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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

Tuesday, November 15, 2005

• (1530)

[Translation]

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

It is a honour to have before us the honourable Constance Glube who is a former chief justice of Nova Scotia. She will share her views with us.

Your Honour, you have about ten minutes for an introductory statement. Members will then have seven minutes each to ask questions.

So without further delay, the floor is yours.

[English]

**Hon. Constance Glube (Former Chief Justice of Nova Scotia, As an Individual):** Thank you very much. I appreciate the opportunity to be here with you this afternoon.

I'd like to start by saying that what I might say, coming from Nova Scotia, might be different in other provinces. There may be different aspects to the various concerns or things that I think are important to talk about.

I guess I'm here at a political committee, but I want to say, first of all, please take the politics out of appointing judges, because I find that if the committees are doing their work, they are trying to put forward people who are the best they consider for the positions that are open.

Are the best people being appointed? Unfortunately, I think not, in a number of cases. The concern that I have is if we are still with the process of "highly recommended", why does a person get chosen from the "recommended" list and not the "highly recommended" list? That's a concern.

It has been suggested to me that the needs of the court might be considered by the person doing the appointments. As a chief justice, they would consult with the chief justice that there might be gender or minority issues or geographical ones. I'm certainly aware of that. But I guess I was never a political chief justice, because even though I would suggest various names, I almost never got the names that I suggested were the top people for the place.

I'm prepared to say that now. I was never prepared to say it when I was a judge, but I can say it now because I'm not a judge any more. I felt that we were not always getting the top people. We had two people on the list during the time that I was there, and they never got appointed. Yet they were the top lawyers in our community. So I don't understand the process myself sometimes, how it works.

If you're not going to appoint from the "highly recommended", then we shouldn't use that term. We should just have "recommended" or "not recommended". We should be able to say, when that appointment is announced in the newspaper, "This is a great appointment." We should always be able to say that, and I don't think we can say that at all times.

We've been lucky. We've had people who have perhaps not been at the level they should be but have worked very hard to come up to that level. But I don't think that's the way it should work. We should get the top people on the courts.

There is some concern about the composition of the committees that are currently in existence as well. Geographical representation should be ensured. We only have one committee in Nova Scotia, because of the size of the province, and there's not always the proper geographical representation, because you need people on the committee who know the lawyers in the smaller communities. We don't always know the lawyers in the small communities.

There's some expression that the term of two years on committee is too short. Appointments have been made late. The term was up in June and appointments weren't made until November. Then there is a backlog of people who have applied for the committee, so it leaves that committee with a lot of work. They're not a paid committee, as you know, and perhaps don't get the credit they should get for the amount of work they do. The terms of the committee members, it has been suggested to me, should be the same term as the applicants. If it's a two-year term, it should be the same term. But the suggestion was that it should be a three-year term at least.

There is some concern about the criteria for the lay appointments, because they vary quite a lot. Sometimes the lay appointments are excellent appointments, but sometimes they're not fully functional members. They must be able to speak up. They must be able to have their views on lawyers and make contacts with the references when they're given those contacts to make.

As I mentioned, they're unpaid. They spend a lot of time. They don't get any recognition for their work, except if the chair of the committee happens to write them a nice letter, but that's all they get. They should be told of the workload that's involved before they're put on the committee, because some of them come on thinking it's an easy committee to be on. It's not an easy committee when you have a lot of applicants.

• (1535)

I guess the question is whether or not there could be an honorarium for them.

Confidentiality is a huge issue. I've talked to a couple of the members, and their view is that it doesn't come from the committee, it comes from Ottawa, that somehow the names on the lists are not in the committee and not in the province but are coming out of Ottawa.

I would say it works reasonably well overall, that the process seems to be reasonably good, and that the committee puts a lot of effort and time into it.

I mentioned at the very beginning to take the politics out. I've been debating in my own mind about whether or not there shouldn't be interviews. I served on the judicial committee for the appointment of the chief judge of the provincial court. As chief justice, it was a statutory position that I served in. We did interview the people for chief judge. It worked okay and there was no problem with it. We didn't ask political questions. The interviews had to be totally in private, but they allowed you to meet the person and get a feel for that individual.

It might be necessary to develop some appropriate questions for them, but I think there could be a process worked out so that you could actually meet the candidates. They wouldn't be able to interview all the people who apply, but when they shorten the list that they're going to send off to a minister, then they maybe would want to be able to interview. You'd then have a better feel for what that person is like or what those people are like.

I really don't have much more to add on this opening statement. Thank you.

[*Translation*]

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

We now go to Mr. Toews.

[*English*]

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

I'd like to thank the witness for coming here today.

There are a couple of comments that I'd like to pick up on. In respect of the interviews or the potential for having interviews, it appears to me that there would be some benefit. Of course, in the court context, we look at witnesses. We not only examine what a witness says, but also how a witness reacts under questioning. One would think that if that's the sort of stock-in-trade that we use in examining witnesses in court, we should be able to do at least that in examining the people who are going to be making those kinds of judgments about witnesses.

I agree that there could easily be some benefit to actually seeing the people face to face. Are there any further comments on that?

**Hon. Constance Glube:** As I said, I've been giving it a lot of thought, because I didn't know whether it was a reasonable proposal or not. I'm sure you'll hear a lot of people who would say you shouldn't do that, but in the end I've come to the conclusion that it would be beneficial.

I've only been a witness once in court, actually. This is my second time being a witness anywhere, and it's not an easy process. Your stomach goes up and down a little bit when you're not used to doing it, but that's not bad for a person who has applied for a job as a judge, as you said.

I just think there has to be great care taken in what kinds of questions can be asked. You can't start asking them if they believe in abortion or if they have this view of HIV or something of that nature, something that they might have to pass on in court. It could only be a personal interview about themselves, about what they're like. It wouldn't be an extensive interview.

**Mr. Vic Toews:** Moving on to another topic—because we're limited in time here, as you can appreciate—you recommend that there only be the two categories, recommended or not recommended. That makes a lot of common sense, because I've thought the same. What you simply do is raise the bar a little higher as to who is recommended and who is not recommended. If you're on the recommended list, there is a tendency to wonder why someone on the highly recommended list would not make the appointment. I think it leads to unsettling and unpleasant questions.

In relation to the categorization of individuals, we've heard prior testimony that in some committees—I can't remember if it was all federal committees or some federal committees—there is the potential for one member on the committee to blackball an individual; that these committees operate by consensus, and if one individual simply says they will not recommend that individual, that ends the judicial potential of that candidate. Do you have any knowledge of that?

• (1540)

**Hon. Constance Glube:** I don't have actual knowledge of that.

**Mr. Vic Toews:** We're not bound by the rules of hearsay here either.

**Hon. Constance Glube:** Pardon me? You are not bound by those rules?

**Mr. Vic Toews:** No, we're not.

**Hon. Constance Glube:** I've never served on one of these committees. I was always involved in the appointment of the person who was the judge to represent the courts. I didn't actually serve on it. Before I came here, I talked to several people who had been on it, but I didn't think to ask that question.

We had a very serious incident in Nova Scotia a few years ago, when a person was not recommended and the name came back by order of someone. The person then ended up being recommended, and the judge who was on the committee resigned from the committee as a result of that. That was a majority vote; it wasn't a blackball of one.

**Mr. Vic Toews:** All right. That deals with another situation, where someone who has not been recommended comes back for reconsideration, suddenly becomes recommended, and then moves on to become a judge.

**Hon. Constance Glube:** Yes, it's an appointment.

**Mr. Vic Toews:** I know of those kinds of situations as well. I've often wondered what the committee must think of the process, if that happens. To me, the one way that kind of thing can happen is through political direction.

**Hon. Constance Glube:** That had to be through political direction.

As I said, the judge resigned from the committee. It went through the process the second time around, and then when people on the committee changed their minds, the judge resigned from the committee.

**Mr. Vic Toews:** I don't have a concern with the whole issue of political involvement in the appointment process and the minister talking directly to the committee members, especially if the minister has a particular need, for example, for a bilingual judge in a particular area or someone with specific technical skills, whether it's commercial law or criminal law.

Do you see any problem with the minister stating to the committee that he or she specifically wants people with this kind of background, even though we don't have that specialist system in Canada?

**Hon. Constance Glube:** I think that it's eventually going to happen in Canada, in our superior courts and trial courts, especially in the criminal end. There are pushes for it everywhere across the country.

I didn't know the minister would say that. I thought that the minister would meet with the committees before they started to meet at the beginning of their term, but I didn't know there was any particular influence of that kind.

Those are the kinds of questions that I sometimes got as chief justice, when they would call me with a list of names. I was never given only one name; I was always called and asked what I thought of three or four names. I'd give my views on them.

**Mr. Vic Toews:** I'm not saying that it happens in the federal context. I know that it happens in the provincial context. Do you see anything wrong with the minister giving those types of directions to the committee?

**Hon. Constance Glube:** How would the minister know what the court needs in that particular province? I don't quite know.

**Mr. Vic Toews:** For example, for clarification, if there is no bilingual judge on the court, there are certain obvious constitutional requirements to meet that requirement.

**Hon. Constance Glube:** As long as it's only a general thing, rather than a specific name going through.

**Mr. Vic Toews:** I understand.

To summarize very quickly, you don't see any problem with those kinds of objective standards or criteria being requested by the minister, of course, provided that it doesn't limit the choice to only one individual.

**Hon. Constance Glube:** That's right.

**Mr. Vic Toews:** Okay.

Thank you, Mr. Chair.

[*Translation*]

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

Mr. Lemay.

**Mr. Marc Lemay (Abitibi—Témiscamingue, BQ):** Thank you.

Welcome, Madam. I found your remarks very interesting. I think they are most relevant. I am definitely in favour of an apolitical committee. To me, this is critical. Are you getting the translation?

• (1545)

[*English*]

**Hon. Constance Glube:** Yes.

[*Translation*]

**Mr. Marc Lemay:** Did I understand correctly that you would prefer having only one category, i.e. "recommended and not recommended"?

[*English*]

**Hon. Constance Glube:** Yes. One category: it's either recommended or not recommended. If you're not going to choose from the highly recommended, then why bother having a highly recommended? If you're only going to choose from that one, then I can see it. Only one category is really necessary. Why bother having two categories? I'm saying don't choose from a lesser category.

[*Translation*]

**Mr. Marc Lemay:** Okay. We both agree then. You mentioned confidentiality in the context of interviews. I would like to see candidates interviewed.

Do you also agree that the committee should hold interviews with the candidates?

[*English*]

**Hon. Constance Glube:** In an interview? Yes, I would like to see that happen. But I think it has to be very carefully controlled so they don't get into questions about how a person who wants to be a judge might decide a particular issue in a case. There would have to be more general questions about the person and what they've done in their life, but not specific questions about their beliefs in the legal system or how they're going to decide a particular issue.

[*Translation*]

**Mr. Marc Lemay:** Agreed.

I am not familiar with the nomination process for provincial judges in Nova Scotia. Is there also a nomination committee for appointing judges to the provincial bench in Nova Scotia?

[*English*]

**Hon. Constance Glube:** Yes, there is.

[*Translation*]

**Mr. Marc Lemay:** Do you know how it works?

[English]

**Hon. Constance Glube:** I don't know exactly how it works. I know the appointment process for the chief judge. There is a committee that has lay people, representatives of the judiciary and the bar, and a member from the provincial court. The people who are seeking to become chief judge can apply.

As far as I know, they advertise for judges for the provincial court in Nova Scotia. When they need a judge, they set up their committee. To my knowledge, people apply and are interviewed for the positions.

[Translation]

**Mr. Marc Lemay:** I understand. It is exactly the same process in Quebec; we have a similar system. When there is a vacancy, there is an interest call and interviews are held.

Do you think it would be a good thing to have a similar process at the federal level?

[English]

**Hon. Constance Glube:** I don't see anything wrong with it. I think it could be reasonable.

As you know, as it is now, the people apply, their names sit on a list, and if the time runs out they have to reapply. There may or may not be any vacancies during the two years, or whatever length of time it is, that their name is on the list. I don't see anything wrong with having to apply.

[Translation]

**Mr. Marc Lemay:** Did I hear you say earlier that it can happen with the present system that someone could request a reassessment of a candidate that was not recommended?

[English]

**Hon. Constance Glube:** Yes, that happened in Nova Scotia.

[Translation]

**Mr. Marc Lemay:** This happened in Nova Scotia.

I have a final question. You stated — and I tend to agree — that confidentiality should be a fundamental principle.

How is it possible to ensure confidentiality when we are dealing with an interview or a meeting with candidates? How can this be achieved? Do you understand my question?

• (1550)

[English]

**Hon. Constance Glube:** Where is the confidentiality concern? It's to keep the information in the committee. I want the committee to be sure there are no leaks from the committee.

That committee calls people who are...what do you call them? If you apply for something and you give a person's name who they can call and ask about you, to my knowledge, there's no obligation on that other person who you call. A committee member's given a name to call Joe Blow out in the community, and when they call that person they put the name of the person who has used their name and ask about them, but there's no obligation on that person to keep the name confidential. Maybe there should be, because somehow names are getting leaked out to the public and they get in the press and

people are.... It's not a very nice thing if your name is out in the press and then you're not appointed. It's hard for some people to take. It's not very nice if you know all the names of the people who are on the list either, and yet it's supposed to be a confidential list. I don't know how you keep it.

[Translation]

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

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

Mr. Comartin, I explained at the beginning of the meeting that you were unable to be here on time and you are therefore excused for being late. I can give you the floor now or, if you would rather wait, you can jump in whenever you wish.

**Mr. Joe Comartin (Windsor—Tecumseh, NDP):** Allow me first of all to ask a question.

[English]

Madam Justice Glube, I'm sorry for being—

**Hon. Constance Glube:** No, not Madam Justice.

**Mr. Joe Comartin:** I never lose that.

I wanted to apologize for being late. You can appreciate there are other matters going on that sometimes detract.

In terms of the whole question of confidentiality, I don't know what the experience is in Nova Scotia, but at the provincial level I believe we've been fairly successful in Ontario in keeping the names confidential of those who applied and who have been cleared in the screening process and are just waiting to see if there are available positions coming. That's the process as it works in Ontario.

Are you aware of what the process is in Nova Scotia? Or has there been any history of leaking at the provincial appointment level?

**Hon. Constance Glube:** Certainly there haven't been the same things happening in the press. You may hear little words around among lawyers, so there's probably some leakage coming out.

We're a small community, and people seem to know who might be applying for various jobs. As I mentioned before, they apply for the provincial court, as they probably do in most provinces. It's a notice in the newspaper, and they apply. But it's not a big thing in the newspapers. It seems to be more guessing about who's going to be appointed from the federal groups if there are vacancies, but not when they apply, because they just apply at any time, whether there's a vacancy or not.

**Mr. Joe Comartin:** I see.

**Hon. Constance Glube:** I can give you my notes of what I said.

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

**The Chair:** That's another confidential.

Monsieur Macklin.

**Hon. Paul Harold Macklin (Northumberland—Quinte West, Lib.):** Thank you very much.

I appreciate you being very candid today with us and giving us your perspective, as you saw it.

One of the opening remarks you made caught my attention, and it was that you'd never had any of your recommendations accepted. I thought that was a very interesting remark.

**Hon. Constance Glube:** A very sad remark.

**Hon. Paul Harold Macklin:** However, let me probe that a little bit, if you wouldn't mind.

Do you believe that the chief justice should have a position of influence over who is to be appointed to the bench? Or do you believe that should be reserved to the executive of the government?

• (1555)

**Hon. Constance Glube:** I think the chief justice should have some input into it on the basis of what is needed for the court. If there are areas that are lacking in the background of a particular group that's necessary for the court, then I think there should be some input.

Beyond that, no, I don't think that I should decide who's going to be appointed to the court. But if you say to somebody that you've got two people who you think are really the top-notch people for the position and neither of them get appointed, and that's not the first, second, or third time that you've said it to someone, you begin to wonder, why not? The only answer you can come to is it's political. It's political in the choices that they've made, and we're not getting the best candidates appointed all the time.

**Hon. Paul Harold Macklin:** Clearly you are bringing that message from your jurisdiction, and it's interesting to hear, because other jurisdictions seem to be telling us that in fact we have been getting candidates with first-class merit.

**Hon. Constance Glube:** That's what I mentioned to you: we're a smaller community.

**Hon. Paul Harold Macklin:** Yes. That's true, and it does have some difficulties attached to it.

**Hon. Constance Glube:** I think it has bearing.

**Hon. Paul Harold Macklin:** When you talk about getting politics out of it, I think, if I can put words in your mouth, you're really saying it's not that someone is engaged in politics—or are you saying that if someone had been a member of a political party we ought not to be taking nearly as much interest in that person? Or should there be a cooling-off period where they have to yield up their membership, or something of that nature, before they—

**Hon. Constance Glube:** No, we haven't had politicians appointed to our court, as it turns out—ex-politicians, or former politicians. We haven't had that. What we've had is people that we know have close association with politicians getting the appointments; they're not former politicians. And they're not necessarily the top candidates, but you know sometimes who's going to get appointed when you hear the list.

**Hon. Paul Harold Macklin:** And what approximately would be the size of the list you were accustomed to? Do you know the size of the list? In other words, how many names would be on, let's say, the highly recommended and recommended...?

**Hon. Constance Glube:** When I would get a call from the minister's assistant, which is the only time I would hear what names were on the list, there would be often about four or five. We're not talking—

**Hon. Paul Harold Macklin:** So it's a relatively modest number.

**Hon. Constance Glube:** Yes.

**Hon. Paul Harold Macklin:** Do you have any concerns about diversity or reflection of the community on the court itself, and do you think that should be an interest, once we've established merit?

**Hon. Constance Glube:** If you can establish merit, I think there should be some concerns. I was on the court for 12 years as the only woman on the court, and that's a long time. Of course it was back in the seventies, but that's a very long time. They sometimes would say on the phone to me: we're looking for diversity; is there anybody in this list who has that kind of diversity? If I was able to say there was, then I certainly would, as a chief.

That's as long as the merit principle is still there; if it's not, then it's not going to work. It's not fair to the people who are appointed. They're the ones who are going to suffer.

**Hon. Paul Harold Macklin:** The other side of it, too, is a question about sitting judges who want to move up. Is there any system, or has there been any system that you have recognized, whereby one would make application, or do you believe that would be an appropriate or inappropriate step for a sitting judge to take when they had an interest in moving up in the court system?

**Hon. Constance Glube:** At the moment, I believe—I could be wrong—they just have to put their names in, so that they're on the committee's list, and they don't get reviewed when they come from the provincial court. If I'm correct in that, I think they should be reviewed, because they have a history, they have a background that can be known. Some of them are good, and some of them don't merit being appointed, and it's not fair, really, to have their names on the list or for them to be put forward if they're not really qualified for it. And sometimes you get people who aren't qualified.

**Hon. Paul Harold Macklin:** You made a comment earlier that you believe we're moving in a direction where there will be what you might call specialty judges appointed, or those who come with a specialty and an interest. To date, do you see that as being a key element in the process of setting a criterion for the appointment of a judge? In other words, do you see a need in your court for someone who has a background in bankruptcy law? Do you feel that that would be something you would...? Or would you simply suggest to the committee or the minister, as the case may be, that in fact you had a need in that area and you'd like someone who had some expertise?

• (1600)

**Hon. Constance Glube:** I would prefer it that latter way, because I've always said we're generalists. And it's a great concern to try to, unless you have a big enough court.... I'm coming from a small province, again. We have a family division in Nova Scotia for part of the province. We'd love to get the rest of it, but there is some legislation that needs to be approved before that will happen.

For years the criminal bar has been trying very hard to have us have a specialty court, because when they took away the county court, which did most of the criminal work, other than jury work, in Nova Scotia—they couldn't do jury work—they knew what kinds of judges they were going to get, so lawyers picked the kind of judge they wanted. It happens everywhere. We understand that.

I think generalists can make very good judges, but if somebody has a specific bent in a particular area.... One of the best judges I knew on the court was a person who had a commercial law background, and he was an excellent criminal judge, in the end, as far as doing criminal cases, because he worked very hard at it.

We've had judges come on the court who have never had any experience as practising lawyers—professors and so on—and that's always a little difficult. Some of them adjust beautifully and others don't. It's a bit of the luck of the draw. But to say specifically that I want a bankruptcy judge or I want a commercial judge, no—I want somebody with a bit of that extra in their background, but not as their sole practising ability.

[Translation]

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

[English]

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

[Translation]

**The Chair:** Mr. Moore, seven minutes.

[English]

**Mr. Rob Moore (Fundy Royal, CPC):** Thank you.

You mentioned that you've been thinking a lot about the interviewing process, and obviously we've had presentations before this committee on that subject—it's an interesting topic—and we've seen how other jurisdictions, other nations, deal with that.

You mentioned a couple of questions you don't think should be asked. But I'm wondering what should be asked in an interview. What are we trying to find out? I was going to ask you this anyway, but you made the comment about lawyers picking the kinds of judges they wanted because they know that maybe some, over the course of their careers, get a reputation for certain types of sentences. Maybe they're really tough; maybe they're really lenient.

Does the committee have any business trying to ascertain that kind of information before someone is appointed a judge? I'm wondering what kinds of questions you would recommend a committee ask, presuming we're going to have them.

**Hon. Constance Glube:** Well, presuming you were going to have them, I would have difficulty if you started into questioning people about how they were going to sentence somebody, because before you're a judge, you can't make that decision, because you can't make it until you see the person who is standing in front of you. Everybody is different. At least I would hope that you wouldn't get that kind of a reputation. But yes, I know some people get that reputation, and others don't.

I think you have great difficulty if you start asking how they would decide cases. That's the issue you can't raise, as far as I'm concerned. How would you decide a case dealing with euthanasia or something of that nature? It just won't work.

You're trying to get a little feel for that person's personality and whether they respond well to questions. This is an interesting process, because as I told you right at the beginning, I'm a little nervous about all this. I think it's good to have that little bit of

nervousness if you're going to be a judge, to know what it's like to be on the other side of the table.

**Mr. Rob Moore:** Okay, I can see that as being one positive, but is there anything else we'd be trying to ascertain? You mentioned personality. Is that relevant?

I'm wondering, besides what you could read on someone's résumé, which everybody would have in front of them—the CV, the person's background—what possible benefit there would be to the interview process. Say there are those who can't handle questioning. They're not going to be questioned any more. They're going to be the ones hearing the answers to questions, but they're not going to be the ones being questioned.

So what types of relevant or practical responses would we be looking for from the judges?

• (1605)

**Hon. Constance Glube:** That's the part I haven't totally thought through myself, and I must apologize for that. I raise it and then I don't have an answer for you, necessarily. I guess because I was in an area where I hired people for a while, doing interviews was something that assisted me in making a decision as to who to hire, and I'm sort of used to it myself, since I've done it in the past.

You don't have to necessarily get into the specific details of how they would handle certain things, as long as you can get some general answers from them.

**Mr. Rob Moore:** You mentioned one thing, and it's one of the reasons I've taken an interest in this committee—that the list becomes known. It circulates who's in the mix, who's in the running, and there is talk about that among people in the legal community. And with a kind of wink-wink, everybody knows who would be on the fast track to getting that appointment.

I'm wondering.... You've never had a recommendation accepted. Have you been called upon to recommend?

**Hon. Constance Glube:** I was a chief justice appointed in 1982 until the end of 1994, and we've had a lot of appointments over the years.

**Mr. Rob Moore:** I find that just fascinating.

**Hon. Constance Glube:** I know, it's just fascinating to me too.

**Mr. Rob Moore:** Even just the law of probability, just by chance, you'd think someone—

**Hon. Constance Glube:** Well, I shouldn't say none. I guess I had maybe a few—one or two. It was few and far between. It was mainly the fact that the people I thought were the best qualified were not getting the appointments. When I would be asked from the list who I would recommend, it would be the people I felt were the highest qualified, and they weren't necessarily the ones who were going to get the appointments.

Of course, when I was appointed they didn't do this process at all. I never knew I was going to get appointed until I got a phone call saying I was appointed.

**Mr. Rob Moore:** You had mentioned close associations of politicians...not politicians themselves, but that people who were kind of in these—



**Hon. Constance Glube:** Well, maybe politicians themselves.

**Mr. Rob Moore:** —associations would get appointed. What effect does that have on people?

I know you spoke to people who serve on these committees. You mentioned they work very hard, they're not compensated, they're volunteers. If you've put this work in, you've made recommendations as chief justice, but someone who perhaps isn't even in the highly recommended category gets recommended, what's the impact on those individuals?

**Hon. Constance Glube:** I think I mentioned before that certainly I know one who resigned from the committee as a result of that, because it's wrong. It's very hard on them. They've put in a lot of effort to come up with the lists that they think are the best. It doesn't mean they're always going to get the appointments, but I certainly think in a few cases it would have been very difficult for the committee.

**Mr. Rob Moore:** This is something somewhat specific, and if you don't have it, then that's fine. It's just an idea.

If in the end the person the minister wants to appoint is going to get appointed anyway, why don't they just pick them and appoint them rather than going through a false process of jumping through a bunch of false hoops when in the end it's already been determined?

I don't want that. I want to see a real process where the committee's work is valued, that when they make a recommendation of highly recommended or recommended—if we narrow it down to two—there's some real weight put to that and the person at the end of that process is the one most likely to be appointed.

Do you have any specific recommendations on how the committee's work could be taken more seriously so that there's less discretion when the final appointment is made?

**Hon. Constance Glube:** No. I wish I did. I'm sorry, I don't have anything that I can say on that.

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

[Translation]

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

Mr. Comartin.

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

[English]

I've had this experience repeatedly in my area, where lawyers who are not affiliated or don't have people who are affiliated with the party in power don't even apply. That's still a common practice in my area of the country. Have you run across a similar type of experience, where people who, perhaps because they're identified with one of the parties not in power, don't even bother applying?

•(1610)

**Hon. Constance Glube:** That certainly has been the situation in the past, and it still exists to some extent, but I think a little less than before. It certainly has been that way. They just throw up their hands and say there's no sense to it; it's not going to happen. Some people will apply anyway and just leave their name there, but after a while they give up.

**Mr. Joe Comartin:** We've had some discussion with prior witnesses about how, if we could improve the process to try to take partisan politics out of it, we would be able to convince prospective candidates that in fact the politics have been taken out of it. Do you have any suggestions as to how we would be able to say "This is what we've done and we're comfortable now that we've made some significant difference to take partisan politics out of it. If you don't belong to the political party that's in power, don't worry about it. It is going to be quite exclusively done on merit, if not totally."?

**Hon. Constance Glube:** Well, I would think if you come to that and you were able to achieve it, you should put something in a very short letter that goes out to the people who ask for an application form. It goes out with their application form, saying this is the process and the changes that we feel...or whatever. Somebody would write it up and do it in the proper fashion.

Whether you have a press conference when the time comes, or whatever you decide to do, I think it would be very important for people to know that.

We've had some people from other parties be appointed, but it's rare. It's very, very rare. It's a surprise when it happens. I was a surprise, but they were looking for a woman, so you had to appoint in those days.

**Mr. Joe Comartin:** One other point that has come up and I'd like your comments on is whether there is, in addition to what we might do to get the message out by way of a press conference or communication, some discussion about a more proactive recruitment process, where you know there are good candidates out there and they haven't applied. It sounds almost like the headhunter type of thing. Would you feel that committees should have that authority, to actually go out and engage attention from candidates they've identified as being prime candidates?

**Hon. Constance Glube:** I think that would be an interesting thing to do. Certainly as a judge, every once in a while if I saw somebody I thought was really good and thought should be on the bench, I might have lunch with that person some day and suggest, "Why don't you apply for the court?" That's all I could say; that's as much as I could say. So I don't see anything wrong with that.

**Mr. Joe Comartin:** Is there still time?

[Translation]

**The Chair:** Yes.

[English]

**Mr. Joe Comartin:** Madam Justice Glube, we had some interesting material or information on what Israel does, and some of it happens in western Europe in the civil code countries. Israel has a very concentrated program of training judges. They're sort of on a probationary period—I think it was for six months. They actually go through a process. There's no guarantee that at the end of the six months you're going to be appointed, but you have to go through it. You get some training, and you actually do some trials.

**Hon. Constance Glube:** Is this right after university?

**Mr. Joe Comartin:** These would be practising lawyers who would have been out for some period of time.

I don't know if you've done any thinking about that kind of thing, where we are, again, more involved. I know there's training that goes on, that is available for judges once they're appointed, but this is before they're appointed, or at least before they're confirmed.

**Hon. Constance Glube:** We have training, as you've mentioned, but it's not enough. It would be nice if there was more.

That's an interesting process, but it would be nice if, at the end of it, there could be at least a position of a master or someone, that if you didn't get the judgeship, you might be able to move into some area that would do it.

I guess I was concerned because I was in Poland once and met a number of judges there, and they had come right out of school. They went through judges' school and then they were judges. It just seemed to me that they don't have the experience; they don't have the background.

I don't know how you'd quite work it, because they'd have to almost give up their jobs or whatever they were doing, and how would they afford it financially?

I don't know how they do it in Israel. I hadn't realized they did that. I don't think they do it for every court, do they?

•(1615)

**Mr. Joe Comartin:** I don't know. We didn't get into that much detail.

I guess I was thinking about this in terms of acting as a reference for a teacher. The way we do it, if you want to move on to being vice-principal and principal, you actually can take training on that. Once you've completed that, then you apply, again with no guarantees you're going to do it.

**Hon. Constance Glube:** Yes, I suppose you could do it, if you could do it on your own time, part time. It would be an interesting process.

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

[*Translation*]

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

Mr. Macklin.

[*English*]

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

I'd just like to go back to the committee concept and get from you a sense of who you think should be on a committee. Who should be represented on a committee that does the reviewing of the candidates? Do you believe there should be, for example, a retired judge, or judges, on that committee?

I guess my concern is, if so, do you feel that their influence might overpower the committee, such that it would have a great deal of difficulty getting what you referred to as, I think, the "input" from the lay members on a committee?

**Hon. Constance Glube:** As far as I know, there's only one judge on the committee, and it's a sitting judge. In the past in Nova Scotia, that sitting judge has not necessarily been the chair of the committee; it may or may not be.

I must say that at one time, in terms of appointing a judge, when I as chief justice was asked to make a nominee for the committee, I was asked for three names. I refused to give three names; I said there was only one name I would give, and I did give only one name.

A retired judge might be an interesting person to have on the committee, but I wouldn't think you'd want more than a sitting judge and one retired judge. It depends on the personality of the person who goes on the committee. If they're going to be overpowering, they're going to be strong people anyway. At the moment, as I said, I think the only concern expressed to me was to make sure that the layperson had an interest in the law, knew some lawyers, knew some people in the communities, and to not just pick any person who might be a friend of somebody who gets the appointment.

So I don't think there's a problem with having a judge on it. I think it's important to have a judge on it.

**Hon. Paul Harold Macklin:** When you say "knew some lawyers", do you mean they should just have a general understanding of lawyers and the general character of...?

**Hon. Constance Glube:** Of people in the community. Often you find that they come from a different area of the province—we only have the one committee in Nova Scotia—and it's important for them to know a fair number of people not just in their own community but in other communities as well. Otherwise, they don't have a lot of input into it. Members of the bar and provincial lawyers and so on usually travel around the province a little bit and get to know people, get to know who the lawyers are in the other areas.

**Hon. Paul Harold Macklin:** From my point of view, it sounds like you're suggesting that the committee would have that intimate knowledge, to some extent, of the lawyers in the area and their general reputation within the community, whereas looking at the broader scale, I think it would be maybe important to at least just be a person of generally good judgment who is actually sitting on the committee, hopefully interviewing these individuals and assessing on the basis of the interview the capacity of this person to go forward.

I know that one of our witnesses earlier on had said that he'd sat on a committee, and that there had been recommendations. It was a case where there was already a pool of highly recommended and recommended, and they brought in certain of those and reviewed them. After the interviewing, their opinion was that in fact they'd been mis-categorized, mis-characterized, in their highly recommended and recommended categories. So the concept of interviewing does appear to have some serious merit.

When it comes to those interviews, you say certain questions shouldn't be asked. But how does one go about strategically trying to find out the thought process and the judgment generally of an individual without asking some of these testier questions, in a sense, that get to the substance of this person who is wanting to sit on our bench?

•(1620)

**Hon. Constance Glube:** You've asked me two questions there.

**Hon. Paul Harold Macklin:** Yes, I have.

**Hon. Constance Glube:** As far as the first area is concerned, I agree with you: a person who has good general knowledge and good common sense can serve on these committees even if they don't know a lot of people in the community. However, it helps if they know some of the people in the communities as well.

On the questions, interviewing is hard. It's hard to develop questions for interviews. All I'm saying is that I don't think you should get into the specifics of how they would decide a case, so you don't get into the truly controversial issues that might be still on the table, that haven't been decided completely yet. To that question, a person is going to say, well, I may have to decide that case in the future, and I will not be able to because you've now prejudiced my position, or you've now given me a position that I will now carry with me for the future; I therefore can't answer the question.

That's the kind of question I'm concerned about.

[*Translation*]

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

If you do not mind, colleagues, since the vote is at 5:15, I am going to ask one or two questions before turning to the dean of the Osgoode Hall Law School.

Your Honour, you suggested at the outset that appointments should be made only from the list of highly recommended candidates and not picked from among the recommended candidates, in order to make sure to choose only the best. Many previous witnesses said they would prefer having a short list of three or five names — this would need to be determined — from which the minister could choose.

Would you agree with such a process?

But some people suggest that if we used a short list, this might be unconstitutional under section 96 of the Constitution which confers to the Governor General the power to appoint judges.

In your view, would limiting the discretion of the minister, without eliminating it completely, be constitutional under section 96?

[*English*]

**Hon. Constance Glube:** I don't know the answer to that. I don't know exactly what section 96 says.

If it were constitutional, I'd prefer it to be a short list. I don't know the answer as to whether or not it's constitutional, but I would think a list of three to five is much more practical than a whole long list of names.

[*Translation*]

**The Chair:** Thank you very much, Your Honour, for taking the time to meet with us today.

We will suspend the meeting for one or two minutes to allow Ms. Glube to exchange seats with Patrick Monahan, dean of the Osgoode Hall Law School.

Thank you.

•(1623)

(Pause)

•(1625)

**The Chair:** We now welcome as a witness Mr. Patrick Monahan, who is the dean of the law school at York University, in Toronto. Mr. Monahan being one of our regulars, I do not believe he needs any diagrams, instructions or explanations.

Thank you for being here. You now have the floor.

**Professor Patrick Monahan (Dean, Osgoode Hall Law School, York University, As an Individual):** Thank you very much, Mr. Chairman.

[*English*]

I do not have any written text, and I apologize for that in advance. I have not been able to find any spare time. But I do have two recommendations I would like to make to the committee. I believe you heard these recommendations earlier. In fact the chair just questioned the previous witness, Madam Justice Glube, over one of the matters on which I wish to speak.

Let me say by way of introduction that I think the current system for appointment of section 96 court judges is seriously deficient. I think the reason it is seriously deficient is that while the committees do review applicants for positions to eliminate those deemed not acceptable, the result of the process is to generate a large pool of candidates, particularly in my province—in Ontario or in the Toronto region—where you have a very large group of candidates who fall into either the recommended or highly recommended categories. There is no further constraint or limitation on the minister's judgment as to which of those individuals in this large pool of recommended or highly recommended ought to be appointed to the bench.

I think that allows, unfortunately, for the introduction of considerations other than merit. Merit must be the primary consideration in selecting appointments to the bench. I don't wish to comment or cast aspersions on the quality of our existing judges, but I simply indicate that it is common knowledge a variety of factors are taken into account under the current process, and not all of them are related to merit.

Second—and again, I believe I just heard the latter part of the previous witness's testimony—the manner in which committees proceed is, I think, unsatisfactory, particularly because they do not interview the candidates. They therefore proceed on the basis of written materials and on their consultations, such as they are.

Although I've not been on any of these committees, I have spoken frequently with members of committees who have solicited my opinion on various potential appointees. It seems to me that there is a complete lack of transparency in the current system; the members of the advisory committees will solicit opinions, obviously on a confidential basis, and we have no way of ensuring that the opinions being provided are well founded, are based on proper considerations, so we have no real check on the committee and no opportunity for the candidate himself or herself to respond to questions or concerns that might be raised. I think it is simply not a very well-functioning process at the present time.

My two recommendations, then, are, first, that advisory committees should be asked to prepare short lists of candidates for vacancies, with three to five names on the short list. Second, the minister and the Prime Minister and the government should be required either to choose from that list or, if they do not, to provide an explanation, with reasons, to the committee as to why they are not choosing from that list. Without naming the individuals, there should be an annual reporting of the number of occasions in the year that the minister has not accepted the recommendations of an advisory committee. The committee, in its annual report, should have the opportunity to comment upon the manner in which the minister has or has not accepted the recommendations, without identifying particular individuals, because that obviously would be a case of embarrassment to those individuals.

• (1630)

That would be my first recommendation, a short-list system. My second recommendation would be that the committee should interview any candidate who is to be listed on a short list. Indeed, they would want, I assume, to have a long list of candidates who would be interviewed.

The personal interview has a number of purposes. Number one is to allow the committees themselves to get a feel for the individuals, to understand their temperament, understand their approach. Among the qualities we look for in members of the judiciary are an open mind, a willingness to hear opposing views, balance, sensitivity to different communities. The interview process is an opportunity for the committee to get a sense of the candidate's character and temperament and fitness to be a judge.

Secondly, it provides an opportunity for the candidate to respond to questions that there may be, that may have been raised about that candidate. At the present time, if I am asked by an advisory committee member to give my opinion about a potential candidate and I provide that opinion, there's never an opportunity for that candidate to respond to it or to be aware of what the concern might be.

I think that's unfair. Hopefully, I am fair in my assessments of people, but it may be that from time to time the information I have is not sound or is in fact incorrect. One offers advice, or one offers comments, perhaps, without a firm basis, and it would be possible that the candidate might well be able to say: that's wrong; you were under the impression that I conducted myself in a particular way, and that's wrong; I didn't conduct myself in that way. It would provide an opportunity for the candidates to have a fairer chance to present themselves and to deal with questions that might be raised.

I think those two changes would help. I know they're not new; I know you've heard those proposals from other witnesses. But I was asked to come and to offer my view. These would be, Mr. Chair and members of the committee, my two recommendations.

With respect to your question, Mr. Chair, about the constitutionality of the short list, as long as the minister is allowed to choose from other than the short list, while being required to provide an explanation to the committee, then I see no difficulty, because in fact you are not constraining legally the discretion of the minister; you're simply forcing the minister to provide an explanation if the minister goes outside the short list. Indeed, at the present time, the minister is

not allowed to choose someone who's not recommended, so we've already crossed that bridge, to some extent.

Mr. Chair and members of the committee, those are my general comments, my general recommendations. I'd be happy to respond to questions or engage in a discussion.

[*Translation*]

**The Chair:** Thank you.

It is now Mr. Toews' turn.

[*English*]

Just to make sure I understand, if there's no provision that he can choose from outside the list, would that limitation of his discretion put the constitutionality of the scheme into question?

**Prof. Patrick Monahan:** I think it would depend on how that limitation were expressed. If Parliament proposed to pass a statute that legally constrained the minister, I think there would be serious questions as to the constitutional validity of such a statute. If alternatively the minister announced that in the exercise of his discretion he would follow the recommendation of the committee, but this was merely the exercise of his discretion, I think it would be perfectly permissible, and it perhaps would achieve the same result. But I don't think Parliament could pass a law saying that the minister must choose from a group proposed by committee, because I think that would be tantamount to an amendment to section 96.

• (1635)

[*Translation*]

**The Chair:** Thank you.

Mr. Toews.

[*English*]

**Mr. Vic Toews:** I wasn't actually going to ask about that, but that's an interesting proposal. Some of the provinces in fact have limited the Lieutenant-Governor in Council to choosing from the list, even though, in the Constitution, the lieutenant-governor's power to appoint is somewhere in section 92, I assume, as opposed to section 96, which is the federal power. But in those situations, for example in Manitoba, for each appointment I think it's between three and five names, and the minister, by legislation, must choose from that particular list. So that does give me some concern.

I'm thinking that probably your precedent for saying that, and I think it's a sound observation, comes from some of the populist legislation that was passed in legislatures back in the early twentieth century, in Manitoba especially, where they purported to bind the discretion of the lieutenant-governor, in terms of passing by referendum laws that the lieutenant-governor or the legislature would then have to proclaim. I can't remember the exact process. It was that binding of the discretion of the lieutenant-governor that was found to be unconstitutional, and yet it appears we're doing exactly the same thing in existing provincial legislation. So that's something we need to seriously consider.

I like your idea, though, that if there is some discretion on the part of the minister, he has voluntarily indicated that this is the process he will follow, and that if there is a reason why he can't comply with that, he will set it out in writing. That seems to make sense, so thank you very much. And the mere fact that you've already stated what others have said just speaks to the timing of us calling you as a witness. It doesn't indicate that we shouldn't hear from you or that your evidence is any less valuable. So you shouldn't worry about that.

The point you make, though, about not only do Canadians not know what is going on in terms of lack of transparency, but the candidates themselves don't.... I guess the concern I would have, and we've heard some testimony, is that candidates can actually be blackballed by one person on the committee. If one person says "I don't like that candidate", and because some of these committees operate by consensus, the consensus is broken and that potential candidate is off the list. And the idea that the candidate has to be there in front of the committee and answer some of these questions and indeed respond to allegations I think is so basic to our system of fundamental justice that I can't see how we can't do that.

Again, I think of my provincial experience, where the witnesses, in confidentiality, were interviewed. The issue of transparency is another thing, but at least the candidate was there in front of a committee composed of judicial, legal, and lay people, and could answer any of those charges. That again strikes me as very sound: to be able to have that ability in terms of protecting your own reputation or at least understanding why you have been blackballed, if that happens.

Do you have any further comments to add to what I've said?

**Prof. Patrick Monahan:** Yes. Thank you, Mr. Toews.

Let me just say that I wouldn't want to comment on the provincial schemes, because provincial appointment power is set forth indirectly, in the sense that the provinces have the power, under subsection 92(14), over the administration of justice, including the constitution and maintenance of provincial courts. Therefore, they don't have an analogue to section 96.

•(1640)

**Mr. Vic Toews:** It's not quite the same, you're right.

**Prof. Patrick Monahan:** They have the power to pass laws to constitute those courts, and they therefore pass their courts of justice acts to constitute their courts.

I wouldn't want to be commenting on those provisions, because in the federal situation the Constitution specifically allocates to the Governor General the power under section 96 to appoint, and I think that a law purporting to constrain what the Governor General can do would be tantamount to an amendment to section 96.

But I agree entirely with your comment about the unfairness to the candidate. I can simply indicate that I have been consulted from time to time by committee members about potential candidates, and various suggestions have been put to me, as in, well, we've been considering candidate X, and we've heard thus, and we have been told that the candidate is not suitable because of this reason or that reason. And the reasons that are offered in some cases are quite

unusual, I might say. Some of these questions almost cry out for the opportunity to be put to the candidate.

**Mr. Vic Toews:** The opportunity to be heard.

**Prof. Patrick Monahan:** The opportunity to be heard.

In other words, there are really two sides to the interview process. There's the opportunity for the committee to better understand the candidate, but there's also the opportunity for the candidate to respond to questions or concerns that may exist. In other words, someone might say, well, candidate X is a firebrand or a hothead and would throw people out of the court, and they wouldn't be appropriate. Well, let's have them in, and see how they conduct themselves in an interview setting.

I think your point is absolutely well taken. The current system doesn't provide that opportunity.

[Translation]

**The Chair:** Thank you.

Mr. Lemay, you have seven minutes.

**Mr. Marc Lemay:** Mr. Monahan, thank you for appearing before us.

Your views for the most part coincide with my position, except on one aspect. You say that there should be interviews, meetings with the candidates, etc., and that, based upon those interviews, a short list should be prepared and submitted to the minister, who would then select a candidate from that list.

Here is the reason why I am having some difficulty following your logic. The minister must follow the recommendations of that short list, but if he decides to do otherwise, he must explain why. But if there are interviews, if there is a special committee created and if the minister agrees with following the committee's recommendations, then how could he choose someone who is not even recommended on the short list? Do you follow me?

[English]

**Prof. Patrick Monahan:** *Oui, je comprends.*

Well, I think it would be very unusual for the minister to do so. I would simply indicate that there should be that residual discretion for the minister to do so, but the minister would have to provide written reasons to the committee as to why the minister chose not to select from the short list. For the reasons that you have identified—that the minister has not interviewed the candidates, but has constituted the committee and therefore is assumed to have confidence in the committee—I think it would be quite extraordinary for the minister to go outside of the recommendations on the short list.

•(1645)

[Translation]

**Mr. Marc Lemay:** I do not want to interrupt you, but if the minister agrees to create the committee, then it is no longer an advisory committee but a committee mandated to recommend suitable candidates for the bench. He would only have before him two, three, four or five names of candidates suitable for the position of judge of the Superior Court of Rouyn-Noranda, for example.

In such a situation, how could he go outside? Are you saying that he could go outside because he has the power to do so by virtue of section 96 of the Constitution?

[English]

**Prof. Patrick Monahan:** No, I go beyond that, because I believe that ultimately there must be the exercise of judgment by the Governor in Council, who is elected. The members of the committee are experts or they're knowledgeable, but they are not elected and they are not ultimately accountable to the people.

I like the short list, and I think you should have a short list. And I'm not saying it's not a good thing to have the committee, but I don't want to just hand over to a committee the right to say a candidate can be prevented from being appointed by a group of unelected appointees. That is troubling to me.

I think it would be very unusual for the minister to go outside, but I believe that in our system of government, ultimately it is those who are accountable to the people—namely, the elected officials—who will have to be accountable and have the ultimate power to decide. I do not believe, no matter how expert they are, that a committee is ultimately accountable directly to the Canadian people. That is why I believe there should be that residual discretion in the minister and in the government.

[Translation]

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

Have you ever sat on judge selection or appointment committees?

[English]

**Prof. Patrick Monahan:** No.

[Translation]

**Mr. Marc Lemay:** Not even as dean?

**Prof. Patrick Monahan:** No, but I have in the past given advice.

**Mr. Marc Lemay:** With regard to candidates?

**Prof. Patrick Monahan:** Yes.

**Mr. Marc Lemay:** With regard to the interview, in your opinion, what types of questions should be put to candidates invited to an interview?

[English]

**Prof. Patrick Monahan:** The questions will depend on the nature of the candidate and the nature of the concerns, but there will be certain generic kinds of questions. One wants to ask about and seek an understanding of the temperament of the candidate. Technical legal competence should be assumed, so I don't think one needs to spend a lot of time questioning the candidate about substantive law. But you want to get an understanding of the kind of person they are, their quality of judgment, the nature of the work they have done, their involvement in the community, and the kind of perspective they would bring to their task as a judge.

I agree with Justice Glube, who was here previously, in that I don't think the exercise should be directed at trying to figure out how they're going to decide specific cases. That's not the purpose of the exercise. The purpose of the exercise is to get an understanding of the person.

I thought Justice Glube's point was exactly well taken: Would you ever hire someone for a job without interviewing them? If it's an important job, you would never do it. I hire a lot of people, and I always want to interview them before I hire them. It's just a given. So how could we imagine that we would appoint somebody to the office of a superior court judge or a judge in the court of appeal—a very important post—without interviewing them?

• (1650)

[Translation]

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

[English]

**The Acting Chair (Mr. Vic Toews):** Monsieur Lemay.

**An hon. member:** It's Joe.

**The Acting Chair (Mr. Vic Toews):** Oh, yes. I'm sorry.

Mr. Comartin.

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

I'm always so shy and retiring, I'm not surprised that he missed me.

Dean Monahan, thank you very much for coming.

I want to go to the committee itself. One of the concerns I've had, given that it's the justice minister or government that is choosing the committee members—although some are coming on due to the fact they're head of or a member of the law society or bar association—is that either a majority or close to a majority are direct appointments by the justice minister.

I'm going to pose a couple of questions. Do we revamp the system, for instance, by having committee members vetted before an all-party committee of the House? Could we establish criteria as to who would be on the committee, as a way of depoliticizing the committee, not just depoliticizing the appointment? Depoliticizing the committee would help in depoliticizing the partisan politics—so we could deal with that first.

**Prof. Patrick Monahan:** Well, I think the committees generally, at this time, are not highly politicized; I don't think they are politicized. I think the danger would be that if you had the advisory committees reviewed by, for example, a committee of this House, you may well politicize the process of selecting those committee members. I think it would be dangerous to try to do that.

I think the advisory committees work rather well. I shouldn't say they work well, because they need to interview the candidates, and the process is not transparent, but I think the members of those committees are quite strong and quite useful. It's the structure in which they're operating that is deficient.

So I would be very cautious about intruding and having prospective members of that committee come before this committee, for example, if that was your suggestion. I think the risk then would be that you would be politicizing it. And you shouldn't have representatives of different communities on the advisory committees; they are not there to be, and should not see themselves as being, spokespersons or representatives beholden to particular groups in society. They should be there to select the best candidate for the community as a whole. I think the members of committee now try to do that.

**Mr. Joe Comartin:** The second part of my question was, are there criteria for who gets on these committees?

**Prof. Patrick Monahan:** Do you mean ought there to be, or are there now?

**Mr. Joe Comartin:** No, ought there to be.

**Prof. Patrick Monahan:** I think there need to be some members of the profession; there need to be some members of the judiciary. But I also think there ought to be representative lay people, not necessarily lawyers, but members of the community generally, of high standing, who will provide an external perspective as well. I think at the present time you may want to look at adding a bit more weight to the non-lawyers or non-judges on those committees. I know that in the province of Ontario, a majority of the committees are so-called lay individuals, so you may want to look at expanding the membership beyond what it now is.

**Mr. Joe Comartin:** I don't know if you saw the article by Dworkin in *The New York Times*. He was writing on the recent appointment of Roberts to the United States Supreme Court. The basic theme of the article was that it was appropriate to interview and ask questions in terms of attitudes, if I can put it that way, and overall basic philosophy—not about specific cases or specific areas of substantive law.

Assuming we moved to interviews, would you see that occurring and those questions as being appropriate?

• (1655)

**Prof. Patrick Monahan:** I think those questions would be appropriate.

I think we should also remember, though, that when you're selecting superior court judges, or even court of appeal judges, they are also ultimately subject to the supervision of a higher court. A judgment of a superior court judge, even on an important case, is going to be subject to an appeal to a higher court. So I don't think one has to be quite as concerned with issues of judicial philosophy in the way that you are in a Supreme Court judge appointment. I'm sure one is going to be concerned about that, but we're appointing a judge to a trial court that may, for example, have a couple of hundred other judges on it. So I think the focus is probably going to be more on their temperament, their quality of judgment, and their suitability to hold judicial office, and those kinds of things, which you would want to look at.

**Mr. Joe Comartin:** In terms of the recommendation you made about a justice minister giving reasons when he or she does not accept the recommendation, could you give us an example where it would be appropriate for them not to accept the recommendation?

Can you think of a scenario where they would pick from other than the short list?

**Prof. Patrick Monahan:** It may be that in the mind of the justice minister there's a particular pressing need—for any number of reasons, which I can't articulate right now—for a particular candidate, and the candidate does not appear on the short list. The minister may say he thinks it's important to appoint this particular candidate and that he's going to exercise his discretion to do so and will provide the reasons.

That would be a possibility. I suspect it would be very rare that the minister would do that, because that would ultimately be reported, I think, on an annual basis.

**Mr. Joe Comartin:** I want to go back to the brief discussion we had about section 96 of the Constitution. I'm certainly not a constitutional expert by any means, but is this a situation where if a justice minister did agree to abide by the recommendations, they would exercise their discretion within those parameters, with this one exception of giving reasons when they did not? Would there be a constitutional convention developed over a period of time that would in fact bind them, say after a decade or two?

**Prof. Patrick Monahan:** No, unless the minister expressed the view that he had an obligation to accept the committee's recommendations. A constitutional convention requires several things. It requires not just consistent practice, which I take would be your example; it requires as well the belief on the part of the minister that he or she is bound to accept the recommendation.

In my scenario, the minister is not bound to accept, the minister may choose and may consistently—hundreds of times—choose to follow. He is saying that he continues to have this residual discretion. In that theory, it is not a constitutional convention, because the minister is not expressing the view that he's bound, even though as a matter of practice he has followed.

It's like the example that every morning I may go to my refrigerator and take out a jug of milk and have some milk. I do that every day. It doesn't mean I'm bound, or believe I'm bound, to do that. In the same way, the minister may consistently follow, but not believe that he is bound to follow. Therefore, there would not be a constitutional convention that could arise.

[Translation]

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

Mr. Macklin.

[English]

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

Thank you, Dean Monahan, for being with us.

You made the comment early on in your presentation about the lack of transparency. When we get into this area of transparency, I guess the questions that arise for all of us become how you limit, and what limits you put on it in terms of confidentiality.

For example, following your comment about how one should be allowed an opportunity and then interviewed to respond, if you've been contacted, do you believe it would be appropriate to say that Dean Monahan said you're a hothead and then allow that candidate to respond, or should this be kept on an anonymous level? Where do we start drawing the line, both to questioning and as to even knowing, for example, about where you are on the list and whether you are recommended or highly recommended?

● (1700)

**Prof. Patrick Monahan:** As to the first question, common sense would have to prevail. If I'm interviewing a candidate to be hired as a faculty member and I have heard information confidentially about that faculty member, I am not going to give the source, but I'm going to give the substance of it. I'm going to confront—not necessarily confront in an aggressive way, but I'm going to put that to the candidate. I'm going to say I have been told something along the following lines—I can't say where...in effect, I've been told this: in the case of a faculty member, I've been told you are not somebody who contributes to the collegial atmosphere at the school. Could you comment on that? The candidate would have an opportunity to comment. I don't have to say from whom I received it. And I think this is something we have all been part of, sitting on one side of the table or the other. I don't see that as a practical difficulty.

As to whether the candidate should be told where he or she is on the short list, I don't have a firm view. I guess practice would vary in different contexts. I don't have a strong view about whether the candidate ought to know. Candidates ought to know whether they made the short list or not. Whether they should be told where they sat, or what position they were on the short list, I'm not sure is material to them. But whether they were on the short list I would think they ought to know.

**Hon. Paul Harold Macklin:** Do you believe that the committee ought to prioritize, or should they simply leave the list with comments about certain characteristics regarding each of the candidates, but not necessarily that final ranking?

**Prof. Patrick Monahan:** I think the committee should have the discretion to provide a ranking. If, for whatever reason, the committee said it really couldn't choose between these two or even three candidates, it should feel free to do that. But it should have the discretion to actually rank the candidates. That is really the best advice to provide to the minister.

**Hon. Paul Harold Macklin:** We've heard of other ways in which judges go through this process. One of the processes we commonly refer to is in Israel, where in fact there's a judges school for those who would like to let their names stand. In other words, there is an education process where, shall we say, they can be reviewed as to their capabilities as potential judges.

Do you see that as having merit, or have you looked at this as a possible addition to this process?

**Prof. Patrick Monahan:** I haven't thought seriously about it. The problem would be that if you set up such a school and lawyers were to sign up, they'd be signalling that they're seeking an appointment to the bench. In some circumstances that wouldn't be a problem, but in many others it might, because if you're a partner in a law firm—and you're a senior partner or an important person in that partnership—and you signal to your partners that you're getting ready to jump

ship, one day you might find you're pushed off the ship before you have a chance to jump. Or it might lead to uncomfortable conversations around the water cooler.

I'm not sure you could require people to take such a course. My instinct is it would be unlikely that you'd have significant demand for it. I say that, having offered a lot of courses and programs for lawyers and others. I suspect it would be a tough sell to convince someone to take such a course, but I could be wrong. My instinct is you'd be hard-pressed for that reason. If you required people to do it, it would be unfair, because it would be putting people into that public declaration, without any assurance that in fact they were going to get an appointment.

I do think that confidentiality is quite important, so that the interviews and the short list would be confidential. It would not be known that the committee was even interviewing a candidate. All of that should be kept entirely confidential.

● (1705)

**Hon. Paul Harold Macklin:** When you go back to your initial comment about transparency, what do you think needs to be done? Is it educate the public as to the process? Is that part of what you see as making it more transparent? What do you see as being necessary to meet the terms of that word?

**Prof. Patrick Monahan:** There's a balance to be struck between transparency and confidentiality, because the process does have to remain confidential.

There's a need for transparency first in terms of some accountability to the candidate, some opportunity for the candidate to make a presentation, to discuss with the committee, and to respond to concerns. That in itself is a measure of transparency, because if you're now not going to recommend me and I come forward and there's not a peep of negative comment—I hear nothing, yet I don't get recommended—I'm going to be twiggled that something's up: They haven't recommended me, but obviously they have concerns and they haven't confronted me. I think it forces the committee to in fact come clean to some degree, and that is a measure of transparency in relation to the candidate.

As well, there's the fact that such a process exists, and given that the minister's discretion is structured in the way that it would be, I think that is some guarantee to the public that patronage considerations are really very minimized in this kind of circumstance and that you are really getting the best candidates.

The ultimate benefit of this is that it will mean that the very best candidates will in fact be appointed. Right now, it's a bit haphazard. We may benefit from time to time with the very best candidates appointed, but it may be that in other cases candidates who are not among the very best are in fact being appointed.

[Translation]

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

[English]

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

[Translation]

**The Chair:** Mr. Moore.



[English]

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

**The Chair:** This is the last round, because the bells are going to start ringing soon.

**Mr. Rob Moore:** This is a broad question, and I have a couple that are more specific afterwards. My question is, why? You mentioned that the current system is seriously deficient, and other people have their own reasons. We've heard from a lot of witnesses as to why they think the system can be improved or why there's fault with it. You mentioned a couple of things, one of which is that there's this large pool of potential candidates even after they've gone through some vetting process—if you want to call it that—through the committee. Why is that a problem as it is right now?

**Prof. Patrick Monahan:** The exercise of discretion is largely unconstrained, and you therefore have the opportunity for improper—and I don't want to say “improper”—pressures that we do not regard as the best intruding into the process, such as political considerations or connections with the decision-makers. That's a concern, as opposed to merit, which has to be the primary consideration.

**Mr. Rob Moore:** If merit is the primary consideration—and I agree that a lot of people see the problem as being that there's too much discretion—and if part of our recommendation and your recommendation is to narrow this to three names, is three the perfect number? What about a list of one? What if the committee narrowed the list to one, with the option—or, as you said, the discretion—that the minister could still, under the Constitution, appoint someone else other than the person the committee has narrowed it to, but would have to provide explanation?

• (1710)

**Prof. Patrick Monahan:** I would not favour a situation in which a committee would present a short list of one, because that would be transferring too much power to this unelected group of committee members. The purpose is to ensure excellence, to ensure that the very best are being appointed.

I don't know whether three is the right number, or five, but it's somewhere between three and five. But if you have a vacancy and you're recommending a very small group of people, I think we can be confident that the very best are going to form the pool from which the minister is selecting, as opposed to a hundred, which in some cases is now the pool.

So I don't favour effectively giving over the power of appointment to an unelected committee. I prefer to give the minister that ultimate flexibility in choosing from a short list.

**Mr. Rob Moore:** The other question I had deals with interviewing, and this has been put to other witnesses on the kinds of questions to be asked. If we want to see what their temperament is and so on, how they react, as you mentioned, then in order to really find out what someone's temperament might be, I would think they would have to have some difficult questions put to them, rather than just basically regurgitating what would be on their résumé or on their CV. They would need to have more difficult questions.

We've had previous witnesses say what questions might be in line, and what might not be. Say there's a rumour that the person doesn't

have a good temperament. What would you think would be some recommended questions if we wanted to test that?

**Prof. Patrick Monahan:** I think that the questions will to some extent probably be tailored to the candidate and to the background of that particular candidate. I think you would want to have some kind of regular interview schedule, which would be the normal way to conduct interviews with candidates. You would agree in advance on the kinds of questions that are going to be asked, but yes, you'd want to test and probe the candidate.

I think that having an opportunity to see the person in the flesh is not going to give you the perfect view, but it's going to give you a much better sense and understanding of the person as a human being and as an individual, rather than reading a piece of paper or getting third-hand or fourth-hand comments about that individual.

**Mr. Rob Moore:** Finally, if we went to a different model, I think that the committee's work would be more valued, rather than being mostly about optics. We've got this committee. At the end of the day, as you've recognized, there are all of these potential appointees who are highly recommended or recommended, and the minister can pick one, but there's still so much discretion.

If we're going to ask the committee to take a lot of that discretion away and narrow the focus to who is the most highly recommended, there are two parts to the question.

One, we've heard that we have to take into account factors other than merit. We have to take language into account in some provinces and in some areas. We have to take the composition of the court into account. Is that where you see discretion on the part of the minister, or should those considerations be made on the final three? Is it something we're going to task the committee with?

Two, if the committee is going to be asked to do all those extra things and have that greater role, does there have to be a change in the composition of the committee or in compensation for committee members, if they're going to be asked to do what I would think is a more important role?

**Prof. Patrick Monahan:** You raise a very difficult and important question. I guess that part of it goes to the definition of merit. What is merit?

My own view would be that merit implies openness and sensitivity to a range of communities and to a different variety of perspectives. I do not think that you should be appointing people because they are representatives of a particular group.

Language skill is a different thing. The capacity to work in two languages is a qualification. It's part of merit. If you can't function in the official languages that are required, you're not as meritorious as someone who can.

To say that we're going to appoint people because they come from a particular group or whatever is something that has to be approached very carefully.

I think that merit encompasses some of the qualities you talked about. Merit has a wide variety of qualities that would be attached to it. By merit, I don't simply mean some technical expertise. It requires the broader temperament of a judge and the suitability to be a judge.

• (1715)

[*Translation*]

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

I wish to thank Dean Monahan for having taken the time to come and meet with us. Despite your having come at the end, rest assured that my colleagues around the table have carefully noted your comments and suggestions, if the head nodding I saw is any indication.

[*English*]

Colleagues, I want to let you know that probably next Tuesday, after the witnesses, we might give some instructions to our research department. If you have any thoughts on that, you could think about it over the weekend.

Let's assume and let's work as if there were no election. If there is, we'll see, but let's keep on working as if there isn't one and finish our work.

[*Translation*]

Thank you very much.

The committee stands adjourned.

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