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Tuesday, November 6, 2012

—
Chair

Mr. Dave MacKenzie

Standing Committee on Justice and Human Rights

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• (0905)

[English]

The Chair (Mr. Dave MacKenzie (Oxford, CPC)): I call the meeting to order.

Pursuant to Standing Order 108(2), we are undertaking study of the subject matter of clauses 210 to 218, respecting the Judges Act, of Bill C-45, A second Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures.

Appearing before us is the Honourable Ron Nicholson.

Ms. Françoise Boivin (Gatineau, NDP): I want to raise a point of order.

The Chair: Go ahead.

[Translation]

Ms. Françoise Boivin: Thank you, Mr. Chair. I have a point of order this morning. Once we have reviewed the documents that have been submitted to us—

[English]

I would like to assert that this Standing Committee on Justice lacks the authority from the House to propose amendments to Bill C-45 or to issue a report to the Standing Committee on Finance, and that therefore we should not hold this farce of a clause-by-clause hearing.

I would like to remind this committee of where we as a committee derive our authority to do the things we do. We derive our existence and our authority from the House of Commons itself. The House creates our committees specifically through Standing Order 104, and the Standing Orders further regulate how our committees are constituted and governed under Standing Order 106. The House also sets out the specific mandate of each standing committee under Standing Order 108.

An excellent summary of this regime can be found in *House of Commons Procedure and Practice*, second edition, commonly called O'Brien and Bosc, on pages 960 and 962, which say, referring to standing committees:

They are empowered to study and report to the House on all matters relating to the mandate, management, organization and operation of the departments assigned to them. More specifically, they can review:

the statute law relating to the departments assigned to them;

the program and policy objectives of those departments, and the effectiveness of their implementation thereof;

the immediate, medium and long-term expenditure plans of those departments and the effectiveness of the implementation thereof; and

an analysis of the relative success of those departments in meeting their objectives.

In addition to this general mandate, other matters are routinely referred by the House to its standing committees: bills, estimates, Order-in-Council appointments, documents tabled in the House pursuant to statute, and specific matters which the House wishes to have studied. In each case, the House chooses the most appropriate committee on the basis of its mandate.

[Translation]

The key word is still the "House".

[English]

Please note that all abilities cited in this citation flow from the House, not from another committee.

So let us look at what we have here with Bill C-45. On October 18 this year, following the adoption of ways and means motion number 13, the Minister of Foreign Affairs moved on behalf of the Minister of Finance that Bill C-45 be read a first time and be printed. On October 24 the Minister of Public Safety moved that Bill C-45 be read a second time and referred to a committee, and after using time allocation, the debate on the second reading of Bill C-45 ended with the passage of the following motion on October 30 this year.

The motion, which passed, read: that Bill C-45, a second act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures "be now read a second time and referred to the Standing Committee on Finance".

As a matter of record, *Hansard*, on October 30, specifically quotes the Speaker as saying "I declare the motion carried. Accordingly, the bill stands referred to the Standing Committee on Finance"—immediately following the passage of the motion in the House.

The reference of this bill to committee was always only to the finance committee. The motion passed in the House only referred to the finance committee. This is important. Under the legislative process that the House of Commons follows, a bill can only be referred to a single committee, the committee assigned by the House itself. This does not preclude any other committee from studying the subject matter of the sections of this omnibus bill.

The official opposition has always advocated that this bill be split up and effectively studied. The official opposition actually proposed a series of motions in the House to split this bill, using the same method as was used to pass Bill C-46, the MP pension plan provision. Sadly, the House did not adopt those motions.

Those motions would have allowed this committee to actually study the separate bills, which would have been referred to them. Then each committee could legitimately hold hearings, calling a variety of witnesses with multiple viewpoints, and, after hearing these points of view on the sections of the bill referred to them, could have formulated reasoned amendments for debate and decision in a clause-by-clause meeting. Then the decision of the committee would be reported to the House in due course.

Traditional practice of committees to allow witnesses to be called from a variety of sources is being overridden by this fake belief that our committee will somehow have a meaningful clause-by-clause consideration of the parts of the bill referred to us by the finance committee. We are being asked by the finance committee, not the House, to study and propose amendments to a bill on such a short timeline that there is no opportunity for reasoned debate. What we have here is a bastardization of the process.

I wish to relate to you all one line from O'Brien and Bosc, which I will repeat later on, on committee reports. On page 985, it states:

In the past, when a committee has gone beyond its order of reference or addressed issues not included in the order, the Speaker of the House has ruled the report or a specific part of the report to be out of order.

● (0910)

[Translation]

In the past, when a committee has gone beyond its order of reference or addressed issues not included in the order, the Speaker of the House has ruled the report or a specific part of the report to be out of order.

[English]

I submit to you, as the chair, that the finance committee is unable to refer any parts of Bill C-45 to anyone. Its only duty is to study this bill and to report back to the House with or without amendment.

Let me review quickly how a committee is supposed to deal with a complex bill referred to it by the House after a second reading.

Normally after passage at second reading, the committee that received the bill would organize its time, call for a variety of witnesses based on the lists provided by the recognized parties in proportion to their representation at the committee, hear the witnesses, formulate amendments, schedule a clause-by-clause meeting, call each clause, hear amendments to the clauses, vote on the amendments and the clauses, and then vote on the bill. The results of these decisions would then be reported to the House.

The House, in its wisdom, has even provided a mechanism to allow for variation on this normal progress of a bill through committee, which it called a "motion of instruction". If I can call again on O'Brien and Bosc, this time under their chapter on the legislative process, on page 752, it states:

Once a bill has been referred to a committee, the House may instruct the committee by way of a motion authorizing what would otherwise be beyond its powers, such as, for example, examining a portion of a bill and reporting it separately, examining certain items in particular, dividing a bill into more than one bill, consolidating two or more bills into a single bill, or expanding or narrowing the scope or application of a bill. A committee that so wishes may also seek an instruction from the House.

If the government were interested in following the rules of this place and wanted to have a variety of committees study this bill, then

it could have moved to instruct any variety of these committees to conduct a review of the portions of the bill, allow amendments to those portions, and report them separately.

The power to authorize this variance in the legislative process rests with the House of Commons, not the finance committee. Because we have not received any order of reference from the House and because there has been no instruction from the House subsequent to the passage of the bill at second reading, I submit to you that it is out of order for this committee to have any vote on any amendment relating to Bill C-45.

I also submit to you that this committee has the right to initiate a study on the subject matter, but we don't have the authority to report to another committee, only to the House.

While committees have the power to meet jointly with other committees, a report from a joint committee must report only to the House, not to another committee.

I would like to quote again O'Brien and Bosc, from page 983, wherein referring to a joint committee it says:

If a report is adopted during a joint meeting, each committee may present to the House a separate report, even though the two reports will be identical.

I also refer you to the same chapter, on pages 984 and 985, where it covers how a committee reports to the House. It says:

In order to carry out their roles effectively, committees must be able to convey their findings to the House. The Standing Orders provide standing committees with the power to report to the House from time to time, which is generally interpreted as being as often as they wish. A standing committee exercises that prerogative when its members agree on the subject and wording of a report and it directs the Chair to report to the House, which the Chair then does.

Like all the powers of standing committees, the power to report is limited to issues that fall within their mandate or that have been specifically assigned to them by the House. Every report must identify the authority under which it is presented. In the past, when a committee has gone beyond its order of reference or addressed issues not included in the order, the Speaker of the House has ruled the report or a specific part of the report to be out of order.

● (0915)

We have rules for committees that show that committees receive their authority from the House. They also say that committees report their information to the House. The request for us to somehow become subcontractors to shoddy work by the parliamentary assistant to the Minister of Finance should not be given any credence.

I suggest to you, Mr. Chair, that our job is to hear witnesses on Bill C-45 and to report findings to the House.

I do not believe we should entertain any amendments to Bill C-45 because the bill was never envisioned by the House as being dealt with by any committee other than the finance committee.

I furthermore submit that it flies in the face of all of our basic principles of being a committee if we agree that committees should receive their mandates from another committee and should then report to that committee, rather than to the body that gives us authority, the House of Commons.

[Translation]

I refer you to the letter that authorizes us to carry out this farce this morning, this letter that was sent by the chair of the—

[English]

Standing Committee on Finance.

[Translation]

The chair, James Rajotte, wrote the following to you, Mr. Chair:

Our Committee is currently studying Bill C-45, A second Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures. Please find attached a motion adopted by the Standing Committee on Finance on October 31, 2012, inviting your Committee to consider the subject matter of clauses 206 to 209 of Bill C-45.

These clauses concern the Judges Act and certain amendments.

The letter continues:

The adopted motion also invites your Committee, if it deems it appropriate, to provide us with recommendations, including any suggested amendments....

Therefore, I invite you to send me recommendations, including any suggested amendments, of your Committee by letter, in both official languages, no later than 5 p.m. on Tuesday, November 20, 2012. Our Committee will consider them during its clause-by-clause consideration of the Bill.

Finally, if your Committee decides not to suggest any amendments, please notify the Clerk of the Standing Committee on Finance in writing as soon as possible.

I thought I had seen everything, under this government. But receiving mandates from other committees is taking the farce of consultation a little too far. I detest wasting my time, given all the work that we are going to be asked to do.

Usually here, at the Standing Committee on Justice and Human Rights, we do serious work, and we take our mandates seriously. We make serious recommendations and propose serious amendments, and we do not take part in a joke of a consultation that is utterly meaningless.

This is the point of order that I wanted to raise to the committee and to you, Mr. Chair, in this context.

I'm sorry, Mr. Minister. I didn't want to make you lose your time. But these are extremely important issues. Procedures apply in this House, and if we start cutting corners to give a clear conscience to the government, which refused to divide its mammoth bill, that isn't our problem. We do not have to take part in this monumental farce.

Thank you.

[English]

The Chair: Thank you.

Madam Findlay

Ms. Kerry-Lynne D. Findlay (Delta—Richmond East, CPC): Thank you, Mr. Chair.

I'd like to begin by reminding my honourable colleagues what this meeting was all about. Our committee was given the task of reviewing division 9 of the budget implementation act 2 and providing any recommendations for amendments we may have to the Standing Committee on Finance.

It is true that the amendments we recommend must be within the scope of the section at hand. However, I note that what we have been asked to do is fairly narrow in scope; it's a fairly narrow issue here at the justice committee, which is to look at the fourth quadrennial Judicial Compensation and Benefits Commission and the reaction of

government to it as it is laid out in the bill. We do have the power to make some amendments.

I would also like to remind all members that committees are the masters of their own agenda and that we can unanimously agree to study whatever we wish to study.

We have the minister with us today. I recall that we had a meeting last week where we had the referral before us. We agreed that we would be meeting on this today. We asked the opposition if they felt they needed the minister here or whether officials would be sufficient.

You said you wanted the minister here. Because you wanted that, we are sitting at a different time than we usually sit—and as it fits the minister's schedule—to accommodate your request to have the minister here.

It seems to me that we as a committee agreed on that schedule and we knew the terms of reference when we did so. At your request, the minister has appeared. It would be both helpful and appropriate to hear from him, and we should move forward.

● (0920)

The Chair: Thank you.

Mr. Scott.

Mr. Craig Scott (Toronto—Danforth, NDP): First, we don't disagree that we should hear the minister and we don't want to inconvenience him any longer, but we do want to make sure it's understood that the process we're intended to undertake is ultra vires the rules of the House. It takes some time to figure all that out, and we regret that we didn't have all this at the tip of our fingers when we were meeting the last time.

Second, if there's any committee in this House that needs to take the rules of the House very seriously, it's the justice committee. I believe most of the people around this table have legal training. They would have understood, to the sentence, the case being put forward by Madame Boivin. It's pretty much an iron-clad case that the referral from Finance asking us to do what they've asked us to do has no basis in the rules of the House.

The last thing is that we have to understand the unhelpfulness of what we've been asked to do. Normally, when we go into clause by clause study, for the amendments process, we've already heard witnesses, and the discussion and the debate take into account that we've heard the witnesses and the amendments reflect that collective knowledge.

Here, if we did that, we're passing it on to another committee that has not had the benefit of hearing witnesses, and at the same time it is a committee that will be subject to the power of its chair to limit debate on each clause-by-clause discussion to five minutes per party.

We have a process set up that's problematic from a procedural perspective, and that is going to be problematic from the perspective of the committee that ultimately has to decide on the amendments according to their terms, which we don't accept.

I wanted to add that latter point to make sure it was clear, Mr. Chair, that this is not merely a procedural matter. It's certainly a constitutional matter when it comes to the rules of the House. Please don't understand this as just procedural. It also has an impact on the quality of the work being asked of us.

Thank you.

The Chair: Thank you.

Mr. Cotler.

Hon. Irwin Cotler (Mount Royal, Lib.): Mr. Chairman, I understand the reason my colleague brought up the point of order. The matter has not been referred to us by the House, but by another committee, and the clauses and amendments are before that committee. That is partly the reason why what I put before this committee this morning were motions, not amendments.

In that context, and having heard my colleagues now, perhaps we might listen to the minister and debate these issues. I think we can address the issues of motions even though the issue of amendments might have been of a different character.

The Chair: Thank you, Mr. Cotler.

I did listen closely to what you had to say, and I've certainly taken advice from the clerk, but I do not have the letter in front of me. We've asked for it to come over.

First, I would say we weren't tasked with anything from the other committee. We were asked to look at it, to make recommendations, and to send back proposed amendments. We're not doing a clause-by-clause this morning. It's a study of the subject matter of clauses 210 to 218 of Bill C-45. We were asked to do this. As a committee we could have said at the last meeting that we did not wish to do it. The committee decided that they did wish to hear the minister, and we set aside today for it.

On that basis, I believe that the intervention does fail in that this is not going to be reported back to the House. It is only by recommendation that we send it back to the finance committee. As I say, we could have decided as a committee last week that we didn't wish to do it, but we did go ahead with it.

I think we should hear from the minister.

• (0925)

Hon. Rob Nicholson (Minister of Justice and Attorney General of Canada): Thank you, Mr. Chair.

I'm here today to speak to you about the amendments to the Judges Act proposed by division 9 of Bill C-45, the Jobs and Growth Act.

These amendments will implement the government's response to the report of the fourth Judicial Compensation and Benefits Commission, or the quadrennial commission, as it's often called. Counsel for the government and the judiciary cooperated effectively to collect the necessary data to put before the commission. The commissioners conducted the hearings in an effective and timely manner and delivered their report well before the statutory deadline. The government released its response to the commission's report more than a month in advance of the statutory deadline for a

response and introduced the necessary implementing legislation in Parliament six days later.

[*Translation*]

As you know, judicial compensation is governed by constitutional provisions and principles designed to ensure public confidence in the independence and impartiality of the judiciary.

[*English*]

Section 100 of the Constitution Act of 1867 requires that Parliament rather than the executive fix the judicial compensation and benefits that are set out in the Judges Act.

In addition, the Supreme Court of Canada has held that before any changes to judicial compensation can be made, the adequacy of judicial compensation must be considered by an "independent, objective and effective" commission. As a result, section 26 of the Judges Act provides for the establishment of the Judicial Compensation and Benefits Commission every four years, with a mandate to inquire into and make recommendations on the adequacy of judicial compensation and benefits for all federally appointed judges.

This inquiry takes place within a statutory framework set out in the Judges Act, and recommendations on compensation and benefits must generally address the criteria set out in the act.

The current commission was convened on September 1, 2011, and was composed of Mr. Brian Levitt, who served as chair, Mr. Paul Tellier, and Mr. Mark Siegel. The Levitt commission received submissions from all interested parties and held hearings at the end of February 2012. It delivered its report on May 15, and the report was tabled in Parliament two days later. The government's response was released on October 12, and the amendments to implement that response, which are before you today, were introduced in Parliament six days later as part of Bill C-45.

In keeping with the commission's key salary recommendation as well as with the government's fiscal commitments and priorities, the status quo with respect to judicial salaries will be maintained. That means there will be no increase to judicial salaries beyond the statutory indexing under section 25 of the Judges Act of the current quadrennial period of April 1, 2012, until March 31, 2016. Puisne judges of the trial and appellate courts will continue to receive the same salary, and those who fulfill additional functions such as chief and associate chief justices and the senior judges of the territorial trial courts will continue to receive a salary that reflects their additional managerial responsibilities.

[*Translation*]

In addition to setting judicial salaries for the next four years, these amendments will also introduce a few minor changes to ensure that judges who perform similar roles and responsibilities receive similar benefits.

[English]

All retirement benefits currently enjoyed by chief justices will be extended to the three senior judges of the territorial trial courts. These amendments will allow senior judges to step down from their duties as senior judge, after having performed them for at least five years, and to return to being a puisne judge or to elect supernumary status, if they're eligible, and to receive a pension based on the salary of a senior judge on retirement. Since the territorial senior judges perform the same functions as do chief justices for their courts and are paid the same salary, it seems only fair to provide them with the same retirement benefits.

In the same spirit, these amendments will provide Ontario's senior family law judge with the same representational allowance of \$5,000 per year that all Ontario regional senior judges receive. Again, I think this change is only fair since the senior family judge performs functions equivalent to those of senior regional judges.

The amendments before you today will also make some changes to the judicial compensation commission process in order to improve its timeliness and effectiveness. More specifically, these amendments will reduce the government's time to respond to a commission report from six months to four months and will require the introduction of implementing legislation within a reasonable period. Currently, once appointed, the commissioners have nine months to receive submissions from all interested parties, hold public hearings, and produce a report outlining their recommendations. The government then has six months from the date on which the commission's report is received to respond.

The judicial compensation and benefits process, therefore, currently unfolds over a period of a year and a half.

• (0930)

[Translation]

The first of these changes, which reduces the government's time to respond by two months, will simply help shorten the process and bring it to a faster conclusion.

[English]

You will note that the amendments also pushed forward the start date for future commissions by one month, from September 1 to October 1. This small change in the timeline of the process is being made because the government is committed to this process and wants to ensure that the deadlines can be reasonably met. Shortening the government's time to respond by two months within the current timelines would make the deadline for the government's response October 1. To coincide with cabinet's ordinary meeting schedule, this clause postpones the commission process by one month, making November 1 the deadline for the government's response.

The second change, introduction of legislation within a reasonable period, will simply codify a requirement that already exists in case law. This serves to further underscore the government's commitment to this process, ensuring that future commission processes function as effectively as have the 2011 and 2012 processes.

Mr. Chair, that concludes my remarks, but I would of course be pleased to answer any questions you may have.

I appreciate being joined today by Judith Bellis and Patrick Xavier from the Department of Justice.

The Chair: Thank you, Minister, and thank you to your officials for being here also.

We'll begin with Madame Boivin.

[Translation]

Ms. Françoise Boivin: Thank you, Mr. Minister.

In their report, the Judicial Compensation and Benefits Commission very clearly stated that the government's proposals, in other words, what you had really put in place, would lead to a reduction in certain salaries of judges. They recommended rejecting your proposals, and you accepted that recommendation. You accepted the commission's vision on that point.

The commission also recommended that appeal court judges have a salary that is 3% higher than that of trial court judges, given the importance and definitive nature of their decision. You did not accept that recommendation.

Why take the first recommendation but not the second?

I have another, perhaps more pointed, question. Do you think it is appropriate that the government is interfering in the recommendations, even though you have the power to do so and must justify your decisions? Aren't you afraid that this goes against the idea of the independence of the judiciary?

[English]

Hon. Rob Nicholson: I don't. I think this is a very fair process. The responsibility to set the salaries is very clearly set out in the Constitution of this country. That being said, we accepted the recommendation with respect to no salary increase, we're maintaining the statutory indexation that is there, and with respect to making a change to appeal court judges, there has been no unanimity in this. Indeed, the commission report of 2003 made the very point that there was not unanimity on this.

Again, the criteria that had been set out for us in the Judges Act specifically indicated the need to attract outstanding candidates for the judiciary. We've had no trouble attracting candidates for the Court of Appeal. There is usually a considerable number of people who are prepared to accept that, so that hasn't been a problem at the current salary levels, which are the same as that of the trial court judges.

• (0935)

Ms. Françoise Boivin: Do you feel it would pass the test that is required from the government when they don't go according to a recommendation of the commission? The test that was set up in the Supreme Court of Canada made sure we have that commission, so we separate the political from the independence of the judges.

Hon. Rob Nicholson: I think it does. I mean, these are after all recommendations. As you can see from the government's response, they were very carefully considered. The main recommendation of the commission was accepted by the government and a number of other recommendations have been accepted. In my opening remarks I indicated some of the anomalies that appear—for instance, with respect to senior judges in the territories, or a gap in terms of the head of the Family Court division in Ontario, and some changes with respect to pensions. It seems to me that for the most part the government has accepted the recommendations. But again, they are recommendations, and the responsibility, according to the Constitution, lies with the government.

[*Translation*]

Ms. Françoise Boivin: I want this to be clear. As Minister of Justice, do you think the commission's recommendations are nothing but recommendations and may be quashed by the government, regardless of the reason?

That is not my understanding of the Supreme Court decision in the context of the reference regarding the remuneration of provincial court justices in Prince Edward Island and the Judges Act, which was subsequently amended. It states clearly that the government must be willing to justify, before a court of justice, as needed, any decision to reject one or several recommendations provided in a report from the Judicial Compensation and Benefits Commission.

So, these are more than simple recommendations.

[*English*]

Hon. Rob Nicholson: The Supreme Court of Canada has stated expressly that the commission's recommendations are not binding and may be rejected by a government for valid reasons. That being said, the court set out a test to determine whether the reasons given by a government in its public response for rejecting a recommendation are valid. In this case, the government is confident that its reasons, as contained in the report, meet that test.

The Chair: Thank you.

Ms. Findlay.

Ms. Kerry-Lynne D. Findlay: Thank you, Mr. Chair.

Thank you, Minister, for being here, and Mr. Xavier and Ms. Bellis.

In looking at the report of the fourth quadrennial commission on judicial compensation, which was released on October 12, 2012, and particularly, even in the introductory remarks of a 48-page report, I note that in reference to quotations from the P.E.I. reference case, it's very clear that Chief Justice Lamer was speaking for the court in saying:

The compensation commissions must have a “meaningful effect on the determination of judicial salaries”. Thus, while the report of a compensation commission need not be binding, at a minimum the responsible legislative or executive authority must formally respond.

It then goes on to say that if recommendations are not accepted, the government of the day should be prepared to give reasons why. But it is very clear from that Supreme Court of Canada case that the ultimate decision on judicial compensation remains, under our Constitution, with the government. Would you agree with me, Minister?

● (0940)

Hon. Rob Nicholson: I would agree with you, Madam Findlay. I generally do agree with you on all different areas as they relate to our judicial system, and I thank you for your contributions.

That being said, the report we tabled in Parliament was very carefully drafted, taking into consideration both the constitutional responsibility of the government and the guidelines as set out by the Supreme Court of Canada, and the guidelines, of course, contained within the Judges Act that set out very clearly the government's responsibility. I'm satisfied that we have met all those tests.

I recommend to anyone who is looking at this area to have a look at the government's response to the quadrennial commission. I think it's balanced and fair and certainly within the guidelines that have been set out by the courts and within the constitutional mandate that is required of the government. I think it meets it on all levels and is a very reasonable document that should have the support of everyone.

Ms. Kerry-Lynne D. Findlay: I note, and you mentioned this again this morning, Minister, that judges should be compensated in a manner that continues to attract outstanding candidates, protects judicial independence, and also respects the current need for a certain amount of fiscal restraint.

Do you believe the government's response to this report recognizes the important role the judiciary plays in society?

Hon. Rob Nicholson: I think it does. Again, we're in a time of fiscal restraint, as you're aware, and at the same time we want to promote, maintain, and safeguard the judicial independence of the judiciary in this country. That's an important priority for everyone involved in this area.

The main recommendation was that the statutory indexes would continue. That maintains the salary levels of judges at the Superior Court of Justice level without the erosion that inflation inevitably would take on it. I think that's a fair way to continue to do that.

These commissions give the opportunity to correct some of the anomalies that have been brought to our attention through the quadrennial commission I just mentioned, with respect to senior judges, the head of the Family Court in Ontario, and some changes with respect to retirement.

I think it gives us all a good opportunity to have a look at that to make sure we're maintaining fairness. In answer to your original question, maintaining the statutory indexing that's set out in the Judges Act is reasonable, and indeed that was the recommendation of the quadrennial commission.

Ms. Kerry-Lynne D. Findlay: With the short time I have left, I note in looking through the report, which is very thorough, that there is a list of the public hearings and a list of the stakeholders who were spoken to. There was clearly extensive consultation. In the response from the government, which is also a thorough and detailed response, the reasons for accepting or not accepting the recommendations were very thoroughly laid out. Would you agree that it's a very complete response?

Hon. Rob Nicholson: It's important to have a complete response. This is a very important process, and I don't have to underline that for you. This is the second quadrennial commission that I have been involved with, and I believe it is and was important to have a complete response.

We take the process seriously, as we should. Again, I invite people to have a look at the government's response on this. I think it's well reasoned and it's complete, and that is as it should be. I think that's the fair way to do that, and that's exactly what we've done in this case.

• (0945)

The Chair: Thank you.

Mr. Cotler.

Hon. Irwin Cotler: Thank you, Mr. Chairman.

I want to also express my appreciation for the minister and his officials for being with us today to discuss the matter of judicial compensation set forth in the second budget implementation act, Bill C-45.

Minister, as you are aware, section 4.1 of the Department of Justice Act stipulates that bills must be checked for compliance with the Canadian Charter of Rights and Freedoms. My question is, by what standard was this bill vetted for charter compliance?

Hon. Rob Nicholson: All bills that are drafted by the Government of Canada are vetted to ensure they comply with the Constitution of this country. That is as it should be.

Hon. Irwin Cotler: No, I understand the requirement, Minister, that is set forth in the Department of Justice Act, but the reason I raise the question of the standard that is used is that a previous witness from the Department of Justice said the standard is one that is—and I quote—“manifestly unconstitutional and could not be defended by credible arguments”. Others have said—and I quote—that it's one of “whether or not a credible Charter argument can be made”.

I'm asking your opinion because I don't think that you yourself have shared your views on what the appropriate standard would be in this regard.

Hon. Rob Nicholson: Well, the standard is that we comply with all the constitutional documents, be it the charter or the Canadian Bill of Rights. We satisfy ourselves that all legislation is in compliance. I think that has been the procedure of this government and previous governments, and that will continue.

Hon. Irwin Cotler: With respect to the legislation before us, Mr. Minister, has this in fact been checked with regard to compliance with the charter? If so, was a different standard used with regard to this particular piece of legislation regarding judicial compensation?

I'm only seeking to appreciate...because under section 4.1, as you know, there's a requirement for a report of “inconsistency” where one exists. Has there been a report prepared for this bill? If so, when will it be tabled?

Hon. Rob Nicholson: Again, I can't tell you anything more than I've already told you. We comply with the tests that have been laid down.

I've indicated I think on a couple of occasions, to Madame Boivin and Ms. Findlay, that in my opinion this completely meets our constitutional responsibilities as set out in the Judges Act and in the Constitution Act of 1867.

I'm not quite sure exactly where you're driving this, Mr. Cotler, but I believe this is in complete compliance with the Constitution of this country, as I believe all the legislation we have tabled before Parliament is. That's a government responsibility.

Hon. Irwin Cotler: The reason I'm asking, Mr. Minister, is that we have not had any tabling of the opinions that the legislation is constitutional. The Department of Justice Act mandates what I might call a constitutional seal of good housekeeping approval. I'm just saying, will this be tabled with respect to—

Hon. Rob Nicholson: I generally don't table legal opinions or legal advice. As the spokesperson for the government in this area, I've indicated that this bill, as with all the other pieces of legislation we've tabled before Parliament, in my opinion is compliant with both the charter and the Canadian Bill of Rights.

Hon. Irwin Cotler: I still don't understand, though, Minister. If you're not tabling it, what standard is being used?

Hon. Rob Nicholson: Well, the standard as set out in the Constitution of this country.

Hon. Irwin Cotler: Because we have—

Hon. Rob Nicholson: Those who work with me are quite familiar with the British North America Act, now known as the Constitution Act of 1867. They're quite familiar with the Canadian Bill of Rights, as introduced by Mr. Diefenbaker, and with the Canadian charter, and with all other constitutional documents going back to the Magna Carta, for that matter. They're quite familiar with those. This is the advice when we draft legislation.

I'm satisfied that the bills we table before Parliament are completely compliant with the Constitution of this country. I believe this bill is, and I believe the response we have tabled with respect to the quadrennial commission is in line with that approach and that it respects the constitutional responsibilities we have with respect to judicial independence, judicial salaries, and judicial benefits.

Hon. Irwin Cotler: Minister, I'm not going to pursue it any further, other than to say that I'm still not aware of what the standard is that is being invoked with respect to the determination, under the Department of Justice Act, of compliance with the charter. I'll leave it at that, but I would hope that at some future occasion that might be shared with us.

On the compensation—

• (0950)

The Chair: Thank you.

Mr. Goguen.

Mr. Robert Goguen (Moncton—Riverview—Dieppe, CPC): Thank you, Mr. Chair.

Thank you, Minister, for appearing today.

Thanks to the witnesses.

In essence, I guess the recommendations have been reviewed. Of course, you balance them on the necessity of attracting good candidates and on the necessity of having the independence of the judiciary tempered against a background of fiscal restraint. In this case, we've gone with the status quo. That means the salaries will remain the same, subject to annual indexation.

I also note that the Canadian Bar Association and the Canadian Superior Courts Judges Association were very pleased with the results and the process. It causes me to wonder about Mr. Cotler's argument and his suspicion that somehow this could be anti-constitutional when major stakeholders such as the Canadian Bar Association and the Canadian Superior Courts Judges Association are both pleased with the results and the process. So the suspicion of anti-constitutionality...I really don't know where that comes from.

Hon. Irwin Cotler: A point of order, Mr. Chair.

There's no suspicion alleged or adduced on my part of unconstitutionality. I asked about the question because it's a constitutional requirement with regard to compliance.

What standard was used for that purpose? That's all I asked.

Mr. Robert Goguen: There's a recurring theme in the questioning, Mr. Cotler, that everything somehow has a dark, anti-constitutional element to it. I don't really think everything has that taint.

Hon. Irwin Cotler: That imputation is in the mind of the beholder.

The Chair: Not in this chair.

Let's deal with the minister.

Mr. Robert Goguen: Back on the theme of the stakeholders being so favourable and agreeable to this well-thought-out process, Mr. Pierre Bienvenu, a representative of the Canadian Superior Courts Judges Association said, "The judiciary has been concerned about delayed government responses to past commission reports", and he was pleased that the government provided its response in a timely fashion.

So again, there's an improvement in the process that's being welcomed by the main stakeholders.

Robert Brun from the Canadian Bar Association was also pleased with the government's timely response.

My question is—and it's going to be more timely, Minister—do you agree with the Canadian Bar Association and the Canadian Superior Courts Judges Association? Do you believe that our government is acting in good faith, that we're balancing the criteria, and that we're respecting the need for fiscal restraint?

Hon. Rob Nicholson: It will come as no surprise to you, Mr. Goguen, that I do agree with their comments. I was pleased to hear those comments about the tabling of our response to the quadrennial commission, as well as the recommendations we've made. As you pointed out, they picked out changes with respect to the government's response and the timeliness of any response. As you can see, we've made some modifications in that, and I think that's a good idea.

We're reducing the government's time to respond to this from six months to four months. I think that's reasonable. We put in as well that if any judicial changes are to be made, that they be introduced within a reasonable period of time. You might have situations where Parliament is adjourned because there's an election, or for any number of reasons, and it's not possible to immediately introduce legislation. I believe it was reasonable to put in there that it would be done "within a reasonable period of time" and to shorten the government's response.

Nobody wants to have these things drag on. That we move forward, have a look at the whole question of judicial salaries and benefits, and do it in a timely manner I think is welcomed by everyone. You correctly pointed out that the Canadian Bar Association and the Canadian Superior Courts Judges Association, and others, have given generally favourable comments on those changes. I think they were important to make, because it's in no one's interest if these things drag on, so I'm pleased that they're moving in that direction.

Mr. Robert Goguen: Thank you.

The Chair: You still have one minute.

Mr. Robert Goguen: Basically, the main actors in this, the Bar Association and the Canadian Superior Courts Judges Association, have been consulted. Mrs. Findlay noted that there had been extensive consultation. Of course, it's done over four years, so I guess it's only fair that we could report more quickly because it is a four-year process. I note that there has been a fair amount of consultation done with both of the main stakeholders, so it's welcome that they have both agreed that this process is improved.

Hon. Rob Nicholson: Yes, I think that's a very good point.

Ms. Findlay pointed out the extensive representations that were made to this quadrennial commission. I think it's important that all these issues be thoroughly reviewed and that they be seen to be thoroughly reviewed. I think the quadrennial commission process has worked in this particular occasion, and I have nothing but thanks to them for tabling the report, for giving me their report.

We've tried to move as quickly as possible on this at the government level, which is why I thought it a good idea to include it with this particular piece of legislation, because it moves it forward. These are important considerations. There are a number of changes that we've outlined and that you're having a look at obviously. To have that included as part of the legislation and then have it debated and discussed here I think has been very important. I think these are all positive measures and I've been pleased to be associated with them.

● (0955)

The Chair: Thank you.

Mr. Scott, go ahead.

Mr. Craig Scott: Thank you, Mr. Chair.

And thank you, Mr. Minister, for being here.

I was wondering if you could address recommendation 11 from the commission. They recommended:

...the Government and judiciary should examine methods whereby the Commission process can be made less adversarial and more effective.

I'm understanding that "adversarial" is in the technical sense of, as they say in French, *contradictoire*. I understand that the government, in its report, from my reading of it, has subscribed to this recommendation. If so, I'm wondering if you have any idea of how this might occur, how the government and the judiciary will talk about this, and what your understanding is of what problem is being perceived here in the recommendation.

Hon. Rob Nicholson: I'm always open to any type of discussion, any suggestions in this area, to make improvements. One of the challenges is that the process seems to get dragged out. You can see from their response...the proposal we're making is to try to shorten up that process, to get it moved through the system, because it seems to me that's not in anyone's interest. This is something I've heard over the years, that nobody wants things to drag on. It's a lot better system, it seems to me, than we had, as I remember, in the mid-eighties, when these things were argued before your committee here, the justice committee, and the discussions....

The set-up of the quadrennial commission I think has been a step in the right direction. It's not perfect. As you can see, we made some modifications to it in this, but, again, I've always been open to suggestions on ways of improving this process. That being said, there are parameters that have been set out by the courts, and we abide by those, and there are constitutional responsibilities in the Constitution, as well as those set out in legislation under the Judges Act. We abide by and comply with those parameters. That being said, I think this is the next step in this. But, again, no system is perfect, and we're always open to suggestions.

Mr. Craig Scott: Thank you.

I can understand by both your response and the government's answer that when it says "the Government and judiciary should examine", this is a recommendation for which you do foresee some kind of a coming together of the government and the judiciary to discuss this?

Hon. Rob Nicholson: Again—and I've made it clear over the years—I'm always open to any suggestions or recommendations that we get in these, and that would continue.

Mr. Craig Scott: Okay, thank you.

Recommendation 10, which I understand is in some sense a non-substantive recommendation, but is a procedural recommendation, states:

Where consensus has emerged around a particular issue during a previous Commission inquiry, in the absence of demonstrated change, such consensus should be taken into account by the Commission, and reflected in the submissions of the parties.

I've read the justice department's—your—response to the commission, and I have to commend it for its thoroughness. I'm just wondering on this issue of the 3% differential whether this particular point, actually a recommendation from the commission itself, loomed large in your thinking. If we are in times that the government considers to be financially straitened times, did the fact that the previous consensus was that there would be no differential weigh extra heavy in your thinking? If this was originally put into a budget bill, I'd like to think that one of the primary motivations for not accepting a recommendation of the commission really was a

financial judgment and not a substantively different judgment from the commission.

• (1000)

Hon. Rob Nicholson: I think it was a combination of a number of things. You alluded to the fact that decisions and reviews by previous commissions are of course looked at each time a new quadrennial commission is put in place. If you have a look at the 2003 McLennan commission, they addressed this issue very clearly and came to the conclusion that there would no recommendation with respect to a differential between trial and appellate judges.

That was the view they had at the present time. Again, when we came up with responses to this...one of the considerations that is set out in the Judges Act is the prevailing economic conditions in Canada, including the cost of living and overall economic financial position of the federal government. That being said, that's one of the criteria. Again, maintaining the fiscal responsibility as the Government of Canada is our responsibility. On the other hand, there are provisions within the Judges Act that ask us to look at the role of financial security of the judiciary and ensure judicial independence, and the need to attract outstanding candidates.

I'm of the opinion, and it has been my experience, that in terms of attracting qualified individuals to sit on the Court of Appeal, we have not had a problem, and there isn't a problem in Canada attracting outstanding individuals with the current salary and benefit levels, and other things that would attract people to the judiciary. It hasn't been a problem, and, quite frankly, I don't believe there is a consensus in Canada that there should be a differential. Again, as I pointed out, in the 2003 quadrennial commission they addressed it very directly and said no, they wouldn't recommend that.

The Chair: Thank you.

Mr. Albas.

This will be the last question. I think we said an hour for the minister, and we will be past that. The bells are ringing because it's 10 o'clock, not 11 o'clock, so it's for the opening of the House.

Mr. Dan Albas (Okanagan—Coquihalla, CPC): Thank you, Mr. Chair, and thank you, Minister, for being here today.

Minister, the Judicial Compensation and Benefits Commission was established by the Judges Act to conform to the constitutional requirements of the P.E.I. Judges Reference of 1997. The commission must establish every four years to conduct an inquiry and must report within nine months of its establishment. The government is required by the act to respond publicly within six months of delivery of the report to the Minister of Justice.

Could you please take some time to tell us a little bit more about the commission's mandates, and specifically which criteria must the commission take into consideration in fulfilling its mandate?

Hon. Rob Nicholson: The commission's mandate is to inquire and to report to the government on the adequacy of judicial compensation and benefits. That's the mandate. There are four criteria set out within the Judges Act that they are to take into consideration. I think I've mentioned a couple of them. One of them is the prevailing economic conditions in the country. The role of the financial security of the judiciary is the second one. There is the need to attract outstanding candidates, and any other objective the commission considers relevant. That means they can have a very broad look at all the issues surrounding the judiciary.

Again, this is a process that has worked up to the present time. The government has indicated they appreciate the work that has been done on these. These are not easy issues. As you hear, there are constitutional considerations, there are considerations with respect to legislation that's been passed in this area, there's the principle of judicial independence, and there are Supreme Court of Canada decisions that give guidelines. So there is lots to take into consideration.

As I indicated to your colleagues across the aisle, I believe our response has been very reasonable in terms of accepting the main recommendation with respect to the salaries. I believed it was important as well to bring to an end some of the anomalies that take place. For instance, on the differential between senior judges in the territories and chief justices in the provinces, making those changes with respect to part of their compensation package I think was very important to do.

As I indicated, I like the provisions helping to speed up the process, and again having the government's response within four months. There's no reason why governments can't and shouldn't focus on these issues, and we certainly have done that. Then there is the requirement that within a reasonable period of time, legislation implementing these changes would be tabled in Parliament.

I think most people having a look at this would say they like the idea that the system is moving forward and that it doesn't get stalled. I can't see why that wouldn't be in everybody's interests, so this is why those recommendations and those responses certainly appealed to me when we were putting this together. But thank you for that.

•(1005)

Mr. Dan Albas: I appreciate the answer.

One of the members, Mr. Scott, had mentioned earlier that he appreciated the fullness of the government's response to the quadrennial Judicial Compensation and Benefits Commission's report. I would like to take a moment on that. To recommendation 11 you responded that you were open to further ideas and to working with future commissions to make the process better. I think part of your answer was in regard to time, which shows respect. It was not only that the government significantly complied with a very comprehensive response, but that it did so in a timely way.

Minister, under the Judges Act, the Judicial Compensation and Benefits Commission must be established every four years beginning on September 1. It must deliver its report within nine months, so that would be June 1 of the following year. The Minister of Justice must respond publicly to the report within six months of its release, normally by December 1. You have proposed some changes, which you mentioned in your opening statement. You proposed that

the time for response to the commission's report be reduced from six to four months. It sounded as though you believed this would allow sufficient time for the development of a government response and subsequent ratification by cabinet. The question is whether by doing these changes we are going to see a better process going forward in regard to the concerns about time and other suggestions.

Hon. Rob Nicholson: I think so, just for the reasons I've indicated.

Most people would like to see this process move along, whether they're in the judiciary or not. Certainly if I were a member of the judiciary, I'd want the process to be implemented and moved forward on a reasonable timeline for the parliamentarians and the government. Nobody wants these things to drag on. We want to have some sort of a conclusion to that.

Again, as was pointed out, we have a constitutional responsibility in this area. To move forward with this is important. This is why in the government's response, as you indicated—and it's a fulsome response, as it should be—we've made some changes to the timelines, and I think that's something that's going to be well received.

The Chair: Thank you.

That ends our time.

Hon. Irwin Cotler: I also want to commend the minister and the officials for their comprehensive response. I went through this exercise, and I appreciate the minister's remarks about timing and timelines in that regard.

I have a short question, if the minister will allow, since he's here, because some time was taken up on a point of order. It bears on a motion I have.

Mr. Brian Jean (Fort McMurray—Athabasca, CPC): Excuse me, Mr. Chair. A point of order.

The Chair: Go ahead.

Mr. Brian Jean: I thought we'd finished our final round.

I was wondering if Mr. Cotler could confirm whether he tabled a legal opinion while he was Minister of Justice, or whether the Liberal government did, in relation—

Hon. Irwin Cotler: I did table a legal opinion.

Mr. Brian Jean: Do you have a copy of that today, Mr. Cotler?

The Chair: Let's deal with the matter at hand.

Hon. Irwin Cotler: I have a short question, if the minister will allow, because it does bear on a motion that it may concern.

The question is, Minister, that you indicated in your response—

Mr. Brian Jean: Excuse me, Mr. Chair. A point of order.

I'm sorry, but we have a system in this place. Mr. Cotler has had an opportunity to question the minister. I think I was next on the list for the government side. We all have privileges as members here. I haven't had an opportunity to ask a question yet, and Mr. Cotler is getting a second round. I don't think that's in order, sir.

The Chair: Fair enough.

I'm sorry, Mr. Cotler.

Thank you, Minister.

We'll take a brief break, if the minister and his officials wish to leave.

• (1005) _____ (Pause) _____

• (1015)

The Chair: I call the meeting back to order.

Ms. Findlay.

Ms. Kerry-Lynne D. Findlay: Thank you.

Mr. Chair, I propose that we go in camera at this point in time to deal with committee business. By that I mean we have notices of motion before us from Mr. Cotler. I know we have the officials with us. Perhaps it may be the will of the committee to have the officials stay through this discussion, or not, but I think at this point we should move forward with the committee business we have to do in camera.

The Chair: We need to vote on it. Those in favour?

Some hon. members: Agreed.

The Chair: We'll have to stand down for a few minutes while we go in camera.

Ms. Kerry-Lynne D. Findlay: Perhaps we could discuss whether the officials will be staying or not.

Ms. Françoise Boivin: You're the one asking to go in camera, so I guess you see something that shouldn't be said to some people around here.

Ms. Kerry-Lynne D. Findlay: This isn't a matter for debate, Ms. Boivin. We've taken the vote. We are going in camera—

Ms. Françoise Boivin: No, but you're asking a question, so I'm wondering—

The Chair: Just a minute. It is the fourth week and it's been a long session, but—

Ms. Françoise Boivin: I was just speaking to the question—

The Chair: We're going in camera, so we will clear the room in accordance with the standard rules of an in camera meeting.

Ms. Françoise Boivin: Excellent. That's clear.

The Chair: I want to thank the officials for being here. I'm sure you're disappointed you have to leave early.

[Proceedings continue in camera]

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