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Mr. Richard Marceau

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● (0950)

[*Translation*]

The Chair (Mr. Richard Marceau (Charlesbourg—Haute-Saint-Charles, BQ)): Good day and welcome to the 11th 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.

Our witness today is Professor Alan A. Peterson, Director of the Centre for Professional Legal Studies of the University of Strathclyde. Thank you very much for coming here, sir, to speak to our committee.

Also in attendance are Conservative MP Rob Moore, Bloc Québécois Member Marc Lemay, and Liberal Party MPs Paul Macklin and David McGuinty.

My name is Richard Marceau. I am also a Member of the Bloc Québécois as well as the Chairman of the subcommittee.

First of all, I want to thank you for taking the time to participate in this important meeting and to share your expertise with us.

I suggest we take ten minutes or so to explain to our witness from the U.K. how we proceed here. We can then follow up with a question and answer session. Each Member will have approximately seven minutes.

Is that amenable to you?

[*English*]

Professor Alan Paterson (Director, Centre for Professional Legal Studies, University of Strathclyde, As an Individual): Yes, perfectly.

Do you want me to start?

The Chair: Yes. You're on.

Prof. Alan Paterson: Thank you for the invitation to address you. I'm most honoured.

I should say that I'm a member of the Judicial Appointments Board for Scotland, but I am not speaking for the board. I am speaking as an individual member of that board. Right?

I should also say that my remarks will very largely be directed to Scotland, as opposed to the rest of the United Kingdom—although I can make passing reference to that as well, if it would be of assistance.

May I start by making a background observation. For me, judicial appointments and reform of judicial appointment is about an exercise of power in a democracy. Historically it has been the politicians who have had most of that power, and that has certainly been the case in the United Kingdom. In England it has been the lord chancellor; in Scotland it has been an individual called the lord advocate, who is equivalent to the attorney general. He is the legal adviser to the government, but in Scotland he had a unique role, because he was rather like the lord chancellor in some respects; he was not a judge, but was both the government legal adviser and somebody with close connections to the bar who had part independence.

I say he, by the way, because we have yet to have a female lord advocate in five centuries. We have a female solicitor general now in Scotland, but we haven't yet had a female lord advocate. It will happen.

In Scotland the appointments have been by the lord advocate in the past, until comparatively recently, and he, as a politician and a member of the bar, could take advice—and constitutionally, by convention, tended to take advice—from the senior judiciary. But he didn't have to take advice—there was nothing written in the constitution to that effect—and he didn't have to follow the advice he was given, or the consultation that he got, from the chief judge. How far beyond that he consulted was entirely up to the lord advocate.

So in the past it was the politicians who made the decisions about judicial appointment in the U.K. Gradually they developed more and more elaborate systems of consultation during the last century.

I won't touch on what the lord chancellor did, because that's pretty well documented. With us it was the lord advocate consulting, as I said, with the senior judge, and if he wanted to consult with others, he would do so, but that was up to the individual lord advocate.

Gradually reform came into the process. There was limited input by the judiciary, but gradually they came to feel that they needed to change.

We have two main courts in Scotland. They don't really map onto England terribly well, but one does reasonably so, and that is what England calls the High Court. We call it the Court of Session, or the High Court, depending on whether it's sitting as a civil or criminal court, and that body also includes the Court of Appeal. The judges who are on that body, who deal with the High Court and the Court of Appeal, are called the senators in Scotland, the senators of the College of Justice—but I'll call them senators.

● (0955)

The other main court is the local court. Unusually for a local court, it has very wide jurisdiction. It can hear just about any kind of civil case and any criminal case, including with a jury, that can lead to imprisonment for up to five years. It also has a wide administrative jurisdiction.

So sheriffs have to be able to cover a very wide area of jurisdiction. This, incidentally, causes problems when it comes to appointing them.

Those are the two main kinds of judges in Scotland.

About ten years ago, we began to advertise shrieval posts, posts for sheriffs, followed eventually by job descriptions, and eventually, in the last five or six years or so, interviews. The senators, the higher judicial appointments, were not advertised until very recently, but there were, latterly, interviews.

In the old days, senator posts were filled by individuals who had a political connection. Originally, 100 years ago, they might be political reward appointments, a reward for a member of the bar who was active in politics. That was abandoned during the last century, quite a while ago, but it was still not uncommon 30 years ago for a member of the bar who was politically active to be appointed, and not necessarily by his or her own party.

The lord advocate was allowed to appoint himself. Sometimes he appointed himself and sometimes it was the other party who appointed the former lord advocate. According to my reckoning, of the last 15 lord advocates, 12 were appointed, either by themselves or by the other party, to be a senator.

The other main route to becoming senator was by being head of the bar. This was an interesting route, because you don't get to be head of the bar unless you're elected by your colleagues. Benjamin Franklin of the American Revolution thought the Scottish system was rather good here, because it combined both the elective method and the appointive method: you elect the head of the bar, and almost all heads of the bar have then been appointed at a later stage by the lord advocate to be a judge. Benjamin Franklin wryly added that you can, of course, guarantee that the members of the bar would always elect the best person to be head of the bar. Why? So that they could get his practice when he was appointed to the bench.

Anyway, so much for that. In recent years, it would be fair to say, political appointments have been very rare indeed, with the exception of lord advocates or the occasional solicitor general. Political appointments of any sort—and I call a political appointment one where somebody has political experience as a candidate—are relatively uncommon now in Scotland and in England. They're pretty rare.

The reform in Scotland, which you want me to talk about, was introduced three and one-half years ago, when the Scottish executive—that is, the new Scottish Parliament with a new coalition government—decided that one of the first things they were going to introduce was the Judicial Appointments Board. Since that board has been in place, we have had very few candidates coming to us with any political experience, or not that I am aware of.

● (1000)

Since I have one or two minutes left, I'll just say that we have adopted some unusual features in the Judicial Appointments Board that are designed to reflect its composition and the way it thinks it should work. It has ten members, five of whom are lay and five of whom are legal/judicial. So it's a fifty-fifty board. The chair of the board is a layperson. If somebody wants to ask me how the people are appointed, I can talk about that later. That model has been adopted to make sure that every one of the 10 members of the board plays an equal part in the board's proceedings. So we try to maximize the autonomy of each member.

Historically, in a number of jurisdictions, what has happened with judicial appointment boards or commissions is that the sway in them tends to come from the legal/judicial members. They tend to dominate, for perfectly understandable reasons. To counter that possibility and likelihood, every panel of our board—and we don't sit as a board of 10 to appoint; if we are appointing a senator we sit as a panel of six, and if we're appointing a sheriff it may be a panel of four—is always equal. There are two lay and two legal, or three lay and three legal/judicial. The chair is always a layperson. The layperson members always vote first. At any sift meeting, we always vote first and discuss later to make sure there's no cross-influence.

And there are two other things I can pick up on if you want me to discuss them, because they are unusual for boards.

First of all, we do not take soundings. We don't take soundings from senior judicial colleagues, and secondly, we do not, although we are a small jurisdiction, encourage members to use personal knowledge. Of course you cannot stop, and why would you wish to stop, a member from having personal knowledge and allowing that to influence his or her votes. What you don't do is share that personal knowledge with another member of the board in normal circumstances, and I can explain why we've adopted these policies.

That's my ten minutes.

[*Translation*]

The Chair: Thank you very much.

[*English*]

You are on for ten minutes, Mr. McGuinty.

Mr. David McGuinty (Ottawa South, Lib.): Thank you, Monsieur Marceau.

Thank you very much for joining us, sir. Are you a professor? Are you Professor Paterson or Mr. Paterson?

Prof. Alan Paterson: I'm a professor of law at the University of Strathclyde.

Mr. David McGuinty: Professor, thank you very much for joining us.

Your commentary, your quick recounting of the Benjamin Franklin quotation reminds me of a time when President John Kennedy was asked to justify the appointment of his brother Bobby as Attorney General of the United States. And without missing a beat, he turned to the camera and said, "I thought it was important for Bobby to get some experience before he began his legal practice". So it's interesting how the thread weaves its way through American administrations.

I'd like to talk to you about your major reforms. This is fascinating, I think, for the committee members, and certainly for me, particularly the question of a chair being a layperson on your Judicial Appointments Board. In the interests of time, can I just probe a little bit around the question of political experience?

You said that to your knowledge, since three and a -half years ago when the new coalition Scottish Parliament introduced the Judicial Appointments Board process, there have been very few candidates with "political experience" appointed to the bench. What do you mean by political experience?

Prof. Alan Paterson: I should say that I didn't mean appointed. I meant that very few had applied at all, so of course very few have been appointed. By political experience I mean a known connection with a political party, which we might not know, or being an MP, or something of that sort.

Mr. David McGuinty: So that would obviously include sitting as an elected official.

● (1005)

Prof. Alan Paterson: Yes.

Mr. David McGuinty: It might include active participation of any kind in a party.

Prof. Alan Paterson: We wouldn't necessarily know that. If it has not shown up on the form, I don't think we ask if they are members of a political party. I could check that for you, but I can' t recall that we actually ask that question.

Mr. David McGuinty: Okay. Now, the drivers that led to the major reforms in the Scottish Parliament. What were these drivers? Why was there an impetus three and a half years ago to revamp the system?

Prof. Alan Paterson: It wasn't that the quality of who was being appointed was felt to be weak. It wasn't. Generally, the quality was felt to be high. But the system did allow for cronyism. It doesn't matter whether there was any; it allowed for the appearance of cronyism, and that caused some concern. It was the lack of transparency and the lack of obvious equal opportunities that worried the new executive.

And they were very bold. They consulted. The judicial bodies were all very happy to have a judicial appointments commission, but they all thought there should be a small minority of lay people. They couldn't see what role lay people would play in the process, except occasionally to just keep an eye on the lawyers to make sure they weren't engaging in cronyism and things like that.

The notion that there would be a fifty-fifty split came from the government minister—the justice minister—who was pushing this, and he stood fast in the face of a certain amount of judicial pressure, which I thought was highly commendable.

Mr. David McGuinty: Let me just explore that a bit. What was the general impression or the general reaction in Scottish society when laypersons were made effectively as important as the legal judicial component? How did people react?

Prof. Alan Paterson: It's very difficult to get feedback on our performance. As a board, it's one of the ironies that we had rather hoped, I think, that we would appear before the Scottish Parliament sometime in the last three and a half years. But no, I think the general feeling from certain quarters—and this is not meant to be complacent, because we have been attacked from time to time—is that we're not doing too badly, and therefore, we don't have to be called before Parliament to explain what we're doing. That may change, and I think it would be a good thing if we were asked to appear before Parliament to explain not individual appointments but the process of what we've done.

We have published everything I've told you in our annual reports and on our website. I think it's fair to say that some of the bar and legal and judicial members find it hard to understand why, for example, we don't take soundings or why we don't use personal knowledge.

Mr. David McGuinty: Can I take it, then, or can we take it as a committee, Professor, that there were two underlying, almost sociological drivers here? One is the appearance of bias that you mentioned earlier, which was a driver three and a half years ago, and the other, given what I've just heard you say about the participation of lay people, was, if I can put words in your mouth, almost a process by which the appointment process would be delegalized, that you would remove—

Prof. Alan Paterson: No.

Mr. David McGuinty: What I mean is that it would perhaps drive up the influence of average members, typical members of Scottish society, to at least equalize their influence as well as the influence of the bench and the judiciary and the bar association. Am I right in this?

Prof. Alan Paterson: Firstly, no, I didn't mean to imply any bias. The desire for reform was because of the lack of transparency. Generally, the quality of those we were appointing was thought to be very high. It was simply that there was a lack of transparency about the process and a lack of clear equal opportunities. The potential for cronyism was occasionally there, but it was only a potential, and of course nobody ever proved it, and so on. So it was to avoid that and to make a break.

As to the issue of lay people, I have no idea what persuaded the minister. As I said, I thought it was a brave stance. When you reform your judicial appointment process, the executive gives up power to a commission or a board—not all power, but they're ceding some power. The question is who they're ceding it to. If you cede it to a board that's dominated by the judiciary, then you're ceding it to the judiciary. If you cede it to one that has mixed lay and judiciary and lawyers, fifty-fifty, then you've taken a different stance, which is to say, yes, the judiciary and the lawyers are very important in the question of who should be judges, but they're not all-important.

I should also say two other things. One, we are not a statutory board, because the government wanted to act on this before they had time to legislate. There is legislation in the offing, but the question will be whether the stakeholders will be able to change that legislation so the board doesn't look or work in the way it has for the last three and a half years. So we wait to see the outcome of that.

● (1010)

Mr. David McGuinty: Thank you very much, Professor.

[*Translation*]

The Chair: We will now go to Rob Moore of the Conservative Party for seven minutes.

[*English*]

Mr. Rob Moore (Fundy Royal, CPC): Thank you, Professor, for taking the time to participate here.

One of the things I noted in your article is exactly what I think we're struggling with in our country. You mentioned the Siamese twins of independence and accountability, and the more you have of one, the less you have of another. I think it's one of the things we're struggling with now.

I want to specifically ask you about one issue. We've been hearing some testimony on and we've been debating the issue of interviews for candidates by the committee. While feeling that we should have a committee, some do not feel there should be interviews for the candidates and others feel there should be interviews for the candidates. If our goal in this country is to have more accountability—while maintaining independence, of course—what are your thoughts on the interview process?

Second, there has also been discussion on the fact that if we're going to have an interview process, there are certain questions that the committee should not ask of a potential candidate. May I have your thoughts on the interview process for these federal appointments and also on what questions would be appropriate in the interview process?

Prof. Alan Paterson: Right.

Yes, I do believe there is a tension between independence and accountability in relation to judges, and also it comes up in judicial.... I think the way you implement your judicial appointment process is a reflection of the balance you're drawing between independence and accountability, so how you do it is very relevant to that balance.

We do use adverts, job descriptions, criteria that are all open, a very detailed competency application form. So do the English; we copied it from the English. It's not novel. We then sift them. We then take references, three referees nominated by each of the individuals. We don't stipulate who they should be, but generally if they use judges we find that quite helpful, but we don't insist on it, particularly because some people aren't particularly well connected to judges, and one thing we have learned is that there is absolutely no point in getting a reference from somebody who doesn't know you particularly well. When we get a reference that says, "I don't know why this candidate chose me; I know nothing about them", it's a complete waste of their time and our time, and unfortunately the candidate has lost one opportunity of explaining the situation about himself or herself.

We then ask them to do a presentation for 10 minutes before the interview. We tell them what the presentation is about. One of the topics in the past has been the tension between independence and accountability for judges. That was one of the first topics we set them. We could set them a topic such as "Do you think appraisal for judges is a good idea?" We have selected a whole range of topics.

Then they give us a presentation, and we ask them questions about that presentation. The presentation will be about the process of judging and important aspects to do with the future of the judiciary. We have no worries about asking questions on that score or what they think the powers of judges should be, what the role of judges should be, whether there should be appraisal, a complaints procedure, a code of conduct for judges, discipline procedure. We've no compunction about asking those kinds of questions.

We can ask them questions about their competence, and they know this. They know from the very detailed competency application form and from our published papers what competencies we're seeking. They include legal experience of an appropriate nature—and I'll come back to that one—integrity, intelligence, moral courage, efficiency, fairness, independence, judgment, communication skills, people skills, all things that were agreed to primarily by the English, the Department of Constitutional Affairs, and approved by a judicial working party or a working party with judges on it in Scotland.

I don't think the criteria are particularly contentious. Most of the criteria I've read out are things that lay people can assess as well as lawyers and judges, which goes back to the composition of our board. They're just as able to deal with issues of communication skills, people skills, efficiency, moral courage, or intelligence as a judge or a lawyer.

The area where the lawyers and the judges are on their own is in relation to whether this candidate has sufficient legal experience. The board's been set up, and I think rightly, so that only the judges and lawyers are allowed to make that call. Lay people cannot decide that this person has sufficient legal experience. It has to be judges and lawyers who make that call. That's a protection for them and a source of influence obviously for the judicial and legal members.

We ask questions about discipline. Have they had any discipline or convictions? We ask them about how they would illustrate that they have moral courage, efficiency, integrity, straight dealing, how well they manage their written work, their paper work. We ask them questions based on the competencies, and they know that's what we're going to ask them about.

● (1015)

If you mean whether we ask them the kinds of questions that are sometimes asked in the American Supreme Court justice confirmation hearings or the South African confirmation hearings for Supreme Court judges, no, we don't ask them questions about their views on social issues.

The Chair: That would be seven minutes.

Mr. Rob Moore: Okay.

Thank you very much, Professor.

[*Translation*]

The Chair: We will now go to Mr. Marc Lemay, for seven minutes.

Go ahead, Mr. Lemay.

Mr. Marc Lemay (Abitibi—Témiscamingue, BQ): Good day, Professor. Thank you for coming here.

As President of the Bar for my region. I have served over the past four years on three judicial appointment commissions. I listened closely to your remarks and oddly enough, your procedures are similar to what takes place in Quebec. I don't know if Scotland came up with the idea at the same time as Quebec, but the judicial appointment process followed by the two is similar. I listened to the questions that you put to candidates and they are similar to the ones asked in Quebec. I find that quite interesting.

I'd like to focus on two points. Do you have a competition each time a vacancy opens up on the court, or do you draw up a list of potential judicial candidates?

● (1020)

[*English*]

Prof. Alan Paterson: It depends on the vacancy. If there is a particular vacancy for a particular court, we will usually put forward two or three names. We could put forward only one name, but it's up to us. The executive has left it up to us to make that decision. We put forward one name, two names, or three names.

I should explain what happens next. It then goes by statute, because there's now a statute on this, to the chief judge in Scotland, who has a look at it. My guess is that although it's not officially part of the system, the lord advocate is now much more of a government legal officer than ever before and is in the cabinet or the executive, and I think he too looks at the names. The name then goes to the first minister, our chief minister, who will either accept or reject the recommendation.

We have made something like 100 recommendations, give or take a few, in the last three and a half years. Much to our astonishment, we have been responsible for appointing up to one-third of the judiciary in Scotland in only three and a half years. I can explain how that's happened, but it has been an astonishingly high proportion. Of those 98 or 100 nominations we have made to the executive, not one has been rejected and not one has been re-ranked. Even though it's not a statutory requirement to do so, the executive has accepted, as has the chief judge, every nomination and ranking we put to them. I think that only shows tremendous credit to the executive, who have exercised a self-denying ordinance.

To the other half of your questions, if there are part-time judges to be appointed, there will usually be a range of vacancies. We now say that for the next 18 months to two years there will be no further competitions for part-time judges. If you want to be a part-time judge, throw your hat in the ring now, we will rank you, and we will compile a list that is sent to the minister. The minister will approve the list or not. As it happens, he has approved the lists. When a vacancy arises, the government then draws from that list in the order that we have given them.

[*Translation*]

Mr. Marc Lemay: That's very interesting. I have one final question to ask you, as I'm running out of time.

Could you explain the composition of the board to us? You stated that it was a ten-member board. That's a large number of members, in my opinion. Why did you settle on 10 members and briefly, can you tell me who sits on the board, without naming any names? I would imagine that the members are representatives of the bar or judges. Could you please enlighten us?

[*English*]

Prof. Alan Paterson: The composition has changed a little in the three and a half years, but the makeup is the same. There are three judges, one senator, one chief sheriff—chosen from amongst the six sheriff principals or chief sheriffs—and one sheriff. So there are three judges, one from each of the branches of the judiciary, and there's one member of the bar and one solicitor. The member of the bar was appointed by interview and application, but the first one to apply was the head of the bar, and he beat off the other competition, perhaps not surprisingly. The solicitor who beat off the competition —but in an open competition, with an advert and interview—was a former president of the law society. And the sheriff who was appointed was the former head of the sheriffs association. So you may take it that the legal members were of a very high calibre and wanted to be on the board.

The same is true for the lay members. The chair is Sir Neil McIntosh, who was a very high ranking civil servant—not in the executive but in what you would call local government, though that would be unfair, as he was chief executive of half of Scotland, in terms of population, and a very powerful and effective civil servant. There's a captain of industry, a very senior knight, who is a leading member of industry and the voluntary sector. There's the principal of one of our universities, and there's a leading human resources person. And here I'll slightly confuse you and say that I'm the fifth layperson, because I'm a legal academic. Even though I'm technically qualified, I count as a lay member because I've never practised.

● (1025)

[*Translation*]

Mr. Marc Lemay: Thank you very much.

The Chair: Next to speak will be Mr. Comartin from the New Democratic Party who joined us a few minutes ago. The New Democratic Party is the equivalent of your country's Labour Party.

Mr. Comartin.

[*English*]

Mr. Joe Comartin (Windsor—Tecumseh, NDP): I have to say, Mr. Paterson, the obvious first question is that you don't have someone from the labour movement on the panel. Were there any applicants from your unions or from the labour movement generally?

Prof. Alan Paterson: I missed the first part of you question, but in terms of the latter part of the question, I can't tell you who applied, because it followed standard procedures for civil service or non-governmental organization appointments nowadays in Scotland, namely that there's an advert placed in the newspapers, there's a job description, there's a detailed application form, and there are short-listed references and interviews. I couldn't tell you who amongst the lay people applied, apart from the ones I've indicated, who are all people of standing in business or HR. Even the senior civil servant, who is the chair, has a long history of expertise in HR.

If a member of a trade union had applied, he or she would have been interviewed, I'm sure, on the same basis as everybody else. I don't think for moment that wouldn't have happened.

As far as the judges were concerned, the senator was nominated by the chief judge, and the sheriff principal was nominated from amongst the six sheriff principals, who decided amongst themselves whom to appoint. As I said, the sheriff and the two lawyers both answered the advert and made applications and had interviews.

Mr. Joe Comartin: You had described this process where the legal qualification or legal capability of the judicial candidate was vetted by the lawyers and judges on the board. Did I correctly understand you to say that if they found the person wanting in terms of capability, that would be the end of it, that the candidacy would not go forward?

Prof. Alan Paterson: That is it, and it does pose problems. I'll explain why it poses problems.

Under the old system, if the lord advocate wanted to appoint a non-standard candidate—i.e., an in-house lawyer, or a lawyer from the city firm who hadn't done much litigation, or a lawyer in the civil service who had been high-ranking, or even a legal academic—or if the lord advocate felt there weren't enough women.... It's easy for a politician to just appoint, but as soon as you put a board in that's focusing on competencies, all that goes. It's actually easier for the old system with a political appointee, particularly if you give them a wide range of choices, to choose non-standard and minority candidates.

When it comes to a board that looks at competencies, the risk is that, for example, when I described the role of the sheriff in Scotland, a sheriff has a very wide jurisdiction—civil, criminal, and administrative—so your ideal sheriff is someone who has had experience of all of that. That means a generalist practitioner.

In Scotland, as in most other jurisdictions, generalists are dying. The only people who are generalists tend to be people who've been practising for 20 years and are sometimes in rural areas. That's not always true, but the point is that when you focus on competencies the generalists are the ones who are going to succeed, and for the specialists, they have to say, well, they've never done any criminal work, so will they be able to cope? They have only done family work; will they be able to do criminal work?

So actually there is a risk, with an appointments board that focuses on competencies, that non-standard candidates will be harder to appoint.

● (1030)

Mr. Joe Comartin: What has the experience been with regard to gender parity and other minority candidates, or during the three years have you a reasonable balance around diversity, including gender?

Prof. Alan Paterson: No. In Scotland I think it would be fair to say it's only a minority view that says the trickle-up theory doesn't work, and therefore the feeling is that minority and gender issues will resolve themselves over time. I happen to be one of the minority who doesn't believe that's going to happen, but at any rate, that's my personal view, not a board view.

In terms of candidacy, about 25% of applicants to us in the three and a half years have been women, and about 25% of those we've appointed have been women. It has not shifted in the three and a half years.

I am concerned that is not going to change unless we can solve one of the big problems that are facing the U.K. in this area, which is how you deal with the apparent tension between diversity and merit.

I don't know if it will please you, but the way I and one or two others argue is that we think you in Canada have led the way there. We think you have taken the view that merit is not objective—which I fully argue—that merit must include the concept of potential, and that you need to look at candidates and ask whether they have the qualities, whether they have the competencies, and whether they have the potential to do this job, and not whether they have been doing this job at the bar for 20 years, which tends to favour white males.

Therefore, I think we have to grapple more strongly than we have done with the issue of diversity and say that it's not a question of positive affirmative action, it's a question of looking at your definition of merit and being sure it doesn't contain cultural aspects.

Mr. Joe Comartin: So up to this point the board has not been prepared to accept that diversity by itself is an additional credential?

Prof. Alan Paterson: No, it hasn't, and I think that may have to come from the politicians. I think the politicians may have to give us that steer, and then I think the board will do it. The politicians did say to us that they wanted us to look for diversity, that they wanted a broadly reflective judiciary, but they also said they wanted appointments purely on merit. And remember, in terms of legal experience, the arbiters of legal merit are the lawyers and judges.

So we're still trying to grapple with the diversity issue. There is a feeling among some of us that talent can be found in unusual places. By that we're referring not to the gender candidate but the non-standard candidate, and that we should be prepared to look at non-standard candidates and grapple with that, as the old system could, that we just have to say, look, merit is not so much in tablets of stone that it can't include potential.

[*Translation*]

The Chair: Your seven minutes are up, Mr. Comartin. We will now go to Mr. Macklin, the Parliamentary Secretary to the Minister of Justice.

[*English*]

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

Thank you, Professor, for joining us. This is proving to be a very meaningful exchange, and I'm very pleased that we're using this methodology of modern technology.

One of the questions that arise in all these discussions about ascertaining an individual's capacity to go forward, first of all, is their ability to let their name stand for consideration. A lot of that has to do with the level of privacy and confidentiality that is maintained. Do you have any issues with respect to that maintenance of confidentiality within this board? Is there a public aspect to it, where people would know who has applied?

● (1035)

Prof. Alan Paterson: Our view is that it's highly detrimental if the names leak out. There have been one or two occasions when it's appeared as though there has been a leakage. We find that very disconcerting and distressing, because it's not good for the candidates.

One thing we have found, particularly at the senator level, the upper level—and this is not a breach of confidence, because it's in our report—is that although we pay £155,000, which is a reasonable salary for Scotland, we are not attracting an overwhelming number of candidates. The outgoing chief judge has said that some candidates in the past would have reacted to a tap on the shoulder saying they were meritorious and should be appointed. They would have accepted judicial offers as a senator because they saw it as their public duty and giving back to the community. But when told that the modern system is that they have to fill in a detailed application form and sell themselves in an interview process, while at the same time not appearing boastful, they find it rather hard to do that. We understand that.

One of the problems with an interview—one of your other colleagues asked me about interviews—and why they find it difficult is that many senior lawyers have never been interviewed in their lives and find the interview process a little disconcerting. We may be losing some very good candidates who simply don't want to put themselves through that. For that reason, we want to make the process as painless as possible. We certainly don't want the name of who has applied and not been successful to come out. We do everything we can to prevent that, and generally we are successful. There has been one round of appointments where we felt we had not been as successful and there appeared to be some kind of leakage.

Hon. Paul Harold Macklin: You also mentioned that when you bring forward your list of approved candidates, in fact you have ranked them. In that ranking process, do you have any system of weighting competence over other aspects, or is the candidate, having completed the application and interview, taken in a holistic perspective?

Prof. Alan Paterson: That's an interesting point. We don't weight them. When it comes to individual appointments, which we do a few of now—let's say an appointment in a remote rural part of Scotland—that appointment may require particular qualities that aren't necessary for a big city court. We will take that into account in the short-listing, the interview, and in the recommendations.

When it comes to what we call the slate or the list of part-time judges, we also have another curious thing that is called a floating judge. This is a permanent judge, but he or she is not necessarily attached to a particular court. This gives flexibility in the system. If there's illness or for whatever other reason there's a shortage of judges in the north of Scotland, then there are some floating judges who have been appointed. When we create a slate of floating or part-time judges, we rank them and say these ten are very highly recommended, the next ten are highly recommended, and the next ten are recommended. It's never happened, but I don't suppose we would have a huge objection if the executive came to us and said, look, we really need somebody for this floating post who needs to know something about the north of Scotland and would you mind if we took candidate seven as opposed to candidate five?

● (1040)

Hon. Paul Harold Macklin: How much time do I have, Mr. Chairman?

The Chair: One minute.

Hon. Paul Harold Macklin: Now, how often are your boards reconstituted, and do you have a carry-over in the reconstitution of your board?

Prof. Alan Paterson: It's only been reconstituted once, and there was a very heavy carry-over. We were reconstituted after three years, and two of our members stepped down and were replaced. When we are made statutory in a year or two's time, it will be very interesting to see what happens. They may totally replace the board. It looks as though there will be a statutory board. It's not clear that it will be exactly like us, but I think it will be somewhat like us. Will some of the existing members be on that statutory board? We do not know. Without appearing self-serving and self-interested, I think it would make sense if there was some continuity. It needn't be me; it could well be several of the others. But at the moment, there's no guarantee.

Hon. Paul Harold Macklin: Thank you.

[*Translation*]

The Chair: Thank you very much.

[*English*]

For the last turn, we have Mr. Comartin.

Mr. Joe Comartin: Professor Paterson, I've scanned your article. I'm not clear, but I think I understand that the sheriffs and the part-time judges can become full-time judges or be promoted to full-time judges.

Prof. Alan Paterson: Yes.

Mr. Joe Comartin: Then moving them from that initial level—we would call it the trial level here in Canada—to the appeals level, does that happen, and if so, how often does it happen? Thirdly, if it does happen, are they reviewed at that time by the board in terms of determining whether they're going from the trial level up to the appeals level?

● (1045)

Prof. Alan Paterson: That's a very good question, but the answer isn't so good. Yes, we have 58 part-time sheriffs and 120 to 130 full-timers. Some of the 58 part-timers will never want to be appointed full-timers, but some will.

Personally, I like the English system—I know it's not the Canadian or the American system—of having a part-time judge and, if they make a success of it, then helping to promote them. But that system, which pertains in England and could happen in Scotland, falls down in a major flaw, namely that we have no system for obtaining accurate and objective information on how well they have done. We don't take soundings, but even if we did, from whom would you take the soundings? If you go to the chief judge in the court in which the part-timer has appeared...usually the part-timer appears in numerous courts, not just one. But the chief judge, indeed no judge at the present, will sit in and watch the part-timer perform. So we've no way of getting reliable, objective information on how well they are doing.

We would like to see, or at least certain of our members would like to see, a judicial appraisal system set up by the judges, for the judges, but allowing us to see the results. In England and in Wales, they have introduced judicial appraisal for several layers of judges, including the part-time layer. That is being done now.

You asked, can you be promoted from the sheriff to sheriff principal? Yes, you can. Most sheriff principals have been sheriffs. Some have even been solicitors. Mostly they're former advocates or barristers. Can you be promoted from sheriff or sheriff principal to the senator's position? Yes, you can. It's happened. It doesn't happen that often; therefore we are not moving to a career judiciary yet.

Mr. Joe Comartin: When someone is moved up to the senator position, are they re-interviewed by the board, or is the board involved in that process at all?

Prof. Alan Paterson: Yes, the board's involved in that process. Like anybody else, they would apply to become a senator, and it happens.

Mr. Joe Comartin: Thank you, Professor.

[*Translation*]

The Chair: Thank you very much, Professor.

That concludes today's meeting. We appreciate all of your comments. You may not see it, but those in attendance were pleased with your presentation and found it quite informative. Thank you very much and we look forward to perhaps working together with you again in the future.

[*English*]

Prof. Alan Paterson: Thank you.

I've enjoyed it, and I hope that will happen.

[*Translation*]

The Chair: The meeting is adjourned.

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