the pattern been across the country? By that I mean lawyers versus lay people.

**Mr. David Gourdeau:** Let me check the composition.

The representative from the bar is a lawyer; the representative from the Canadian bar is a lawyer.

**Mr. Joe Comartin:** No, I'm asking for...

**Mr. David Gourdeau:** There's no requirement that these members named by the Minister of Justice be lawyers. It might vary from province to province; in some cases, there'll be two out of three, or one out of three, and occasionally it might be three out of three who are lawyers. There is no set pattern, but there's more of a tendency—

**Mr. Joe Comartin:** Are they lawyers or are they lay people?

**Mr. David Gourdeau:** There's more of a tendency to appoint lay people, though, to those three. Occasionally there will be lawyers, but we'll call them the lay members, for want of a better word.

When I've attended these meetings, I've always found their contributions to be highly significant, and I think they give the committee members a very interesting perspective. Lawyers, as a group, have their own way of looking at things—Mr. Lemay can testify to this—and it's interesting to have another perspective or an outside perspective for this.

**Mr. Joe Comartin:** Are there any criteria—nor for these three nominees—for gender balance and a cultural—

**Mr. David Gourdeau:** There's gender balance. I think we mentioned geographical representation. What the particular criteria take into account—well, they're particular to each province or territory—are geographic representation, sex, language, and multiculturalism. So I think the minister tries to take into consideration as many criteria as possible, but it's the minister's call.

**Mr. Joe Comartin:** Is the composition of this committee public? Can anybody make an inquiry and find out who's on the committee?

**Mr. David Gourdeau:** My understanding is that the minister wants to make the composition public and has requested that our office do so, and we shall be doing so shortly. However, since I only received the request from the minister recently, I've sent a letter to each of the committee members stating that the composition will be made public shortly, and if they have any comments to make before it's made public, to get back to us, because it's my understanding that these people took on this work in the understanding that it was not to be public.

**Mr. Joe Comartin:** The nominees from the law society and the bar association, do they have to meet the same criteria in terms of gender, geography, and language?



**Mr. David Gourdeau:** I think that's internal to those organizations, but my understanding is that they get the names from these other organizations and then try to balance them with the three members the minister appoints.

**Mr. Joe Comartin:** When do you expect to be able to make the list of...?

**Mr. David Gourdeau:** I think it's by the end of this month.

**Mr. Joe Comartin:** And it will then be public?

**Mr. David Gourdeau:** It will be public; it will be on our website.

**Mr. Joe Comartin:** Is there any criterion or policy that the three appointees not have a particular political affiliation?

**Mr. David Gourdeau:** As I said, those three appointments are the minister's call, and as to what criteria he or she takes into consideration, they are up to the minister.

My understanding has always been that ministers in the past have tried to use these three appointments to balance out the appointments they get from the other organizations. So if there were, let's say, a gender imbalance, I think they'd try to placate that or, depending on the province, if there were a linguistic imbalance, they would try to fill that hole, if you will.

**Mr. Joe Comartin:** Has the commission ever recommended that we move away from the process and go to a short list, in prior—

**Mr. David Gourdeau:** No, not since I've been commissioner anyway.

**Mr. Joe Comartin:** In prior tries within that list?

**Mr. David Gourdeau:** No, not since I've been commissioner. I don't know if it has in the past, but I don't think so.

**Ms. Judith Bellis:** If I could just clarify that, Mr. Comartin, the responsibility for making that kind of assessment and recommendation would be the policy responsibility of the Department of Justice and the Deputy Minister of Justice. The commissioner, obviously, from an operational and practical perspective, would be consulted, but the responsibility for policy development in relation to these processes lies with our department, and there hasn't been any developed recommendation or study at this point beyond what the minister has publicly stated.

• (1700)

**Mr. Joe Comartin:** Has the department ever solicited recommendations as to how the system could be improved?

**Ms. Judith Bellis:** Not to date, sir. Not since 1988, when of course the establishment of the process was really spearheaded by the Canadian Bar Association, and that was the last time there was a major or comprehensive policy initiative in this area. There have been periodic adjustments and improvements, but they essentially have been related more to the practice than to the overall structure and principle of the committee and the process itself.

As the minister has said a number of times—and the commissioner has repeated today—his position at this point is that the committee process and the judicial appointments process generally are sound in principle, but he is open to adjustments in practice, and that's what he's hoping will be the contribution of this committee.

**Mr. Joe Comartin:** Merci.

In light of that, just so I'm clear, tell me this. The Canadian Bar Association, from what I understand, has not made specific recommendations to alter the process in the last five years to the department.

**Ms. Judith Bellis:** No, it has not in any systematic way. There have been commentaries but mostly in relation to the Supreme Court of Canada process, as you can appreciate.

[Translation]

**Mr. Joe Comartin:** Thank you.

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

I would suggest wrapping up at 5:15 p.m. If you agree, we can then discuss a few matters. We will do this quickly.

Before moving on to David McGuinty, with your permission, Mr. Gourdeau, I would like to ask you two questions. First, if I understand correctly, the advisory committee has seven members, three of whom are department officials. Is that correct?

**Mr. David Gourdeau:** That is currently the case.

**The Chair:** They represent 43 per cent of the advisory committee's members.

**Mr. David Gourdeau:** I'm not an accountant, but I imagine that's probably about it. Three out of seven equals approximately 43 per cent. Is there not a number after the decimal point?

**The Chair:** The exact percentage is 42.8 per cent but we are rounding it off.

**Mr. David Gourdeau:** Fine.

**The Chair:** I have a second question. Today, 394 people are being either recommended or highly recommended, but there are only 23 vacancies. That means that there are 17 lawyers available for every judge's position that is open. That is a ratio of 1 to 17. We did the math because you're not an accountant. If by chance a minister wanted to appoint someone and choose amongst those recommended or highly recommended names—for example according to their political affiliations—then he would have a great deal of leeway.

**Mr. David Gourdeau:** Currently, within our legislative system, the minister has a great deal of leeway.

**The Chair:** I assume you do not have an opinion on whether or not that leeway is too extensive.

**Mr. David Gourdeau:** That is correct.

**The Chair:** Thank you.

Mr. McGuinty, you have seven minutes.

[English]

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

I just have a couple of quick questions.

Are members of nomination committees...? Is that what they're called, nomination committees?

**Mr. David Gourdeau:** I'll give you the exact name. We call them judicial appointment selection committees.

**Mr. David McGuinty:** And once you serve as a member of that committee, are you precluded from being considered for the bench?

**Mr. David Gourdeau:** For a one-year period after you leave.

**Mr. David McGuinty:** How long do members normally serve?

**Mr. David Gourdeau:** The initial appointment is two years. It can be renewed for an additional two years.

**Mr. David McGuinty:** So what's the practice? Two years, four years, six years?

**Mr. David Gourdeau:** It used to be three and three, and then it was brought down to two and two. Most ministers try to keep some people from the previous incarnation so they don't always start off cold, if you will.

**Mr. David McGuinty:** So there's some institutional memory.

**Mr. David Gourdeau:** Yes.

**Mr. David McGuinty:** Do you have any statistics on the number of members of these committees across the country who may have been named to the bench?

**Mr. David Gourdeau:** No.

**Mr. David McGuinty:** Has it happened?

**Mr. David Gourdeau:** It may have. I think it has happened, yes, and I think the one-year freeze period was brought into effect just before 1993 because a member of the committee who was a lawyer filed an application and then resigned from the committee, and it caused discomfort in the committee. I think that was in 1992 or 1993.

**Mr. David McGuinty:** Can we go back to the question of short-listing for a second? I think there are precedents in the Canadian federal system. I'm thinking of the Immigration and Refugee Board, which is quasi-judicial, where the administration of that board now presents to the minister, as I understand the process, a list of five names, an alphabetical listing, not ranked. And the minister is now bound, if I understand the process, to choose from those five names.

• (1705)

**Mr. David Gourdeau:** I know their process has changed. I don't know the details of it.

**Mr. David McGuinty:** I think that's the new process, and in fact anyone applying for consideration with the IRB must be interviewed and write a series of examinations by the IRB's internal mechanism, the interview committee, for example. Then once again, the five names are put forward for consideration to the minister without discretion, but the only discretion is to choose one of the five. Anteriorly, I understand, the process was that names were delivered up, but the minister still retained discretion to add names from whatever source he or she was willing to choose. Has that been seriously considered in this appointment process?

**Mr. David Gourdeau:** No.

**Mr. David McGuinty:** It's never been considered?

**Mr. David Gourdeau:** Short-listing, to my knowledge, no. The system is as I've explained it to you, that the applications are assessed and the result of the assessment is sent along to the minister.

**Mr. David McGuinty:** Are there any provinces that are working in a short-listed system?

**Mr. Marc Lemay:** Most.

**Mr. David McGuinty:** Most are working with a short list. They choose from the list and there's no discretion.

What about comparatively internationally?

**Mr. David Gourdeau:** Oh, I'll quote Shakespeare: "Let me count the ways". It varies so much from country to country.

**Mr. David McGuinty:** If we don't know, that's fine, we don't know. But I'm just wondering in terms of a short-listed system.

**Mr. David Gourdeau:** I don't know.

**Ms. Judith Bellis:** There are some jurisdictions where there's a short-listed system. South Africa, for example, goes even further than a short-listed system for its high courts. The judicial appointments commission makes the recommendation and the government is bound, so there's a full spectrum of systems out there.

I just want to clarify once again that with the system the commissioner is responsible for administering, the pool is an evergreen pool. The committees do not consider candidates at the time a vacancy arises, because the numbers of vacancies that arise are significant at the federal level. It can be in the range of 200—

**Mr. David Gourdeau:** It's at a record low.

**Ms. Judith Bellis:** But in terms of the need for the minister to make appointments annually, it can be somewhere between—

**Mr. David Gourdeau:** It's 50 or 60, the average.

**Ms. Judith Bellis:** It can be somewhere between 50 and 60 or 70.

The members of the committee make their time available without compensation, so for the efficiency and the effectiveness of the process, they sit at regular intervals, and the minister then has a pool of pre-qualified candidates from which he or she can make that appointment. There are very strong advantages to having an evergreen committee of that kind.

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

[Translation]

**The Chair:** Mr. Toews, this is your last turn.

I would then ask my colleagues to remain in order to discuss certain matters.

[English]

**Mr. Vic Toews:** This is a summary. I just want to know if I have any of this wrong after listening to Mr. McGuinty.

We had approximately 200 names, as a result of public consultations, go to the Minister of Justice. Those names are in no way published. This is for the Supreme Court of Canada position. They're secret names, so we will never find out who the 200 people were on that list. Out of those 200 names, which the minister has seen himself but nobody else other than very close and trusted staff has seen—the public doesn't see them—he chooses then five to eight candidates. There are absolutely no restrictions on the minister as to which five to eight. He can choose virtually any candidate on that list, and indeed could choose others not on that list. Indeed, of the 200 names, none of those...perhaps they are not on that list.

**Mr. David Gourdeau:** It's possible.

**Mr. Vic Toews:** Yes, it's possible, and the only things that are really guiding the Minister of Justice are some statutory criteria and the fact that an individual would have to be a lawyer, I imagine, to go to the Supreme Court of Canada. Even that depends on what the Supreme Court Act says.

So he chooses, with a pretty broad discretion, the five to eight names that will come to this all-party committee. The committee then chooses three candidates, whose names go back to the minister.

So the minister gives us a list that is essentially unfettered in terms of who he can recommend, and we give him back three of the names he's already sent. Is that correct so far?

• (1710)

**Mr. David Gourdeau:** That's my understanding.

**Mr. Vic Toews:** The minister then chooses one of the five to eight people he originally recommended to the committee.

**Mr. David Gourdeau:** I suppose so.

**Mr. Vic Toews:** Is there any other alternative?

**Mr. David Gourdeau:** That pretty well seems to encapsulate it, yes.

**Mr. Vic Toews:** Thank you.

**Ms. Judith Bellis:** Mr. Toews, if I could, I'll just clarify two things. I was mistaken. I've been advised it's not 200; there were 100 submissions. Some people both wrote and e-mailed.

The other point I'd like to make is that it seems unlikely that each person who made a submission identified a separate.... It's unlikely there were 100 names identified as the leading likely candidates within the prairie provinces and the legal community.

It's an extraordinary region, I do agree.

**Mr. Vic Toews:** You're not suggesting there are less than 100 wise people in the prairie provinces, are you?

**Ms. Judith Bellis:** Perhaps less than a hundred lawyers who would be suitable for candidacy for the Supreme Court of Canada.

**Mr. Vic Toews:** No, I appreciate that.

**Ms. Judith Bellis:** I just wanted to clarify that, but yes, as the commissioner confirmed, there are five to eight, of which three will be the short list.

**Mr. Vic Toews:** But of the 100 then sent—let's assume at a maximum there would be 100 sent or recommended by the public—indeed, none of those 100 are necessarily the five to eight the minister sends on to the committee.

**Ms. Judith Bellis:** That is possible. He's seeking the input and views, yes.

**Mr. Vic Toews:** Thank you.

**The Chair:** Thank you.

[*Translation*]

We will now break for two minutes. We will then sit in camera to discuss certain matters. I would like to thank the witnesses for having taken the time to appear before us. It is much appreciated.

[*Proceedings continue in camera.*]

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