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—
Chair

Mr. Art Hanger

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• (1600)

[English]

The Chair (Mr. Art Hanger (Calgary Northeast, CPC)): I would like to call the Standing Committee on Justice and Human Rights to order on this Monday, February 5, 2007. We will renew our study on the judicial appointment process.

I would like to ask the media if they wouldn't mind leaving now with their cameras. I appreciate that.

Before us, as noted on the agenda, the Honourable Rob Nicholson, Minister of Justice, will be testifying. He has two Department of Justice officials with him: Donald Buckingham, judicial affairs adviser; and Judith Bellis, general counsel.

Minister, I'd like to thank you for appearing. If you would like to begin, you have the floor.

Hon. Rob Nicholson (Minister of Justice): Thank you very much, Mr. Chairman.

[Translation]

Thank you for this invitation to appear before the House of Commons Standing Committee on Justice and Human Rights concerning the federal judicial appointment process.

[English]

Our Canadian democracy is strong, in part because of its constitutional underpinnings, its respect for the rule of law, and the mutual respect extended by each of the three parts of government—the legislature, the executive, and the judiciary—one to the others. With respect to several matters, the three branches have interrelated but distinct roles to play. This is particularly the case with respect to judicial affairs. Once the Governor General signs an order in council naming a person to the federal judiciary, he or she enters the judicial branch of government and enjoys the rights and responsibilities accorded to the judiciary—*independence and security of tenure*, to name but two—outlined under Canadian constitutional law.

However, under the Constitution Act of 1867, part VII, the legislative and executive branches of government also have fundamental roles associated with judicial matters. Under section 101 of the Constitution Act of 1867, Parliament is charged with the constitution and maintenance of our federal courts as well as the determination of the salaries of federally appointed judges. The subject matter debated by Parliament and the passage of Bill C-17 in December 2006 was an exercise of Parliament's competence in this area.

The executive branch has been charged, under section 96 of the Constitution Act of 1867, with an important responsibility with respect to judicial affairs: the appointment of federal judges. This prerogative has remained unchanged since 1867, with the Minister of Justice tasked with the responsibility of making recommendations to the federal cabinet for approval for the appointment of individuals to the federal judiciary. Constitutionally speaking, this legal power represents the heart of the federal judicial appointment process.

As of February 1, 2007, the Canadian federally appointed judiciary consists of 1,054 judges: 825 of them acting as full-time judges and the remaining 229 acting as supernumerary judges. The latter of course are those judges who by virtue of the Judges Act and recent amendments thereto have been able to elect to move from their full-time function to a reduced load given their prior service to the Canadian judicial system.

All of these judges must retire at the age of 75. Thus there is a constant turnover of judges, with ebbs and flows requiring executive action in the appointment of new judges to replace retiring ones, ones who unfortunately have died in office, and those electing supernumerary status. It's the responsibility of the Minister of Justice to make recommendations to the Governor General through cabinet to name individuals to these vacancies.

With respect to the timely filling of federal judicial vacancies, when this government took over after the last general election of January 2006, there were 23 vacancies for federally appointed judges. This government has proceeded, and will continue to proceed, with all due dispatch to fill existing vacancies. Since January 23, 2006, 58 judges have been appointed—20 in Ontario alone. This is a respectable achievement given that in the entirety of 2004, for example, only 41 federal judges were appointed in the whole country. Still, I acknowledge that as of February 1, 2007, we have 45 vacancies for federally appointed judges.

It's important to note, however, that a full two-thirds of these have arisen since the coming into force of Bill C-17 on December 14, 2006. That bill, as you know, provided federally appointed judges with new options for electing supernumerary status. Thus the vacancy list, which was reduced to just 15 prior to the coming into force of Bill C-17, almost instantly tripled in size as the direct result of 30 judges from across Canada having elected supernumerary status under the new eligibility rules.

I am committed to filling these vacancies in a timely manner, as was my predecessor. I will continue to instruct my staff to assist me in preparing recommendations for cabinet approval for the appointment of new judges.

•(1605)

[Translation]

Since 1988, the Minister of Justice has been assisted in preparing recommendations for cabinet approval for the appointment of new judges by the judicial advisory committees.

[English]

Despite the fact that the administration of candidate applications and the operation of the JACs have been carried out by the Office of the Commissioner for Federal Judicial Affairs continuously since 1988, structural changes to the JACs themselves have been a fairly constant feature of the JAC process. Over the past 20 years, changes to the JACs have occurred—in 1991, 1994, and 1999—always with a view to creating a process that provides the Minister of Justice with advice on the merit and legal excellence of candidates aspiring to judicial appointments.

In November 2006, my predecessor announced changes to the process, which would better assist the committee in providing the minister assessments of potential candidates. Changes were made to the composition of the JACs and to their operations, but the same fundamental purpose of assessing candidates and advising the minister as to their suitability for the federal judiciary was maintained.

With respect to the composition of the JACs, the JAC process has always included input from a broad range of stakeholders. These stakeholders have, since 1988, been represented by men and women whom the Minister of Justice selects. Stakeholders from the law society in each province and territory, the provincial branch of the Canadian Bar Association, the judiciary of a province or territory, the provincial Attorneys General, and the public have in the past provided the Minister of Justice with advice in the form of assessments of potential candidates for appointment to federal and provincial superior courts.

One of the November 2006 changes to the JAC process provides the opportunity for representation from another important community. A voice from the law enforcement community, a community no less implicated in the administration of justice than are judges and lawyers, will broaden the basis for examination of potential candidates and contribute a fresh perspective on the competent and qualified individuals recommended to me for appointment to the bench.

This change, implemented by my predecessor in November of last year, broadens the base of stakeholders who will contribute to the discussion and assessment of the competence and excellence required for the appointment.

From an operational perspective, the 2006 JACs will continue to assess candidates and report to me on their quality and merit for appointment to the bench. Almost invariably, the assessment of candidates by the JACs results in a finding of consensus and a recommendation to me. Thus, voting on the merit of a candidate rarely occurs. If it does, the results of that vote are recorded on the candidate's file comment sheet, which is directly relayed to me with each candidate's file. The outcome of this vote and the comments relayed to me from the committee are taken into consideration when

I decide whether to recommend such a candidate for judicial appointment.

Another change announced for the 2006 JACs is that the judicial nominee will be made chair of the JAC. As a consequence, the judicial nominee will have significant control over the oversight of the flow of discussions, and will manage the operation and expectation of assessments of candidates. In rare cases, when a vote is required, the chair will abstain unless his or her vote is required to break a tie. Taking into account the important directive function of the chair, I do not believe the judicial nominee has any less influence in the 2006 JACs than he or she would have had under earlier JACs.

A final operational change announced in November was the elimination of the “highly recommended” designation given to some candidates. As is the case for other aspects of the process, the designations “recommended” and “highly recommended” have not always existed. I remember a time when the JACs were required to assess candidates only as “qualified” or “unqualified”. The designations “unable to recommend”, “recommended”, and “highly recommended” were implemented as a post-1988 change to the process. Unfortunately, there were no criteria based upon which the JACs could objectively determine who should be awarded the “highly recommended” designation. One wonders if such criteria could ever be defined, given the different practice contexts of Canadian lawyers.

•(1610)

Experience also showed that the use of “highly recommended” was in some cases losing its significance, as percentage rates for candidates receiving this designation varied significantly across the country. It's hard to imagine why, on a per capita basis, there could be a significant number of more highly recommended lawyers in one jurisdiction in Canada than in another. There also seemed to be a higher prevalence for the “highly recommended” designations for lawyers coming from larger firms than those from smaller firms or smaller cities.

Finally, the comment sheet provided by the JACs for each candidate is more explicit with respects to strengths and weaknesses of a candidate than any one- or two-word label like “recommended” or “highly recommended”.

All but one of the 2006 JACs have now been constituted, you'll be pleased to know, and several are already meeting to assess over 150 candidates from across Canada who are awaiting consideration of their application for a federal judgeship. I am confident that the 2006 JACs will continue to conduct their examination and assessment of candidates with the same expertise, diligence, and conscience as prior JACs, and will forward recommendations that will permit me to make judicial appointments in a timely fashion, from among candidates of merit and legal excellence.

Finally, I would like to add a brief word about a subject related to the federal judicial appointment process: the outstanding requests for additional judicial resources. I expect committee members are also aware that a number of jurisdictions have expressed the need to have additional judges added to their courts, over and above filling all current vacancies. I want to say I'm prepared to give these requests serious consideration; however, I'm sure all committee members would appreciate that the creation of additional judicial positions involves significant additional ongoing expenditure of public resources. It is therefore not only reasonable, but responsible to ensure that there is a clear, objective indicator of the need for that expenditure. Therefore, my first priority is to get all the vacancies filled in a timely way.

As I've indicated, I think we are making significant headway now that the new judicial advisory committees are in place. Once those vacancies are filled, I will be in a position to better assess the overall needs of the requesting courts, in light of their entire existing judicial complement.

In addition, the government cannot simply act alone in providing additional positions even where their establishment is justified. Rather, amendments to the Judges Act would be required to provide necessary authority for the government to make those appointments. I would hope that all-party support would be secured for the quick passage of such an amendment in the event that the case for additional expenditure of public funds is justified.

•(1615)

[*Translation*]

Thank you for your attention and I look forward to any questions you may have.

[*English*]

The Chair: Thank you very much, Minister.

I'll now turn the floor over to Mr. Murphy.

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

Thank you, Mr. Minister, for your comments. I'll get right to the quick, to the chase here.

I think there's a case to be made that this gerrymandering of the judicial advisory committees—the JACs, let's call them—is done to give the new government an opportunity to stack the committees, the JACs, and to therefore influence the recommendation process unduly, in a way not seen during the time of the Liberal government, and certainly not even during the time of a previous Conservative government in which you served, namely the Mulroney government.

Just taking the case of New Brunswick, which I know a little more about than the rest of the provinces, I put it to you that there were seven committee members. In short, three of them were from the federal side. Let's put it that way. They were federal appointees, lay people, generally speaking. They all came from different walks of life. The other four were from various stakeholders, including the Attorney General, although I think we're all familiar with the makeup.

What you have done here, what the previous minister has imposed upon you, is an eight-member committee in New Brunswick, with the addition of the police representative. I'm not going to ask about the merits of having the police alone visited on the committees, but I am going to ask about what is really the central issue for me. The concern I have is that with the chair being non-voting except in the case of ties—correct me if I'm wrong in the case of New Brunswick—that would mean four direct federal new Conservative government appointees effectively can overrule or outvote, if you like, three members from the rest of the legal community. Let's put it that way. That's my first question.

My premise on the question, really, is this. It's on the comments of the recent appointee who represented the police interests, so to speak—and it's a whole other question whether the chiefs or the rank and file should be represented. The comments made by the representative were that there's nothing wrong with the judiciary. She's had no problem with the judiciary in her life as a police officer. That would imply to me that there's no reason to change the system that has served us so well.

I am wondering if you, by implication as the new Minister of Justice who has served in this chamber as a parliamentary secretary and now as the minister, over a long political career, Mr. Minister, think there was something wrong with the quality of the judiciary, thus leading to its meriting this stack-the-committee, political gerrymandering proposition that's before us.

That's just a light question to start with, Mr. Minister.

Hon. Rob Nicholson: I can't speak for the previous government, but certainly I can speak for the appointments that have been made under this government. Indeed, in the years that I did serve as a parliamentary secretary, as a member of this committee, and as a vice-chairman of this committee, I knew that the criterion was always the highest quality of candidates who were judicially competent, first-class legal mind people who are prepared to serve their country through sitting on the judiciary. Nothing has changed in that regard.

I was a member of this committee when Ray Hnatyshyn, who at the time was justice minister of this country, proposed it. It wasn't a question of trying to stack it in favour of the federal government, whatever that means. It was then, as it is today, an opportunity to get individuals who have a commitment to our judicial system and to ask them for their input and their advice. Indeed, that wasn't the last word on the subject. That was in 1988.

I believe there were five members then. I was part of the government that changed that again, in 1991, in order to have a couple more individuals on that committee. I believe the subsequent Liberal governments made at least two changes as well, in 1994 and in 1999. So over the last eighteen and a half years, since this concept was introduced, there have been changes. There have been modifications.

With respect to the latest modification that is adding a member of the police community, I think this is a positive change. Over the years, I've had the privilege of meeting with the police associations and chiefs of police. When I was in private practice, I met police officers in that forum. I can tell you that they are as absolutely committed as any of us to making sure our judicial system works. Having them—and that's the major change, Mr. Chairman, in that we have added another individual from the police community—I believe will work out very well. Again, I have no doubt about their commitment to our judicial system, and I think it will work well.

• (1620)

The Chair: Thank you, Mr. Murphy.

Monsieur Ménard.

[*Translation*]

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

Welcome, Minister.

You probably know that your appointment was welcome as a breath of fresh air. However, the remarks you've made today show that you intend to continue in your predecessor's footsteps. Continuity has its advantages and its disadvantages. We see there being more disadvantages than advantages to the reforms you are proposing.

I think the committee has no doubts as to the integrity and the quality of our judiciary. You're going to have to explain how you intend to implement what you are proposing. Will you need to introduce a bill? How do you intend to change the composition of judicial advisory committees? Are you acting on purely ideological considerations? Is the reality not that the Conservatives want to move the justice system to the right, that they do not believe in judicial discretion and that they are convinced that they need to direct judges?

Aside from police officers themselves, who is asking to have police officers sitting on these judicial advisory committees? Do you not understand that there is something worrisome in this? Yesterday, I asked for written material on this subject. Civil society, right-leaning and left-leaning, does not support your reforms in the least. Why? Because police officers have no place intervening in the process to select judges.

Would you be able to name one country operating in a comparable way to Canada which has done the same thing or intends to? Could you tell us what is behind this decision, who is asking for this and what possible benefits there could be? Once again, are you not simply governed by ideological considerations which will disrupt the balance we thought was wisely established?

[*English*]

Hon. Rob Nicholson: Thank you very much for that question.

Going back to the first part of your question, these judicial advisory committees are already up and running, with the exception of one. Some of them have already had their first meetings. So this is something that's already taken place.

In answer to the second part of your question, on whether this requires an amendment to a piece of legislation, it doesn't. These

committees are set up to assist the Minister of Justice in his or her constitutional responsibility to appoint Superior Court judges. Because they are for the assistance of the minister, there is no legislation governing this particular aspect, nor would any be necessary. I don't think anybody is suggesting that we change the Canadian Constitution.

That being said, I disagree with you about the addition that has been made of a member from the police community. I have found in my lifetime—you may have had a different experience, but if you did that would surprise me—that the police officers I have been in contact with over many years, as a member of this committee, as a parliamentarian, and as a lawyer, were absolutely committed to the criminal justice system.

[*Translation*]

Mr. Réal Ménard: Who supports this type of reform? When you turn to civil society, to those who have written on the matter or worked in this area, it gives you pause. Are you not concerned that you may be upsetting a balance?

I have the greatest of respect for police officers. My older brother is a police officer. The work these people do in the field is important. But in keeping with the legacy of Montesquieu, you need to make a distinction between the judicial, the legislative and the executive branches of government.

You are about to upset this balance. Why? There is an unhealthy ideological motivation behind it, you'll admit. You would be well advised to maintain the status quo. We believe in the quality of the judiciary. Your motivation is purely ideological and you are about to create an imbalance which is not desirable in a democracy, it has to be said.

• (1625)

[*English*]

Hon. Rob Nicholson: I don't think it is. I think this is a system that has worked well. When I discussed this, as a member of this committee, with Ray Hnatyshyn in 1988, there was no suggestion that this was the final word on it, or that this was going to be entrenched for all time. I remember back in 1988 that it was more of an experiment to try to get some input to the Minister of Justice, and there have been modifications to it over the years.

On the other part of your question, about other countries, it's very difficult to compare. I live in a border community, and every couple of years I'm inundated with American programming about judges running for election. How can we compare it to that system? I've studied the German Constitution, and it's a very complicated process. We have what is known as the Westminster model, whereby in our Constitution it's the Crown that makes these appointments, in the person of the Governor General, on recommendations.

[*Translation*]

Mr. Réal Ménard: We're not talking about the American model. I am trying to understand who is asking for this. Where does this idea come from?

[English]

Hon. Rob Nicholson: I can tell you that the Minister of Justice, in an effort to broaden the kinds of individuals who were advising him about his constitutional responsibility, deemed it appropriate and a step in the right direction. Over the years, various ministers of justice have made modifications because they wanted to get the best input possible. They wanted to get people who were dedicated, competent individuals, and this is another part of that ongoing process.

The Chair: Thank you very much, Minister.

Mr. Comartin.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Thank you, Mr. Chair.

Thank you, Mr. Minister, for being here.

Let me pursue this along the same lines. My feedback from the legal community in particular is that this is just another step on the part of the government to politicize not only the judiciary, but our police forces. I don't know about the last few appointments, but of the first eight, not one from the police came from the police chiefs; they all came from the police associations. It's no secret that the Association of Chiefs of Police has been more judicious in its assessment of crime legislation and how the criminal justice system should be dealt with than the police associations. The gun registry is probably the highlight of their taking a different position initially from that of the police associations.

As a practising lawyer and a person who's been involved in the legal system your entire career, do you not see the serious risk you are perpetrating here of politicizing both the judiciary and the police associations? At the very least, even if you say that's not happening and not your intent, would you not agree with me that the vast majority of lawyers in this country, and the general community, see you doing just that?

Hon. Rob Nicholson: I wouldn't agree with that. I've made the point that it's very difficult to make generalizations with respect to the attitudes of people in the police community, just as it would be difficult and wrong to make conclusions as to what defence lawyers believe, or what they are looking for.

Adding to this process in no way politicizes it, and I think it strengthens the input that is given to the Minister of Justice.

I think the process has worked well in the past and I think it will continue to work. And I believe that process will continue to work with an additional perspective, and that will be from a member of the police community.

So I don't see that at all.

Mr. Joe Comartin: What do you say to the first nations or women's groups who are saying, "Wait a minute, we use the system"—and certainly in the case of first nations, they are oftentimes the victims of the system—"why aren't we given special consideration in terms of the input we could give to judicial appointments?"

•(1630)

Hon. Rob Nicholson: If that's a suggestion you're making, Mr. Comartin, you're entitled to make it, but I have complete confidence

that the individuals appointed by the attorneys general across Canada will take matters like that into consideration when they are making recommendations to the Minister of Justice in the exercise of his or her constitutional discretion. I have complete confidence that members of the bar association, and in this case the people from the police community, will take that into consideration. They have a responsibility when making recommendations to make sure that all interests in society will be heard and be fairly treated. That's the basis, quite frankly, of the judicial appointments process. We have to have individuals who have a fair outlook and who will understand that this country is diverse, that there are many opinions and groups who need to be heard and represented. I'm quite sure that the judicial advisory committees as constituted will live up to that responsibility, as have others in the past. I have no doubt of that.

Mr. Joe Comartin: But certainly you're not going to suggest that the present composition in any way accurately reflects our communities, and not nearly as much as at the provincial level?

The composition of our committees is heavily weighted towards the legal side, and now you're bringing in the police. But the consumers of our courts are not in any way proportionally represented on those committees at this time.

Hon. Rob Nicholson: One of the things we have to struggle with, Mr. Comartin, is to make sure that in the actual judicial appointments, those individuals and groups.... I remember that back in the 1980s and the early nineties, women were very much under-represented on the bench, as it indeed continues, and a push was made to make sure....

So we are of course looking—

Mr. Joe Comartin: But we've been much more successful doing that at the provincial level than at the federal level, because—

Hon. Rob Nicholson: I don't have statistics comparing that in terms of the judicial appointments I have made or my government has made. They extend back only the last 12 months, so for the appointments in the previous 12 months, I don't have any statistics in that regard. But it certainly is a priority and certainly we want to have people who represent all communities. They have to see that on the bench, and I think this is only fair.

The Chair: Thank you, Mr. Comartin.

Mr. Petit.

[Translation]

Mr. Daniel Petit (Charlesbourg—Haute-Saint-Charles, CPC): Thank you.

Good afternoon, Mr. Nicholson.

I have a question for you. I'm going to read a motion that was voted on in the House of Commons on June 7, 2005 which stated the following:

Pursuant to order made on Friday, June 3, 2005, the House will now proceed to the taking of the deferred recorded division on the motion moved by Mr. Marceau (Charlesbourg—Haute-Saint-Charles, seconded by Mr. Côté (Portneuf-Jacques-Cartier):

That the House denounce the recent remarks made by Mr. Justice Michel Robert stating that it is acceptable to discriminate on the basis of political opinion when appointing candidates to the federal judiciary and that it call on the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness to create a special subcommittee with the mandate to examine the process for appointments to the federal judiciary and make recommendations for reform, with the primary goal of eliminating political partisanship from the process, by October 31, 2005.

There were 157 votes for and, of course, there were 124 against, and you know who they were.

I would like to know if you intend to respond to this wish within the strategy you are devising. Earlier on, Mr. Murphy asked whether or not the committees were being “stacked”. That was the term that was used; it was translated in that way from the English to the French. In 2005, that is to say last year, a Chief Justice crossed the line and said that partisanship was not a valid reason for not nominating a person. The Bloc Québécois wisely decided that indeed, that should change. I do not know why he has changed his mind today, but that is the situation.

Do you believe, as Minister of Justice, that this change or what you are proposing as a change, can answer to the order made in the House at that time, in which indeed the Liberals were being criticized for being a little too partisan in their appointments? The House came to a decision on it.

• (1635)

[English]

Hon. Rob Nicholson: I don't know if there's much point at this time in my attempting to analyze appointments that were made by the previous government, or what motivations went into them, and I should point out to you that I'm not proposing a new system. A system is already up and running that was proposed and implemented by my predecessor.

I should be very clear about how these judicial advisory committees work. They're not part of our adversarial system. In many ways, we generally think of decision-making in this country along adversarial lines. We can think of the House of Commons: we have the split between the government and the opposition parties. If you attend in court there is the crown attorney—or the plaintiff—and the defendant, or the accused. We are used to an adversarial system and so we assume that is the way things are organized.

That's not the case with the judicial advisory committee. My experience at this point is that these committees overwhelmingly come to a consensus one way or the other, and it's not a question of having the government against any other particular group. These individuals work together, and I believe they do work together. We can be very proud of the individuals who have been appointed to the Superior Court bench in this country, and we shouldn't apologize for it. I don't think we should fret that somehow something has gone amiss when in fact we have an excellent system, an excellent process, and we have great individuals who have stepped forward to serve their country.

The Chair: Thank you, Mr. Petit.

Mr. Bagnell.

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

I've never said this before, but I'm absolutely delighted you're in this position.

I have a quick point I want to put on the record before I ask my question, just for your knowledge.

There is an aberration in law so that currently the justices in the territories are called by a different name from that of chief justice, and the premiers and everyone asked to change that. The last minister said he would take that to the Prime Minister, and I hope you will follow up on that. That's not my question, though.

As you were formerly responsible for democratic reform, I know you like things to be democratic, so if this committee, as the justice representatives of a democratically elected Parliament, were to suggest changes to the JAC procedure or reverse it to what it was, would you endorse those?

Hon. Rob Nicholson: It seems to me it might be premature, Mr. Bagnell, to do that at this point when in fact we've got the process up and running. Certainly any change to that process right now would probably delay the judicial appointments process in this country, and as you know and as I indicated in my opening address, there are a number of vacancies that I would like to see filled. So I would suggest to you that the process already in place will work well, and I think it should have the support of all members around this table.

Hon. Larry Bagnell: So you would never consider our input?

Hon. Rob Nicholson: We never say never, Mr. Bagnell, but the system has worked well. Again, when this was first proposed to me in 1988 or discussed with me then, it seemed an excellent process that the then Minister of Justice was implementing. There were modifications to it a number of years later, and I thought they were reasonable.

Hon. Larry Bagnell: That's good. Yes, the system has worked well, and I think that's why the opposition didn't necessarily want it changed.

My understanding is that before you changed the system, a police officer or a police representative could be appointed under the lay positions. Is that true?

Hon. Rob Nicholson: That is correct.

Hon. Larry Bagnell: So then it's not true what you've said, that the purpose of this expansion was to broaden the individuals advising the minister or, as you said in your opening speech, provide an opportunity for another group, because they already had that opportunity and could already be on the committee.

Hon. Rob Nicholson: It's an additional perspective, there's no question about that. There are more individuals now giving input to the Minister of Justice on the exercise of his or her constitutional discretion. For instance, we have representatives of the provincial attorneys general. We could have done it without having them formally part of the process, but I think it's a healthy part of the process to have provincial attorneys general because of their responsibility in the administration of justice in this country. So to designate an individual on that is a good idea, and I think it can work well.

• (1640)

Hon. Larry Bagnell: But the police could always have been involved before, so we didn't need this change to get them involved?

Hon. Rob Nicholson: Any individual could be appointed by the Minister of Justice with respect to the appointments that he or she makes.

Hon. Larry Bagnell: I think the biggest concern is that people see justice as independent from Parliament. Of course, you make the final decision; we don't quarrel with that. But don't you at least think that having a commission without a majority of your own appointments making recommendations would give the public more confidence that there's a separation between the judiciary and the executive branch of government?

Hon. Rob Nicholson: I think the whole process with judicial advisory committees is a step in the right direction, and I don't think you or anybody I've heard—I'm not sure—would want a constitutional change from the present situation we have, where the Minister of Justice makes those recommendations eventually ratified by the Governor General of Canada. Nobody's suggesting that the Constitution be changed.

In terms of getting input into those appointments as to whom the Minister of Justice should appoint, I believe it is a step in the right direction to have members of the police community make that input. I think it's a healthy part of our exercise.

Again, I don't accept the premise that there is some sort of combative or adversarial role that takes place within these committees; my understanding of them is that they work on a consensual basis, and I believe that will continue.

The Chair: Thank you, Mr. Bagnell.

Mr. Bachand.

[*Translation*]

Mr. Claude Bachand (Saint-Jean, BQ): Thank you, Mr. Chairman.

First of all, I would like to thank my colleague Réal for allowing me to use some of his time. I feel it is important to say something. Furthermore, I discussed it with him because I am one of the members of Parliament who does not have a legal background. I had already heard talk of the significance of appointing a policeman to the advisory committee, but I did not expect to find myself at the justice committee later on. It would seem important for me to give you my perspective on the subject.

First of all, the problem is not one of political partisanship, unless the minister is saying that he wants only Conservative policemen to

sit on these advisory committees. I do not believe, however, that he wishes to go that far.

My colleague Réal Ménard is right: the issue is one of balance. In society, there is the executive, which is the cabinet and the Prime Minister, the legislative, which includes all of the members of Parliament and which votes on bills, as well as the judiciary. When we ensure that each of these three components can act in its respective context, we create an important balance in society. When we start to tinker with this balance, this challenges fundamental ideas about society. We must be very careful before acting.

I understand that it is the minister who, in the end, appoints the selection committees on behalf of the executive. He does not require a legislative instrument in order to make the change. However, he submits the issue to the justice committee and its members try and make a contribution in order to maintain a fair balance in society.

In my opinion, there is a problem on the judiciary front. In this case, there are two components that form the judiciary: the judges and the police. The latter carry out investigations and, depending on the province, it is either the police or the Attorney General who would lay charges. I have often read in court decisions that it is important that there be no conflict of interest in a judge's decision, but it is equally important that there not be any appearance of conflict of interest in the decision.

If we allow the police, even if they are in the minority on the advisory committee, to have a say in the appointment of judges, we are beginning to toy with an appearance of conflict of interest. Not that a judge will tell himself that a policeman supported his nomination and that he therefore owes him something, but there is nevertheless a certain appearance of conflict which, in my opinion, could jeopardize the perfect balance that we currently have.

That, Mr. Minister, is where the problem lies. I am asking you for further explanations because I would prefer the police continue to carry out their investigations, and in some provinces, to lay charges. The poor guy who has been charged but who knows he is innocent would want to be absolutely sure that the judge hearing his case does not owe his appointment to anyone, other than those members of society who have the power to appoint him, that is to say you, yourself and the executive, the cabinet.

I therefore need to be reassured because I have the impression that we're opening the door to the appearance of a conflict of interest. If we want Canadians, in Quebec as well as in Canada, to have confidence in their justice system, we must separate the police from the judges. Their work is complementary. We cannot proceed with appointments or decision-making that could lead citizens to think that society is not functioning as it should.

• (1645)

[*English*]

Hon. Rob Nicholson: Thank you very much for your comments.

We have members of the judiciary on that committee; in fact, they will chair that committee. I think that's a healthy component of the process. I believe that members of the police establishment will make a positive contribution. I don't see this as a group of individuals who are at odds with each other. I have known crown attorneys in my life. I've known judges. I know members of the defence bar, and I know members of the police establishment. For the most part, and almost invariably, they have the best interest of the judicial system at heart. I'm sure you are aware, as I am, of police forces that have innovative concepts in dealing with the difficulties they experience on a day-to-day basis. I don't look at it that they are at odds with any particular component of the judicial system. I firmly believe that the different components involved with our judicial system are there for the best interest of the rule of law and our judicial system in this country.

I believe you will see that and that you will approach me some day and tell me you think it really worked out well to have members of the police community, that they made an outstanding contribution to the process, and through that process they made an outstanding contribution to their country. I look forward to that opportunity.

I say to please keep an open mind about this decision that has been made, because I think it's in the best interest of the administration of justice.

The Chair: Thank you, Mr. Bachand and Mr. Nicholson.

Mr. Moore.

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

Mr. Minister, thank you for being here today. We appreciate your appearance. You mentioned that in the past these advisory committees were in place to provide to the minister a list of, as it used to be, recommended, highly recommended, or not recommended. You alluded to some changes that were made in the past. There seems to be, on one hand, some thought that we had an absolutely perfect balance on these advisory committees before, but in fact changes had been made in the past. Can you speak just a little bit about some of those? And can you speak to the suggestion that now we go back and somehow narrow the advice that you can get by taking the police off the advisory committee? The suggestion has been made to narrow the broader judicial community's input into the advice that you get. Can you talk a bit about what value there is to having a broader spectrum of advice on these committees?

Hon. Rob Nicholson: Any time that an individual has to make a decision, to get input from a number of areas or a number of individuals I think is a healthy thing. I believe this is the fifth modification, in a little over 18 years, of the judicial advisory committees, made by a couple of different governments.

Again, going back to their creation, it wasn't written in stone. It wasn't to be the last word, if I remember the conversations, and I think I do fairly clearly. There have been a number of modifications, and the success of each of those can be judged. But it seems to me that getting a number of people or a number of groups that have an absolute commitment to the best interests of our judicial system is healthy, and I certainly am one who will look forward to the input from them. It's a huge constitutional responsibility to appoint judges to the Superior Court. I have to believe that expanding that group of

individuals who are able to provide advice and are willing to provide advice is a step forward.

• (1650)

Mr. Rob Moore: Thank you.

Can you speak a bit, Minister, about the change that eliminated the "highly recommended" category? You did mention in your speech that there was some blurring of the line between recommended and highly recommended and that there was perhaps inconsistent application. Can you speak to how having simply not recommended and recommended is going to improve your ability to make these decisions?

Hon. Rob Nicholson: I can understand why the distinction between the two "recommended" categories was eliminated. The recommendations that we were receiving across the country were very uneven. In some provinces the majority of those recommended also came as highly recommended. In some provinces a fairly small minority of lawyers received the "highly recommended" designation. At the same time, we noticed that you were much more likely to be highly recommended if you came from a larger law firm or one of the larger cities across Canada. I'm at a loss to explain why that would be, but I'm not at a loss to make the point that people who come from small communities and small law firms are just as qualified to serve on the bench in this country as are those from larger firms.

So inasmuch as there weren't any objective criteria to say why a person was highly recommended as opposed to just recommended, it was deemed appropriate to eliminate that particular category.

Mr. Rob Moore: Thank you.

The Chair: Thank you, Mr. Moore.

Ms. Jennings.

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

How much time do I have, Chair?

The Chair: You have approximately five minutes.

Hon. Marlene Jennings: First, did you or your predecessor consult our judiciary and the Canadian Bar Association prior to changing the composition of the committee from seven positions to eight—having four appointed by the federal government instead of three? You've made the point very well that over time there have been modifications to the way the federal government appoints judges, and many of those have been very welcome. My understanding is that in most of those cases, the government actually consulted the judiciary and the bar association before moving forward to make those changes.

Second, you've said that of the 13 judicial advisory committees, 12 are up and running. So you've gone forward with the change that your predecessor made to increase from three to four the number of members appointed by the federal government. One of those four members is from law enforcement. How many of the 12 members from law enforcement come from the Canadian Association of Chiefs of Police—are high-ranking police officers who have the managerial skills and are there to put into place performance evaluations, operational procedures, and all of that?

You've stated on the one hand that you don't really have any statistics on the appointments made by the government preceding you. But in your response to Mr. Moore you talked about how a number of those who were highly recommended appeared to come only from large firms in some provinces, whereas in some provinces that wasn't the case. So I'd like you to bring forth all of the statistical information you have—without the names, obviously—on the recommendations that were made over the last five years under your government and the previous government. Of the 13 JACs, how many were highly recommended, how many were recommended, and how many were not recommended? Which cities did those lawyers come from? Were they large cities? Did they come from large firms, small firms, or were they sole practitioners? You don't have to give us the names, so no personal information will be violated.

You've made those points several times in your responses to members of this committee, so you obviously have this information. I would like you to send that information to the members, through the chair.

Thank you.

• (1655)

The Chair: The minister will respond.

Hon. Rob Nicholson: I think I have the list, Mrs. Jennings. First of all, you asked whether I consulted. No—

Hon. Marlene Jennings: Or your predecessor.

Hon. Rob Nicholson: You made the point that previous justice ministers consulted widely on these. Either they did or they didn't. The first time, in 1988, there were extensive consultations. In 1991 the decision was made by the federal Minister of Justice. There were two changes to the process under the Liberal administration. I believe there was consultation on one of those cases, and on the other cases the decision was made by the federal Minister of Justice.

Hon. Marlene Jennings: Thank you.

Did you or your predecessor consult about this change?

Hon. Rob Nicholson: In this case, the decision was made by the previous Minister of Justice.

Hon. Marlene Jennings: Did he do any prior consultations?

Hon. Rob Nicholson: I can't speak for him, Mrs. Jennings, but I understand that he made the decision. I'm not in a position to say how he arrived at that decision.

Hon. Marlene Jennings: If you read some of the newspaper reports and the statements of Beverley McLachlin, Chief Justice of the Supreme Court of Canada, when your predecessor made the announcement that he was going to change the composition, she rebuked him publicly for compromising the independence of the panel—or the JACs, as you call them—and the fact that there had been no prior consultation. That's public knowledge. So how can you as minister not be aware of that, when you were the House leader at the time and therefore responsible for guiding the government's agenda in the House?

But I would ask you to move on to the question of whether there are police chiefs on any of the JACs.

Hon. Rob Nicholson: Madam Jennings, I indicated the decision was made, as is the prerogative of the justice minister. That decision was made by the previous justice minister. And again, the history of this is that sometimes the Ministers of Justice have consulted widely or narrowly, and it's up to each individual Minister of Justice.

Hon. Marlene Jennings: You're correct. I just wanted to know whether or not he had.

Hon. Rob Nicholson: With respect to where appointments come from, you quoted me saying that the highly recommended appointments were coming only from large law firms. I didn't say that. I said there was a tendency that was noticed that it would be more likely that a larger firm from a larger community would be highly recommended. It was not necessarily exclusive, but there was a tendency in that regard.

With respect to the statistics—

Hon. Marlene Jennings: May I interrupt, Mr. Minister?

Hon. Rob Nicholson: By all means.

The Chair: Order, Ms. Jennings.

Can the minister finish?

Hon. Marlene Jennings: The minister is not actually answering the specific.... I did not say that he made that statement. What I said was that in response to Mr. Moore, he made the point that the highly recommended tended to come from.... So I'm asking you to make—

Hon. Rob Nicholson: Oh, okay. I apologize. I didn't actually hear the word "tended".

The way I heard it—and that could be my fault—you said that I said that they were coming from there, and I believe there is a tendency. If I didn't make that clear, I want to make it clear.

Hon. Marlene Jennings: Thank you.

But the point is, whether you made a categorical statement or you said "tended to come from", it would have to be based on some fact. That would mean you actually have some statistics on the issue in order to say "it tended", or "it did".

You're saying you said "it tended". You have some facts. I'm asking you to provide to the committee, through the chair—

Hon. Rob Nicholson: I've not made a statistical analysis of it, Madam Jennings. Our observation, looking at these, was that there was a tendency on both those counts. There was a tendency, for instance, in one province to have a fairly substantial majority of the individuals get the highly recommended category, whereas in other provinces there would be a very low percentage of the highly recommended.

I'm informed that this information would be accessible from the Commissioner for Federal Judicial Affairs. I'm sure, with a request by your committee, he would be glad to provide any information like that.

•(1700)

Hon. Marlene Jennings: Thank you.

The Chair: Thank you, Ms. Jennings.

Hon. Marlene Jennings: And the third question, are there chiefs of police on any of the 12?

Hon. Rob Nicholson: That's already up on the website, and I would be glad to forward to you a copy of those individuals. It is already public knowledge.

The Chair: Thank you, Ms. Jennings.

Minister, the time has actually concluded, but would you possibly make yourself available to us for another ten minutes?

Hon. Rob Nicholson: If that's the wish of the committee.

The Chair: I wanted to check with your time first, of course.

Hon. Rob Nicholson: Okay. I am due at another committee, but if we could perhaps confine it to five minutes, Mr. Chairman, I think that would be fine.

The Chair: Five minutes.

Mr. Thompson, you have a question you wanted to pose, and then Mr. Lee immediately after, moving right along.

Mr. Myron Thompson (Wild Rose, CPC): First of all, I want to congratulate you, sir, on your appointment, and I wish you the very best in your tasks.

I was also very pleased to hear you state that it's good to have the police input on these committees you've talked about. I certainly support that highly, because they are part of our legal system.

I'm quite concerned about another group of people, and I'm just going to throw this out there. You can comment any way you like, because it really isn't a question. Last week there was a decision made in a court in Calgary—and our chairman would be aware of that—where the victim was knifed to death and then his body was dismembered and scattered wherever. The courts determined that it was manslaughter and not murder, and the victims are highly upset over this. Immediately the phones started ringing, and people like me were asked what we were going to do about these blanketly-blank judges and their decisions in these types of cases.

The group I'm talking about are victims. There are thousands of victims out there who belong to organizations. They're grouped, they're working together to try to bring about a system that answers their pleas more than what has been happening in the past.

No one can deny that we have a lot of people out there, those who pay the bills to keep the legal system going, who would like to see some good justice, and they feel it's not happening. I'm just wondering if they shouldn't also have some input in some of these decisions.

We've talked about the judiciary and we've talked about the police. How about the victims? I really put a high emphasis on their portion and the role they play in this whole criminal aspect.

Hon. Rob Nicholson: Thank you, Mr. Thompson.

In the premise to your question, you mentioned a case. I don't make any comment about cases that are before the court.

But you would be aware that in the last election our party promised a victims ombudsman. I believe that is a step in the right direction, in making sure the rights of victims are heard within our system.

I'm keeping it short, Mr. Chairman. I believe Mr. Lee would like to have a question.

The Chair: Mr. Lee.

Mr. Derek Lee (Scarborough—Rouge River, Lib.): Thank you for the additional time, Minister, and congratulations on your appointment.

•(1705)

Hon. Rob Nicholson: Thank you very much.

Mr. Derek Lee: You won't be a stranger to any of these issues.

I want to first express regret with the decision of your predecessor not to consult with Parliament, with this committee, which has done a significant amount of study on judicial appointments over the last few years. It was conspicuous, and it is regrettable that in the appointment of the judiciary, which of course is unelected, the minister couldn't have taken some time to check with Parliament to see the lie of the land.

In any event, I want to give a second congratulations to Mr. Bachand for trying to articulate, as a non-lawyer, something I know the minister will be familiar with, and that is that police could not be chosen as members of a jury, as the police are not impartial; they are not disinterested.

I'm wondering how you respond to what I will say now. The government has chosen to put police, when they're not disinterested—as between the crown and an accused—on the committee that will play a major role in the selection of judges. What about this concept of picking a judge who will decide on police cases in the future? That, to me, gives an appearance of interest, of partiality, of trying to balance something that wasn't broken. Could you comment on that appearance, articulated by Mr. Bachand and restated by me? Please tell us what was so broken that it had to be fixed.

Hon. Rob Nicholson: First of all, with respect to your comment, which is quite correct, a police officer cannot serve on the jury. That's just one of the functions of the system of law we have, that none of the lawyers who also serve on the judicial advisory committee could serve on a jury, nor could the judge who sits on the committee. The judges themselves, of course, are precluded. So all the members on a judicial advisory committee will never have that opportunity. I believe it even extends to their spouses, if I'm not mistaken. None of them will be...because of their involvement. I think you hit upon it. They're all very involved with the judicial system in this country. They all play different roles. I believe they all play an important role, but none of them will be able to serve on a jury.

That being said, I believe all of them have a positive contribution to make. These committees have worked well. It doesn't mean a committee can't be improved. And it doesn't mean the minister can't get additional input into the use of his or her discretion. I think that's what we have here.

I don't look at it, as some people have suggested, as some sort of an adversarial system, or that one group is more interested in justice in this country as opposed to another. I don't agree with that. I believe, in a sense, we're all in this together. Certainly all those individuals who serve on a judicial advisory committee I believe have, should have, and will continue to have the best interest of the judicial system of this country. And I believe it will work very well.

The Chair: Thank you, Mr. Lee.

Thank you, Minister, for attending the committee.

Hon. Rob Nicholson: My pleasure. Thank you very much.

The Chair: The meeting is now adjourned.

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