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● (1535)

[*Translation*]

The Chair (Mr. Richard Marceau (Charlesbourg—Haute-Saint-Charles, BQ)): Good afternoon and welcome to this sixth meeting of the Subcommittee on the Process for Appointment to the Federal Judiciary of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness. Pierre Michaud, an honourable representative of the judiciary, who is a former Quebec Chief Justice, will be with us until around 4:30.

It is an honour to have you here to give us your appreciation of the problem for which we are seeking solutions, if there is any problem, in your opinion. You have around ten minutes to make your presentation, then members will each have seven minutes to ask you questions, although they often take a little longer. You have the floor.

Mr. Pierre Michaud (Former Chief Justice of Quebec, As an individual:

Thank you, Mr. Chairman. Thank you for inviting me to appear before you here today. I must say, I was a bit surprised by your invitation. It has already been over three years since I retired as Quebec Chief Justice. I really thought I had joined the ranks of the forgotten. Returning to anonymity is hard to take, so I was quite delighted by your invitation. Given that your deliberations began quite some time ago, I assume you know the ins and outs of the current system, and in particular how the committees that review and assess candidates operate.

Canadians can rely on an independent and high-quality judiciary. The current system works fairly well. However, that doesn't mean it is perfect. In my humble opinion, some changes are desirable and would increase the likelihood of reaching the goal that any system should have of appointing the most qualified candidates. I would therefore suggest five significant changes to the current system.

The first change has to do with the types of recommendations.

As you know, the members of the committees that review the quality of candidates draw one of the three following conclusions: highly recommended, recommended or not recommended. Those conclusions, and the supporting grounds, are recorded by the committee secretary and forwarded by the Office of the Commissioner of Judicial Affairs to the Minister of Justice. When the candidate is a provincially appointed judge, the committee merely makes comments that are recorded by the executive director and forwarded to the Minister of Justice.

Before coming here this morning, I had an opportunity to talk with the chair of the advisory committee for West Quebec, the Honourable Pierre Dalphond, who is an Appeal Court judge. He told me that as of June 30, 2005, his committee had reviewed 63 candidates, of whom 12 were considered highly recommended, 16 recommended and 35 not recommended.

As an interested observer, I'm certain that in the past, not enough attention was paid to the distinction between highly recommended and recommended. I think that only highly recommended candidates should be successful, and only in truly exceptional cases where a court has a specific need should there be any departure from that rule. If the distinction serves any purpose, it's that it identifies the most qualified candidates to the minister.

So as a first change, greater weight definitely has to be given to this distinction among recommendations than in the past.

The second recommendation has to do with the makeup of the advisory committee.

As you know, the committee is made up of seven people, three of whom are chosen by the Minister of Justice of Canada. My comments should not be construed as criticism of the choice of people who are currently members of the committee after having been chosen by the Minister of Justice of Canada. That said, I don't see the need for the Minister of Justice of Canada to have three representatives on the committee. In my opinion, one would suffice. The fact that there are three of them may give the public the impression that the minister wants to have control over the committee.

I would suggest that the Minister of Justice designate only one person as a member of the advisory committee and that the deans of the faculties of law in the area in question have a representative on the committee, which is not currently the case.

The third recommendation has to do with the term of the committee.

These committees are currently set up for a period of two years. I don't think that's practical at all. The current setup leads to substantial delays in reviewing candidates. It should be a standing committee, with one-third of the members being replaced each year. That would avoid having a buildup of files between committee terms and would provide continuity of assessment.

● (1540)

[*English*]

I cannot stress enough the importance of timely appointments. There is really no reason whatsoever for delayed appointments to the bench. The reason is that we know in advance when a vacancy will occur. We know months in advance that there will be a vacancy in such a court, so having a permanent committee will facility what I would call timely appointments.

[*Translation*]

In addition, I think the assessments should be valid for three years, as was the case a few years ago. Currently, they are only valid for two years. That would reduce the burden on the committees and would basically produce the same results.

The fourth recommendation has to do with the appointment of provincial judges to the Superior and Appeal Courts.

For far too long, federal justice ministers have excluded or avoided the appointment of provincial judges, whether Superior Court or Appeal Court judges. I say this based on my experience in Quebec, because I haven't checked to see whether the same is true of the other provinces. When a lawyer is appointed to the bench, he or she is expected to produce satisfactory results. However, that can only be known for sure once the person begins working as a judge. By appointing someone who is already a judge, you know exactly what that candidate may do.

I congratulate the current justice minister for appointing François Doyon, former Associate Chief Justice of the Court of Quebec, to the Quebec Court of Appeal. That appointment was praised by everyone interested in justice in Quebec. It sets an example that should be followed. There are very high-calibre judges in the provincial courts all across Canada. I don't see why we shouldn't give greater consideration to the appointment of some of those judges to federal courts.

If you look at the past 10 years of appointments in Quebec, you can count the number of provincial court judges appointed to a federal court on your fingers. Don't forget, the Chief Justice of the Supreme Court of Canada, the Right Honourable Beverley McLachlin, began her career as a provincial court judge. She was subsequently promoted all the way to the top. The same thing goes for the Honourable Rosalie Silberman Abella, who is also on the Supreme Court. It's a mistake to overlook this talent pool. I hope the appointment of Justice Doyon marks the beginning of a new era.

The fifth and final recommendation is in my view the most important.

The current system guarantees us quality appointments. To my knowledge, since the creation of the advisory committees, no one has been appointed without their recommendation. However, that doesn't mean that the most qualified candidates are always appointed. At the Montreal Appeal Division, which is the court I know best, there must be over 60 names of people who have been favourably recommended. When the time comes to fill a vacancy, the minister can choose from among 60 previously recommended candidates. The current system does nothing to ensure that the best candidate is appointed. In other words, if the 60 names on that list were to be ranked, there could be quite a difference between the top candidate and the 60th.

And yet, the minister could end up appointing the 60th or the 58th instead of those who would have ranked near the top. That should be avoided. In order to succeed, a major transformation of the current system is required, a transformation that is not easy to design and put in place. For each vacancy to be filled, the committee should definitely be tasked with drawing up a short list. That would significantly limit the minister's discretion, and instead of choosing from among 60 candidates, the minister would be given a list of five, six, seven or eight candidates. That could entail significantly more work for the advisory committee. I would point out that a similar system works well provincially, and I don't see why it wouldn't work federally. I think this idea should be examined in depth with the chairs of the committees that review candidates.

And that, Mr. Chairman, concludes my 10-minute presentation.

● (1545)

[*English*]

I had very little time to prepare this, so I went with the basic recommendations, but I'll be pleased to answer any questions you might have.

[*Translation*]

The Chair: Thank you very much. We are now going to go to Mr. Toews, who has seven minutes.

[*English*]

Mr. Vic Toews (Provencher, CPC): Thank you for attending here and accepting the invitation of the chair. We appreciate it very much.

I noted your concern that not enough attention has been paid to the distinction between recommended and highly recommended, and I'll make a note of that. I'm just wondering, however, has there ever been any study that correlates performance and ranking?

Mr. Pierre Michaud: To my knowledge there's none, but I know for a fact that the committees come with that distinction, which is a very important one. If you're highly qualified, you're better than just qualified. I know for a fact that candidates of tremendous value, ones who undoubtedly are highly qualified, are not appointed, while others who are not worthy of that special distinction are. Why is it? I'm not the one who makes the appointment and I don't really know how it happens, but I have much difficulty in accepting that the highly qualified are not as a rule appointed first.

I understand that you may have special circumstances. For instance, a court has a specific need for a criminal law or an environment lawyer or whatever. You have a special requirement that has to be filled, and this would be an exception, which is okay.

I've been involved with the courts for 45 years, so I've seen quite a few go by. I know a lot of very highly qualified people who have been waiting years and are never appointed. Why, I don't know.

Mr. Vic Toews: I'm just wondering, rather than trying to figure who's highly qualified and who's qualified but not as highly, why shouldn't we simply raise the qualification level? We'd say to the minister, look, the people who make it past this bar are qualified to be judges and you can pick out of that lot. What I don't understand is this somewhat artificial distinction of qualified and highly qualified or recommended and highly recommended.

Mr. Pierre Michaud: If you're not going to pay attention to it, it's useless; you're right. It depends on how many candidacies you have. Circumstances or requirements may vary from one area to another, but really, if you're going to have the distinction, use it. That's my point.

Mr. Vic Toews: I'm just speaking from personal observation. I've seen real property lawyers appointed to the bench who've made very fine criminal judges even though they haven't had the experience. Generally speaking, our system has not focused on the actual training of the judge during his or her time at the bar, but once you're accepted as a judge, you're generally accepted as a generalist.

That's another point we should maybe be looking at, what type of education judges are receiving after being appointed. That might eliminate this need for having this continuing distinction between recommended and highly recommended.

Mr. Pierre Michaud: Maybe, but I'm taking the system as it is now. The good news for everyone is that the continuous education of judges in this country, at both the federal and provincial level, is increasing all the time. Judges now are invited to special seminars all year long, and yes, you can take someone and improve their knowledge, no question.

● (1550)

Mr. Vic Toews: You also made a comment that there should only be one representative from the minister. Could you tell us who would then fill that gap, or would you just make the—

Mr. Pierre Michaud: No, I'm not going to tell the minister who he should appoint. I was suggesting that the deans of universities of that area should have a representative instead of the minister having three. He'd have only one; that's what I'm suggesting.

Mr. Vic Toews: Again, your point is that there only be one from the minister, because it looks as though he has three.

Mr. Pierre Michaud: Why should he have three? Is it important that he have three?

Mr. Vic Toews: My concern is, why should there ever be a judge on these panels—

Mr. Pierre Michaud: Oh, come on!

Mr. Vic Toews: —given the very clear distinction in our division of powers between judicial powers on the one hand and the executive powers on the other. We've had a Supreme Court of Canada ruling that made it very clear that the executive could not be setting salaries; it would be inappropriate. Our Constitution clearly leaves the appointment of judges to the executive.

I'm wondering whether that distinction doesn't hold true both ways. Why have judges interfering in the appointments process—and I'm stating it a little harshly—when there is this distinction that the executive, for example, should not be setting salaries for the judges?

Mr. Pierre Michaud: I'm sure Professor Russell will have an answer to that later on, but as far as I am concerned, judges have what you call in boxing a ringside seat to evaluate the quality of lawyers appearing before the court.

Mr. Vic Toews: But doesn't that say, sure, we can consult judges but they should not be the decision-makers? The framers of the Constitution specifically left that with the executive, not with the judiciary, and to mix the two, I think, causes some concern. Because on the one hand—

Mr. Pierre Michaud: Where have you had a problem with this?

Mr. Vic Toews: Well, I could tell you about the problems I had as the Attorney General of Manitoba on exactly that issue.

It may look like the representatives from the ministers are dominating, but my concern comes from the other side, when the chief judge of the province, for example, recommends another judge to sit on the panel and there are those two judges plus the member from the bar association or law society. The legal profession dominates, and of course the lawyers usually kowtow—and I say that in a nice way—to the judges. So we always have that—

Mr. Pierre Michaud: You'd be surprised, but I take your point.

I think we've had that system now for, what, 12 or 15 years? It began in 1988 or something like that, and we've always had a judge on those committees. It never occurred to me that there was a problem. Maybe I haven't followed the matter closely enough, but I certainly don't see a problem with it. Maybe Professor Russell will have another point of view on that.

Mr. Vic Toews: Well, we know he's not shy about expressing his opinion.

Some hon. members: Oh, oh!

Mr. Pierre Michaud: It's not that I'm shy, but I'm pretty satisfied with having judges involved the way they are at this time.

Mr. Vic Toews: Thank you.

[*Translation*]

The Chair: Thank you, Mr. Toews.

Mr. Lemay, you have seven minutes.

Mr. Marc Lemay (Abitibi—Témiscamingue, BQ): Good afternoon, Justice Michaud. You don't mind if I still call you that?

Mr. Pierre Michaud: I'm not offended. As a matter of fact, it brings back fond memories.

Mr. Marc Lemay: Having argued cases before you at the Court of Appeal, I am honoured that you accepted the invitation of the Subcommittee on the Process for Appointment to the Federal Judiciary. You are probably one of the most experienced people in this field.

I listened closely to your presentation and took note of what you said. However, I would draw a distinction between two things. I'm not sure whether you are going to follow...

Mr. Pierre Michaud: I'm following so far.

Mr. Marc Lemay: I draw a distinction between the appointment of Superior Court judges and Appeal Court judges.

In your five recommendations, perhaps I misunderstood—there is no reference to interviewing candidates. Candidates for appointment to the Court of Quebec are interviewed. I think we should have the same kind of interview for candidates for appointment to the Superior Court. However, I don't think it's necessary for the Federal Court of Appeal and the Quebec Court of Appeal, not to mention the Supreme Court.

Do you agree with me? What do you think about that?

● (1555)

Mr. Pierre Michaud: True, Appeal Court appointments don't raise the same difficulties as trial court appointments. I was chief justice for eight years, and the appointments were always done quite quickly. In most cases, judges who were already on the Superior Court were appointed to the Appeal Court. At times, practising lawyers were appointed directly. For example, everyone knows that a few years ago, Justices Fish and Proulx, two renowned criminal lawyers, were appointed directly to the Appeal Court because we needed reinforcements in that area.

Mr. Marc Lemay: I remember.

Mr. Pierre Michaud: The problems I mentioned have to do with trial judge appointments, because there's no problem at the Appeal Court.

Mr. Marc Lemay: All right. But would you be in favour of having interviews for the Superior Court? The committee—I'm going to weigh my words—is a bit secret. You submit your name if you want to be appointed to the Superior Court. You are notified if you've been appointed—or not, if you haven't—but the candidates are not interviewed.

What do you think about that?

Mr. Pierre Michaud: That's right. Provincially, the candidate has to be interviewed. What has prevented committees from doing that to date, in my opinion, is a lack of time. The backlog was considerable. For example, for a six-month period, there was no committee, so when a committee was struck, they were already six months behind in reviewing candidates. They now have 60 candidates to review, and they have to work quite quickly.

The problem is above all one of time, but, unless I'm mistaken, they can hold interviews if they wish.

Mr. Marc Lemay: If the candidate wishes.

Mr. Pierre Michaud: No. The committee members are the ones who can decide to meet the candidate if they wish. Unless I'm mistaken, I don't think there's anything that prevents them from doing that. In fact, I'm quite sure of it. However, in practice, they don't do it; you are right about that.

Of course, there is nothing to lose and everything to gain from holding an interview.

Mr. Marc Lemay: You said earlier that two years was too long, and that there should be some turnover on the committee. You also said that the assessment should be good for three years instead of two.

Mr. Pierre Michaud: Currently, the committee is set up for two years, and the assessment is valid for two years too. Two years can go by quickly. When a new committee is struck, it has to re-examine the application of a candidate who has already been interviewed. I am confident that extending the period by one year would not change anything. In fact, you would save members of the committee from having to do a review. They would have to work harder were you to go further with the short list recommendation. They would have to choose the best possible candidates.

I think the idea of a permanent committee is a good one. That would provide continuity and consistent standards. I didn't delve into the logistical issues, i.e., who would leave and for how long, but it seems to me that setting up a permanent committee with some form of turnover in the membership would be a good idea.

● (1600)

Mr. Marc Lemay: As for the makeup of the committee, you said you'd like to see the number of members appointed by the minister reduced from three to one.

Are we to take it that in your opinion, the review committee should have five members?

Mr. Pierre Michaud: Yes, probably. Seven members is a lot. That might be quite cumbersome.

Mr. Marc Lemay: Based on your experience, but without naming names, tell me who you think would be in the best position to do this work.

Mr. Pierre Michaud: Mr. Toews isn't going to like hearing me say this, but I have always thought that people in this field were in the best position to do this type of assessment. It could be, for example, a representative of the local Bar, a representative of the Canadian Bar, of the Quebec justice minister, of the federal justice minister and of the judiciary. I also mentioned earlier a representative of the deans. In the case of the Quebec Court of Appeal, it would be the dean of the Faculty of Law of Laval University. In Montreal, someone could be designated.

The Chair: Thank you, Mr. Lemay.

Mr. Comartin, you have seven minutes.

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

Thank you, Justice, for being here with us.

Can you tell us why former provincial court judges are not promoted to this position?

Mr. Pierre Michaud: No. Please note that my comments apply to the situation in Quebec. I haven't studied Ontario or the other provinces. Mr. Toews, it could be that this does not exist in Manitoba. But it's quite striking in Quebec. As I said before, Justice Doyon was recently appointed to the Court of Appeal. It's the first time that a provincial court judge has been so appointed.

I have to say that it would be hard for me to name five provincial court judges who have been promoted in the past ten years. It's even harder to understand given how terribly busy the Criminal Division of the Court of Quebec is. There are some incredibly competent people there. That would be a pool of candidates from which it should be quite possible to choose. So I'm surprised that that isn't happening. I interpreted the appointment of Justice Doyon to the Court of Appeal as the mark of a new approach. At least, I hope it is.

Mr. Joe Comartin: Often, the party in power is not the same federally and provincially.

Mr. Pierre Michaud: Is politics a concern in relation to appointments?

Mr. Joe Comartin: I think that's the raison d'être of this committee, Justice. I don't know whether you have any comment on that.

Mr. Pierre Michaud: I do not. I have a lot of trouble imagining why it would be that way. Currently, in both Quebec and Ottawa, there's a Liberal government. However, that doesn't change the situation at all.

Mr. Joe Comartin: Do you know whether provincial court judges are encouraged to apply?

Mr. Pierre Michaud: I think they would be if this kind of opportunity came up from time to time. I know a number of provincial court judges whose abilities would definitely be an asset to the court. They would be positively thrilled at the prospect of a change in jurisdiction. Justice Doyon was appointed to the Court of Appeal. According to all reports over the past year, he is highly appreciated by all. I don't understand why these people are passed over.

Mr. Joe Comartin: Mr. Lemay asked a question about interviews. Do you have any comment on the fact that some candidates might be discouraged from applying if it were a requirement for the committee to interview them?

Mr. Pierre Michaud: Anyone who wants to become a judge but is afraid of being interviewed had better not apply. I have absolutely no concerns about this. An interview is not going to discourage a candidate. I'm sure of that.

Mr. Joe Comartin: Is it necessary for the interview to be in camera, or can it be public?

Mr. Pierre Michaud: The identity of candidates has to be kept confidential. A lawyer who applied to become a judge and who was interviewed publicly would automatically lose all of his or her clients. It would be like saying publicly that you were no longer interested in remaining in private practice, and like telling your partners you might not be with them much longer. That way of doing things would definitely be practically impossible.

● (1605)

Mr. Joe Comartin: Thank you.

The Chair: Thank you very much, Mr. Comartin.

Mr. McGuinty, you have seven minutes.

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

Good afternoon, Mr. Michaud. My first question is about Judge Robert's comments. Did you read or hear about what he said on the matter of appointing judges in Quebec?

Mr. Pierre Michaud: I'm not sure which particular cases you're referring to. Are you talking about those that were the subject of a complaint?

Mr. David McGuinty: Yes.

Mr. Pierre Michaud: I think that in a way they led to the creation of this committee.

Mr. David McGuinty: Indeed.

Mr. Pierre Michaud: I don't really want to reply to that, but put your question anyway.

Mr. David McGuinty: Mr. Chairman, I believe that is one of the reasons why we decided to consult retired judges rather than...

Mr. Pierre Michaud: Ask your question first.

Mr. David McGuinty: I simply want to know if you heard comments to that effect and, if so, what you think about this.

Mr. Pierre Michaud: I will be frank. When those comments were made, I was in Italy. When I came back, the issue was in the newspapers. I never actually heard an account of this myself. I do know however that the judge provided an explanation to the Canadian Judicial Council and that this led the council to reject the complaint that had been made. I did not read the letter that was sent to the council.

These comments lead me to believe that he is still of the opinion that a candidate's political past should be neither a prerequisite for nor an obstacle to an appointment. I think that is his final position. It is also mine. When an individual is involved in politics, regardless of the party in question, that should not prevent him from being a candidate for the bench. When one becomes a judge, one swears under oath to apply the law as written. One can hope that the law will change, but as long as it hasn't, one has to apply it as it stands. That is perhaps what Judge Robert was saying. I don't know if that answers your question. If it doesn't, please word it more precisely.

Mr. David McGuinty: There was, therefore, a complaint regarding certain comments made by Judge Robert, and that complaint was heard.

Mr. Pierre Michaud: Yes, by the Canadian Judicial Council.

Mr. David McGuinty: What was their finding?

Mr. Pierre Michaud: The complaint was dismissed.

Mr. David McGuinty: The complaint was dismissed?

Mr. Pierre Michaud: Yes.

Mr. David McGuinty: Completely?

Mr. Pierre Michaud: Yes, that is what I understood.

Mr. David McGuinty: Fine.

Mr. Chairman, will the Canadian Bar Association be appearing tomorrow or next week?

The Chair: The Canadian Bar Association will appear tomorrow, on November 1st.

Mr. David McGuinty: An article in one of our newspapers apparently describes the association's position on this important issue. They recommend a two-year cooling-off period. Anyone who wants to be considered for a judge's position must comply with a two-year waiting period.

What do you think of that recommendation?

Mr. Pierre Michaud: In other words two years of purgatory, but for whom? Does that apply to an elected member of Parliament, to political militants?

Mr. David McGuinty: If I have understood correctly what I read, that would apply to anyone involved in any political activities, regardless of the party and the level of involvement.

Mr. Pierre Michaud: I've always said that you have to read a contract before you can say what you think about it. I haven't read that statement and it bothers me because it's too black and white. It probably has to be qualified and I don't know how it would have been qualified and what terms would have been used. However, I believe I said earlier that having previously belonged to a political party should not be a prerequisite for nor an obstacle to sitting on the bench. I think that principle is universally acknowledged.

I'm not challenging the Canadian Bar Association's statement because I am not familiar with it and I haven't seen it.

[*English*]

Mr. David McGuinty: Finally, Monsieur Michaud, I'll ask a third question.

Last week, I put a question to two witnesses about the potential of reviewing the tenure of judges; putting, for example, a 10-year cap on sitting on the bench in this country in superior, higher-level courts. One witness said this would be in breach of constitutional provisions. Another, a professor, disagreed.

In your experience of 40-plus years in the judiciary, I understood —

● (1610)

Mr. Pierre Michaud: No, it's 45 years in the law profession but 19 years on the bench.

Mr. David McGuinty: Okay, 19 years on the bench.

Mr. Pierre Michaud: I would have been very sad with a 10-year tenure, because I was there 19 years and I think I did a pretty good job right up to the end.

Mr. David McGuinty: I'm absolutely convinced you must have.

But do you have any view, or have you heard any evidence, or is there any kind of serious argumentation about 10-year capping?

Mr. Pierre Michaud: No, actually that's the first time I've heard of it recently.

Personally, I think one of the most important aspects of this question is that of independence. A judge must be totally at ease to decide cases, and if he has only 10 years.... Suppose he's appointed at age 45 and only has 10 years. What is he going to do when he's 55? He'll have to envisage another career, and that would mean he's already starting to look at what comes next. I don't think that would be consistent with the total independence a judge must have with regard to the matters he hears. I would see a problem with a 10-year tenure.

I'm not talking about the Supreme Court. They have tenure until age 75, but they can leave after 10 years. Usually they're appointed after some years on the bench already—most of the time, but not always.

But I have a problem with this; I wouldn't agree with it at large. You may have more specific questions, but in a general way I certainly would not agree with it.

Mr. David McGuinty: In closing, Mr. Chairman, to your knowledge, there is no constitutional restriction with respect to—

Mr. Pierre Michaud: I'm not saying that. There may be, yes. It could be interpreted.... We say under section 96 that a judge is appointed until retirement, which is 75 for a federal court. I think you would probably have a constitutional problem. You may ask Mr. Russell, who'll be a much more knowledgeable—

The Chair: Yes, he will be addressing this issue.

Mr. Pierre Michaud: He'll be much more knowledgeable than I am on this question. I really haven't put any thought into it or haven't examined it, but there may be a problem. Mr. Russell will tell you.

The Chair: I know he will.

[*Translation*]

Mr. Lemay, you have seven minutes.

[*English*]

Mr. Mark Warawa (Langley, CPC): Thank you, Mr. Chair.

Thank you for being here today.

The Chair: My pleasure.

Mr. Mark Warawa: I have a question regarding the assessment of the candidates. Your first point was that only highly recommended candidates be considered for appointment.

Mr. Pierre Michaud: What I said was that if you're going to have a distinction where you identify those who are better qualified than others, why not appoint them?

Mr. Mark Warawa: The witnesses of last week, many of them agreed and had similar comments. They asked, why would you choose a B candidate over an A candidate?

Mr. Pierre Michaud: That's my point exactly.

Mr. Mark Warawa: And you shared the composition of the committee.

I'd like to ask questions on the assessment, how you would assess whether or not a person is highly recommended or recommended, and does the committee have adequate tools in that assessment? During that presentation of last week, there was a comment from one of the witnesses that psychological assessment is used in some other countries and may be a tool that could be considered. What tools would you like to see the committee consider for even better assessment?

Mr. Pierre Michaud: You mean additional tools to those that they have now?

● (1615)

Mr. Mark Warawa: Yes.

Mr. Pierre Michaud: I'm not quite sure what has been envisaged by those other witnesses. I haven't seen how they presented that. But are you thinking about medical examination of some sort?

Mr. Mark Warawa: Psychological assessment was one of the examples used.

Mr. Pierre Michaud: When the committee does its homework appropriately, they know whether the person has what we call "judicial temperament" or not. You may have some people who are very knowledgeable in the law but don't know how to deal with people. To me, one of the most important qualities of a judge is to have what we call in French *l'empathie* to be able to put the people who come before you at ease, to have them less nervous and have them more in possession of...*plus en possession de leurs moyens*, in order to give a better testimony. I think it's very important for a judge to have that kind of demeanour to be able to make people at ease in their court and make it more humane, actually.

Most of the time we know this about the person, whether he or she has that, by having seen what they've been doing for years.

Mr. Mark Warawa: And that's my second question. If you have applicants being looked at and considered to the provincial court systems, they're already on the bench serving provincially, and to see them considered federally, you are able to see that.

Mr. Pierre Michaud: Exactly. That's exactly the point I made. I said when you appoint a lawyer or a judge, you feel that you've made a good appointment, that you've appointed someone who has all the qualities, the requirements, to perform in a satisfactory fashion. But you'll know only when that person exercises the duties. But when you're appointing a provincial court judge to a federal court, you already know what you have because he's already done adjudication and he's already dealt with the people who come before the court, so you know exactly what type of person you're going to have and how that person will perform. So to me that's a very important advantage.

Mr. Mark Warawa: How do we encourage those—

Mr. Pierre Michaud: You won't have a problem encouraging them to present their candidacy provided that you give them a little hope that they might be appointed. But I'm sure you won't have a problem interesting those people in presenting their candidacy.

[*Translation*]

The Chair: Mr. Lemay.

Mr. Marc Lemay: I want to be sure I heard you correctly. In your opinion, there should only be two categories: "recommended" and "not recommended".

Mr. Pierre Michaud: I said that the system currently has those two categories.

Mr. Marc Lemay: No, there are three categories.

Mr. Pierre Michaud: There is the category "not recommended", certainly.

Mr. Marc Lemay: Currently there is "highly recommended", "recommended" and "not recommended". You think the following would be preferable...

Mr. Pierre Michaud: No, Mr. Lemay. With all due respect, that is not what I said. I said that if we want to keep this system, then we need to make the distinction between "highly recommended" and "recommended". Those two categories don't exist for nothing. So let's appoint the best, in other words the "highly recommended".

Mr. Marc Lemay: Fine. You're recommending that the Court of Quebec, or at least the court...

Mr. Pierre Michaud: ... the provincial courts...

Mr. Marc Lemay: There are good candidates.

Mr. Pierre Michaud: Of course there are good candidates. There are several and I don't see why we are disregarding them.

Mr. Marc Lemay: You say that you don't know why, but do you have an idea why? Surely you have an opinion on this after having spent 15 years on the Court of Appeal.

Mr. Pierre Michaud: Yes, I have an opinion. I gave it to you, and I don't know why they don't do it. Earlier, Mr. Comartin suggested that it's perhaps because there were governments of various allegiances. However, the same applied to Quebec over the years.

Mr. Marc Lemay: When someone is appointed judge to a provincial court and they sit there for 10 years, nothing prevents that person from being appointed to the Superior Court or even the Court of Appeal.

Mr. Pierre Michaud: Absolutely not.

Mr. Marc Lemay: There was the case of François Doyon.

Mr. Pierre Michaud: That's what I'm saying.

Mr. Marc Lemay: Fine. Thank you.

The Chair: Thank you.

David, you have time for one last brief question.

Mr. David McGuinty: Mr. Michaud, you have had the opportunity to analyze the situation in Quebec over the course of your legal career. Have you ever noticed people appointed to provincial courts belonging to one political party rather than another, whether that be the Parti Québecois, the Liberal Party, the Communist Party, the Animist Party, Republican, etc.?

● (1620)

Mr. Pierre Michaud: I haven't looked at that at all. I suspect that it resembles what happens elsewhere. I have never considered this and I have no idea.

Mr. David McGuinty: Are you familiar with this situation in the other provinces? Have you seen any evidence or read any reports on that issue? For example, there has been a Conservative government in Alberta for 50 years—are there more judges that were involved in the Conservative Party? Do we know?

Mr. Pierre Michaud: I have no idea.

The Chair: Mr. Justice Michaud, thank you very much for coming to see us.

Excuse me, Mr. Toews has another question.

[*English*]

Mr. Vic Toews: I know that we've been struggling with this issue of why a provincial judge doesn't go on to become a Queen's Bench judge or court of appeal judge. I would suggest perhaps the following theory. And that is once the provincial judge becomes a provincial judge he or she is outside of the political influence necessary to get that push into the next level. The judge at the provincial level simply is cut off from all of the federal avenues to appointment. So when you see a federal judge moving from Queen's Bench to court of appeal to the Supreme Court, they're still in that federal circle and they can move up. The problem is—it's my own theory, and it may not be justified in any way—from my experience, they simply are cut out of the political loop in order to get into the federal—

Mr. Pierre Michaud: Your theory is interesting, Mr. Toews, but I certainly hope that it is not followed in the future.

Mr. Vic Toews: All right, thank you very much.

[*Translation*]

The Chair: Thank you very much. We'll take a short two-minute break, so that other witnesses can take their places.

● (1625)

The Chair: We are back and ready to hear testimony from Mary Eberts and Professor Peter Russell.

[*English*]

You are both used to this committee, I believe. You have ten minutes for a statement and then you have, as you saw earlier, a seven-minute period of questions and answers from the members.

You have the floor, Ms. Eberts, to start.

Ms. Mary Eberts (Lawyer, As an Individual): Thank you very much for inviting me to address you today.

What you are doing is really essential to the rule of law in Canada. Although the selection from time to time of members of the Supreme Court here or in the United States attracts much media attention, there are always vacancies for federal appointments as section 96 judges, and the superior court bench in each province and territory is the bench that is central to the day-to-day administration of justice in the country. Your recommendations about that appointments process will make a lasting impression on the shape of law and of justice in Canada.

I have submitted through your committee clerk two articles for the committee's background reading. One was published in *The Lawyers Weekly* on September 30, and it was called "The *real* judicial appointment process". That was an article I wrote on the basis of my experience of over 30 years in the law and from seeing friends, relations, and colleagues pass through the process with varying degrees of success. I also must say that I went through the process myself, an experience I will talk about in a moment or two.

The second piece I submitted to the committee through the clerk is in the editorial process at *The Lawyers Weekly*. It emphasizes how important it is to get the appointments process right, because once a judge is installed, that judge is for all intents and purposes above the law. The basic points of these articles are as follows.

Whatever may be the attempt to say otherwise, the process of appointing to the federal bench is indelibly political. The political nature of the process goes well beyond whether candidates donated to the Liberal Party or to any other party. The political nature of the process resides chiefly in the reality that you cannot get through the process without a political mentor or team of mentors.

Even to get through the first committee, which is ostensibly non-political, but after that committee in particular, you need an insightful political guide to make sure your name goes before the provincial or regional political "boss"—and I use that term in quotes—the various caucus or committee meetings, and even on up to the minister. Even to find out when those meetings are and what names are going to be considered at them, your guide is essential to you. That person may be an active politician, provincial or federal, a retired one, or simply a legal godfather with lots of clout because of personal or political ties.

If you don't have such help, your name will sit on the list until your clearance expires. I have seen many fine lawyers get through the first part of the process and then sit and wait for an appointment because they had no political mentor.

The process of getting a judicial appointment is one that would be condemned for its lack of transparency, for the opportunity for bias, and for the lack of due process if it were a hiring process in any other sector, and every judge who administers the laws of due process, bias, and access to information has gone through this process. I believe a massive act of hypocrisy sits at the heart of our legal system because of the politicized nature of this process.

I once applied myself. I did not get formal notification of the committee's results, but I learned via the grapevine that I was rated "not recommended". I do not know who they spoke to for this rating, and I was given neither the reason for it nor the opportunity to face my detractors—the basics of due process in any court of the land.

● (1630)

At the time, I took this as a devastating peer judgment on my legal career. Now I see it more as an indictment of the process. But this is what happens when you have a secret and unaccountable process. To your face, they give you—and this is my case—the Law Society Medal, the Canadian Bar Association's Professional Achievement Award, honorary degrees from several law schools, and with lawyers as nominators, the Governor General's Gold Medal for my work on women's equality. But behind your back, they rub you out.

The other paper I gave you argues why it is essential that the appointments process be a good one. Once you become a judge, to all intents and purposes you are above the law. If you get the law wrong, you may be reversed on appeal—if the disappointed litigant has the large amount of money required to bring an appeal, and if your error is big enough. It must be palpable and overriding, if it is a mistake in the way the judge handled the evidence or the facts. Most judgments are not appealed.

If you are a judge who has been accused of a crime, you may continue to sit, depending on what your supervising judge has to say. The police investigating a sitting judge will be proceeding cautiously, and so in the real world will the crown who has to decide if charges will proceed. The complainant will learn there is one law for the judge and one law for the rest of us.

When a judge makes a big mistake in social attitude or behaviour—invoking invidious stereotypes of women or of racial minorities from the bench—usually there is no consequence and no process of correction. One of the articles I gave you is an instance of the Canadian Imperial Bank of Commerce sending one of its executives, who had made racial slurs in a broadcast, for an attitude adjustment. That doesn't happen with judges. It happens in every other profession.

The independence of the bench is jealously guarded. Judges alone may discipline judges. The starting point of that discipline is they assume fairness, they assume impartiality, and they assume integrity in performing the judicial role.

Given all of these assumptions, the process of appointment becomes absolutely critical. It is a one-way street. There is a very heavy burden to overcome on anyone who tries to overturn the assumption of fairness, impartiality, and integrity.

The judicial council will not proceed against a judge unless what the judge did threatens the integrity of the judiciary as a whole and is not curable by the appeal process. Even if the CJC were prepared to proceed with a case, there is no corrective structure of discipline available short of a joint address to Parliament. There are no suspensions. There is no loss of pay or benefits. There is no requirement of further education. If your behaviour is not serious enough to merit removal, then nothing happens to you.

What do I recommend? I like the approach developed by Professor Russell in Ontario, but I would like to see even greater accountability of the political authorities to Parliament.

I will close on this note. I am now writing a book on section 15 of the charter: its origins and how it has fared in the courts over the past 20 years. I have been struck powerfully by the fact that between 1980 and 1985, parliamentary committees that travelled the country and listened to ordinary Canadians understood exceptionally well what was necessary to secure and promote equality in this country, when the cabinets of two successive governments did not.

I have a great deal of trust in the parliamentary process, and I would urge this committee to recommend its greater involvement in the selection of federal judges at all levels.

● (1635)

The Chair: Thank you very much.

That was nine minutes and 45 seconds.

Professor Russell, you have 10 minutes.

Professor Peter Russell (University of Toronto, As an Individual): Thank you, Mr. Chairman, for having me here today.

I made a submission on both points that were discussed in the House of Commons on June 3, one pertaining to Chief Justice Roberts' remarks on the ineligibility of sovereignists for the bench. I'm not going to deal with that. He may have been misquoted, and that matter seems to have gone to the Canadian Judicial Council. But I'll answer questions on what I said, if you wish to pursue that.

I rather focus on the second issue, which Mary Eberts has focused on. I might say after hearing her that I hardly need to say that the system needs to be improved. I was very pleased to see that Minister Cotler agrees with that point—that it needs to be improved—and so do members of this committee. So I hope this is really the beginning of improving the system and not just a talk session, that it will really produce some results, because I've been concerned about this matter for a great many years and have seen very little interest in reforming it among federal parliamentarians of all parties, not just one party.

So the ball is in your court and I hope you'll run with it, parliamentarians. I agree with Mary. It's your job to do.

The reform that is needed, in my view, is basically to change from a system of having advisory committees do screening to a system where advisory committees that are balanced and independent actually perform the function of a search and nominating committee.

A screening committee, which is what you have now, might perform and probably does perform the job of screening out those who are really not qualified. And of course you don't want to have unqualified people serving on the courts in Canada, but surely you could set your sights a little higher and actually go for a system that looks for the best people available to be on the federal judiciary, the highest courts in the land under the Supreme Court.

The provinces have done that. They're ahead of you, members of Parliament at the federal level. In most provinces they've developed systems designed to help the government by looking for the very best people available, as you would if you were trying to reform the system of appointing university presidents, heads of crown agencies, and so on. Surely you want the best. You should not be content with a system that simply gives some assurance that the worst are not appointed.

The most modest change in that direction—and I say it's the most modest change, as I'm a political realist—and the easiest thing to do would be, which we've discussed with former Chief Justice Michaud, that the committees that are in existence now as advisory committees submit only the names of those who are highly qualified, or they can submit a longer list but the government appoints only people who are considered highly qualified. That's the very least they can do.

If I have time, I'll say why I think you should do more than that, but I want to deal with Mr. Cotler's public reason for not doing that, his public reason for saying the government should sometimes go to the B list and not be confined to the A list. He is not the first justice minister to give me that answer. His explanation is in terms of getting diversity on the courts.

I think his argument is wrong, not because diversity is an inappropriate objective. It is extremely appropriate, and in my brief I cite the book that I have co-edited with Kate Malleson of the LSE on 19 different countries. They are all trying to get more diversity on their bench. That's not the issue.

● (1640)

My rejection of Mr. Cotler's premise is based on my experience as the first chairman of Ontario's judicial appointments advisory committee, in which we had a double mandate: to get the very best candidates, and to get diversity—and not to trade off one for the other.

As the chairman of that committee, I went to see the Premier and said, as the mandate of the committee was being developed: I'll only chair a committee in which we recommend the best people available; I will also do all I can to increase the diversity. Our committee did that, and it's built into its mandate.

In terms of diversity, we worked hard to increase the diversity through an outreach program encouraging members of the under-represented sections of the legal profession who were qualified, with 10 years experience, to apply. We were in a setting where there were about 245 provincial court judges, and there were 12 women. We're talking not about 1958 or 1968 or 1978; we're talking about 1988, after years in which women had gone through the law schools, often at the top of the list. Believe you me, we found that this stimulated a lot of applications from women who had never considered applying because they did not have access to the political networks that up to that point seemed so necessary to get appointed.

We also had outreach to the Franco-Ontarian community, which was under-represented in Ontario, the aboriginal bar, and other parts of the profession that were under-represented. And we achieved more diversity; you can look at the statistics. I know that in our first 75 appointments under our committee, 38 were men and 37 were women. We had no quotas; that is simply the way it came out.

I'm going to skip a couple of parts of my brief, because I want to turn to another point in this soft approach of mine. Even if, under the current system, only the "highly recommended" were to be considered by the government for appointment, you've heard from the previous witnesses, Mary Eberts, myself, and Chief Justice Michaud, who chaired one of the Quebec committees, that the list of highly recommended is still too long. Twelve from western Quebec; that's not a short list. A list like that is an invitation to government to go down until they find someone whose political networks are working well and about whom the word is in that they should be appointed, because they have the connections with the government.

You all know that. Let's not be schoolchildren about this. This is the real world, and this happens. I'm being very polite about it in this brief. If you want to go on playing that game, well then, keep it the way it is. But if you're serious about finding the best people—and the best people may include those who have connections with the government, and they certainly shouldn't be excluded—then don't play games. You need a short list of highly recommended people, selected by an independent committee not controlled by the government.

The second argument that Justice Minister Cotler—for whom, I might say, I have great regard.... I think he's one of the finest justice ministers we've had; I'm not here to trash him. The second argument he gave for not going to what I call a real merit system and appointing a nominating committee that really helped the government find the best-qualified people was that there was a constitutional legal problem.

I want to deal with that, because I think he's wrong. When one, as a political scientist, comes to a parliamentary committee and says the Minister of Justice, who's a very eminent lawyer and legal academic, is wrong, I choose my words carefully. Here's why he's wrong.

First of all, the approach we're recommending has been followed, as I've told you, by several provinces, which have even written it into their statutes: that the lieutenant governor in council, which has the formal legal power, say in Ontario, to appoint judges, will always appoint people who come from a short list that's being put to the attorney general by the judicial advisory committee. The judicial advisory committee gives a list, and the nominee must come from that list.

● (1645)

The government can turn back a list. In Ontario, they've done that. For example, when I was chair, as chair I sent the list to Minister Ian Scott. He had created the system, so he was certainly behind it. He said, "Peter, tell your committee I won't take a name from that list, because I really want a Franco-Ontarian, someone who can speak French and can hear French cases in this particular community. That's the gap I'm trying to fill."

So we went out and made a real effort to drum up applications from the Franco-Ontarian bar all over the province, and we got some superb applications. Another list was submitted. The committee worked hard, not too much time was lost, and the appointment was made.

So what I'm saying is that there's a lot of precedent in the Canadian system for a government saying, "Though we maintain the power of appointment as it is in our statute, at the provincial level or in the Constitution at the federal level, we the government are committed to having our minister only bring to cabinet names of those who have been highly recommended by an independent nominating committee as highly qualified, the best qualified people they can find." What's wrong with that? There is nothing wrong with that.

In Great Britain right now—and I mention this in my brief—they've gone even further. I gave evidence to their House of Commons—they gave me more than ten minutes—

The Chair: We're already at almost 14 minutes.

Prof. Peter Russell: Anyway, they have their advisory committee give only one name, and that's a system where the Queen has the formal power of appointment.

I have to stop there. I've overstepped my limits. I have other suggestions on how to strengthen the committee system. You've heard some good ideas from Chief Justice Michaud and from Mary Eberts and others, and I hope we move ahead.

I'm sorry to have overstepped my time.

The Chair: You are excused, believe me. Thank you.

Mr. Toews.

Mr. Vic Toews: I want to thank both of you for your testimony.

Ms. Eberts, I want to thank you specifically for your frank testimony. I thought Mr. Russell was always frank, but I think you outdid him today, and I appreciate that. I think those are heartfelt personal experiences that often give a bit of colour to what we're talking about.

My concern here is that we've heard from some who would continue to protect the status quo on the basis that we have to protect privacy interests. Ms. Eberts, I think you summarized exactly what goes on in the legal profession, that they will indeed praise you to your face and privately the fix is in.

How do we balance the issue of privacy? There must be some legitimate privacy concerns that we can identify, because we even do that in our criminal court process. Certain types of names we can't publish in sexual assault cases of children, and that kind of thing. I'm not equating this to that, but even in our very open Criminal Code trial system we have some limitations on freedom of the press in protecting certain privacy rights.

Then, on the other hand, what I think we've been lacking in this entire system is transparency. I think that's something you're complaining about. The system certainly operates against you and in favour of those who may have an ulterior motive to destroy a person's judicial aspirations.

Is there some kind of a balance that would be acceptable to you, or do we have to open the gates wide? That question is to both of you.

● (1650)

Ms. Mary Eberts: I think there probably are some legitimate privacy interests, but right now the system errs way too much on the side of privacy. In the whole legal system right now, there is in fact a great concern on the part of lawyers and civil libertarians that there are getting to be far too many secret trials, and judges are acceding all too readily to requests not to name people. So I would ask that you consider this privacy issue in the appointments process in light of what is an emerging concern with the erosion of the public function of justice in this country. It is a foundation of our system, and I believe we need to err on the side of transparency, as part of the protection of the rule of the law and the fundamentals of civil liberties.

There are situations, for example, where someone may not want his or her firm to know about an application that has gone in, but that is the privacy interest of the applicant. When we get to the point of the privacy interests of the referees—and let me define my terminology.... The applicant for judicial office is asked to provide certain names as referees. Voluntarily, those referees have allowed themselves to be named, and as far as they're concerned, anything they have to say is open. Where we get the so-called privacy concerns are where members of the advisory committee, or perhaps people in the minister's office, or in other parts of the system, go and ask Henry at the X firm or Madge at the Y firm what they think of this candidate. And Henry or Madge say, I'll tell you, but I don't want my name used.

I used to chair the regulatory council for midwifery in Ontario during the period when midwifery was being developed as a regulated profession. I cannot tell you how many calls I got from doctors, particularly, complaining about midwives. They said there should be an investigation of this midwife; there should be a complaint about this midwife going forward. I said fine, send me a letter and sign your name. They said no, we can't do that.

Mr. Vic Toews: Is it your point then that it's quite a substantive difference between protecting legitimate interests or privacy interests of the applicant, as opposed to the referee's?

Ms. Mary Eberts: Yes.

Mr. Vic Toews: That's what is being put into one big ball here as a privacy interest, without specifying who we're actually protecting.

Ms. Mary Eberts: That's right.

Mr. Vic Toews: Dr. Russell, just on that.

I'm sorry, Ms. Eberts, it's just that we're—

Ms. Mary Eberts: No, no.

Prof. Peter Russell: In terms of the privacy of the applicants, I make a distinction between applicants for the supreme court of any country—the top list of contenders—and those who are applying for the lower courts, the courts below that. In the supreme court situation, I think the names of those who are considering and who let their names stand for consideration of one of the most important positions in all of our public life should be known. The names of those candidates should be known before the final selection is made. I think that's what an adult democracy does.

However, once you go below that, and this was certainly our rule in Ontario for the committee I chaired, and it's still the rule in Ontario and the other provinces.... We promised to keep complete confidentiality as to who were applying to be provincial court judges. It was for a lot of very practical reasons. A lot of these people were in firms where they didn't want their partners to know they might be doing it. There was always the danger to their practice if at relatively mid-career they didn't get the position; they'd find that very embarrassing. There were a lot of personal reasons.

We worked very hard on that. It meant when we were interviewing —and we interviewed all the top candidates, which for a given position might mean seven or eight candidates would be interviewed —the secretariat for our committee were very ingenious. The candidates didn't meet each other in a waiting room. One went in there, and one came out the other end. I felt it was terribly important to make that promise of confidentiality to all candidates.

That's an important difference. Today you're concentrating on appointments to the courts below the Supreme Court of Canada. I think confidentiality of those who are considered, and particularly those who are interviewed....

And I surely hope you recommend that interviews are absolutely necessary. Can you imagine appointing anyone to a major position—and as Mary Eberts has said, these are tremendously important positions—and you're not going to interview? Would you do that for any organization you've been involved in? Oh, we'll just take a shot at it and hope he or she turns out to be nice and decent.

Anyway, you have to have confidentiality.

● (1655)

Mr. Vic Toews: Add, at least, “in that context”, Doctor.

The Chair: This will be your last question, Mr. Toews.

Mr. Vic Toews: I'm just making a comment in order to clarify.

In that context, at least the accusations made against the candidate could be made in private, and at least he or she would have an opportunity to respond to them.

Prof. Peter Russell: Exactly, and that's so important, because however you do the referencing part, something will emerge, and members of the committee will want to ask about it. It's often a matter that the person's too biased in a particular direction, so they'll want to draw them out on that.

The other part of accountability, and you can see it with the Ontario committee, is a very thorough public reporting of what the committee is doing. Every year, all the procedures, the criteria, the numbers, and so on.... There's a public report tabled in the legislature. That kind of accountability is absolutely crucial.

So it's not a mysterious process. All the mystery should be taken out of it.

[*Translation*]

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

Mr. Lemay.

Mr. Marc Lemay: I listened closely to your presentations and I was impressed by the quality of your remarks. I was also able to read your speaking notes as you were kind enough to make them available prior to the meeting.

Ms. Eberts, I wouldn't be mistaken in saying that you came through the process and came out disappointed. I was also president of the Bar in my region, and I sat on selection committees, so I can easily understand your frustration, especially given all the secrecy that enshrouds this process.

Have I read your notes correctly? I read them in English and in French. To your knowledge, did a non-recommended candidate manage to get his non-recommended status overturned because he had a good relationship with a minister? Is that what I read? That's my first question. That's what I want to hear. Is that really true?

[*English*]

Ms. Mary Eberts: I got that information from the website for the Office of the Commissioner for Federal Judicial Affairs. It surprised me when I saw it, but it's right there on the website. I pulled it off the website in English, but I'm sure it's there in French as well.

It says that someone who has not been successful before the committee...if the minister has information from other sources that contradict the committee's recommendation, the minister can ask the committee to reconsider its recommendation.

It's right there on the website. I almost fell off my chair when I read it.

● (1700)

[*Translation*]

Mr. Marc Lemay: I also almost fell off my chair, like Mr. Robinovitch did in another committee, but I won't do that.

How can a minister do such a thing if he doesn't even know the names of candidates who are not recommended? He is not supposed to have heard about these highly recommended, recommended and other candidates.

[*English*]

Ms. Mary Eberts: It is the convention of these committees that no one is supposed to know what your ranking is. That's why I said in my article that it is through gossip that you find out. So through gossip you find out whether you were highly recommended, recommended, or not recommended. Then, if you were not recommended, or even if you were recommended and you think you should be highly recommended, and you have good political connections, what this thing on the website suggests is that you could get your friends to ask the minister to have the committee reconsider you. That really was astonishing to me.

[*Translation*]

Mr. Marc Lemay: Does that apply to appointments to the federal bench? I must admit that I haven't looked at this on the website, because you didn't mention it in your speaking notes. So you're saying that it is posted on the website?

[*English*]

Ms. Mary Eberts: If you go to the website for the Office of the Commissioner for Federal Judicial Affairs, there is quite a detailed description of the process for appointment. One of the little entries that you can click has all the criteria, but one of them has a description of these advisory committees, and it's from the description of the advisory committee on the commissioner website that I got that information.

[*Translation*]

Mr. Marc Lemay: Thank you.

Mr. Russell, I have a tremendous amount of respect for the work that you've done. When I was a student, and even when I was a lawyer, I read what you wrote.

You are convinced—as indeed I am—that there needs to be a meeting or, simply, that candidates should appear before a committee and that a recommendation should be issued. Do you believe that there should also be such a hearing for candidates put forward for the federal Court of Appeal, the provincial Courts of Appeal and, obviously, even though it is not within our purview, the Supreme Court? Let's just stick to the federal Court of Appeal and the provincial Courts of Appeal. Would you go so far as to say that there also needs to be a selection committee and hearing for these nominations?

[*English*]

Prof. Peter Russell: Absolutely.

[*Translation*]

Mr. Marc Lemay: Why?

[*English*]

Prof. Peter Russell: There are all kinds of questions you want to put to them about their experience, and if they're going on a court of appeal, the kind of work that's involved and their capacity for it—for instance, what their experience is in writing.

The court of appeal is a very scholarly type of job. It's so different from a trial and the kinds of skills you look for in a trial judge. You have to know a lot of law, but you have to know a lot about other things too, in hearing cases at the court of appeal. You have to have a breadth of outlook, and so on, because only 2% of all the cases decided by our courts of appeal ever go to the Supreme Court. The court of appeal—the federal and the ten provincial ones—98% of the time is the final word, and often on very important legal matters.

You want people with a very big breadth of view and mind and life experience when you're selecting for that body. Absolutely, the interview would be very important.

[*Translation*]

Mr. Marc Lemay: Unless I'm mistaken, Mr. Russell, what you said is clear to you. If I were to sum up your testimony and the text you sent us, would I be right in saying that several nominations of candidates currently in federal jurisdictions were not based on merit but rather on the contacts these candidates may have had?

● (1705)

[*English*]

Prof. Peter Russell: I would.

[*Translation*]

Mr. Marc Lemay: Thank you.

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

[*English*]

Prof. Peter Russell: May I just say one piece of evidence? People who applied for the provincial court when I was the chair and didn't even make our short list were appointed federally. People who made our short list and weren't highly ranked were appointed federally.

I've compared notes with chairs of other provincial committees and found the same thing. So I have evidence. I'm not going to name names. It's easier to get appointed federally, to the higher courts, than it is to most of the provincial courts today.

I'm proud of the provincial courts, I might say.

The Chair: If the committee gives its okay, Mr. Broadbent would like to ask the questions instead of Mr. Comartin. Is everybody okay with that?

Mr. Broadbent.

Hon. Ed Broadbent (Ottawa Centre, NDP): I want to thank my colleagues and welcome our guests.

To preface my comment, I want to get at the selection process a bit, about a phrase that particularly Professor Russell used, about getting the best people. If I may, I want to raise the question, and you just said something about the importance of the appeal court, but to the Supreme Court level.

For the first time in my life, if I may say so as a parliamentarian, a political scientist, and someone who was very active in the constitutional change between 1980 and 1982, I was deeply shocked by the Supreme Court decision on the Quebec health care system, which I thought was a very bad decision. I, for the first time in my life, started thinking about the process of selecting our judges.

I followed with interest what's going on in the U.S. Particularly, I was struck by Ronald Dworkin's recent article, and I want to ask you what you think of it. This is about, how do we get the best people? Let me agree with the kind of process that you yourself have said is kind of a minimal level of reform, as I've listened to you.

Here's what he says about the importance of a judicial philosophy of senior appointments to the bench. He makes reference to the U.S. Constitution, obviously, but I think everything he says applies to our Constitution, and I'd like to get your response on it.

He's talking about how to get beyond the abstract language, say, that our charter is written in, or the equivalent writing in the U.S. Constitution, to making practical decisions. He says:

> Judges can interpret that abstract language only by appealing to a vision of a desirable, workable form of democracy that they believe both fits and justifies the overall structure of the Constitution. They can then justify choosing one reading of the abstract clauses rather than another by explaining how that reading makes a better contribution to democracy so conceived.

He goes on, and broadly speaking, what he says is that it's of profound importance in appointing a person to the Supreme Court—and I would say the same now to our Supreme Court or to the courts of appeal, as you're talking about—that we understand their conception of democracy and the Constitution.

I would like each of you to respond, if you would. Do you think that is really important for legislators, to understand the kind of conceptual thinking of judges, potential judges? Is their ideology, their philosophy, very important; and if so, in terms of the process that you're recommending, how would that be dealt with?

Prof. Peter Russell: I'm glad you asked the question, because it gives me an opportunity to say “don't go to the United States”. I admire the South African system. This sounds as though you're talking about Mars. South Africa is not Mars; it's a new and thriving constitutional democracy. It takes the appointment of its judges, particularly at the higher levels, very seriously. This is a country that suffered enormous deprivations of human rights, and they have a constitution with guaranteed rights that they take very seriously, and the court has a huge role in giving reality to the vision of democracy incorporated in the South African constitution.

They have a system of narrowing down the candidates to a relatively short list and then having public hearings, not before a committee of the Senate but before a judicial services commission chaired by the chief justice of the constitutional court. It includes members of Parliament. It's very important to have the members of Parliament from all sides of Parliament. it includes law deans and eminent people in the law, and a judge too, and representatives from the bar. It takes place in public. The media cover it. The questions are very much about how they see the constitution serving South Africa and what kind of vision they're bringing to its interpretation. Then a short list goes forward to the President, who in their case is the equivalent position to our Prime Minister.

● (1710)

Hon. Ed Broadbent: Would you recommend such a system?

Prof. Peter Russell: Yes, but I'd recommend the committee not just take my word for it, in two or three minutes in a subcommittee of the justice committee. To really get serious about it, our book will be out soon, and we have a South African who's written it up very well. There's a lot of writing about the South African system. They have an active body of both scholars and journalists who cover those affairs.

I could go to other countries. Part of the book that I keep advertising will be out, I hope, soon on appointing judges around the world covers 19 different jurisdictions, including the new International Criminal Court.

There are other ways of reforming that are, I think, better than ours. The Israeli one is an interesting one to look at. Now, there is a dynamite, important supreme court, with a huge jurisdiction and tremendous issues of balancing security and democracy. If ever a constitutional...a supreme court—it is a supreme court—

Hon. Ed Broadbent: I don't want to be rude, but—

Prof. Peter Russell: —it involves parliamentarians very much.

Hon. Ed Broadbent: Yes, that's what I wanted to ask.

Prof. Peter Russell: They're front and centre in that process, because so much about the future of the country hinges on the people who go there.

So I encourage you to not think that the U.S. system, which I don't want to knock—I think it's better than ours—

Hon. Ed Broadbent: I'm not advocating the U.S. system. I'm advocating his argument and its applicability here.

Prof. Peter Russell: But so many people think that's the alternative: you either have the status quo here or you do what's done in Washington. I just want to open up your horizons to other ways of doing it.

The Chair: Your last question?

Hon. Ed Broadbent: Well, I think I'll hear Mary Eberts on the same issue, and that's fine, Mr. Chair.

Ms. Mary Eberts: I agree that it's very important to understand the philosophy about democracy and about the role of Parliament of potential judges.

I would say your question is aimed at the level of the Supreme Court of Canada, which makes the critical decisions in our constitution, but courts of appeal make them as well, and it is central to any decision under the charter for a judge to understand the proper role of Parliament in a parliamentary democracy. Our judges are making decisions all the time about what is appropriate for Parliament, what are the capacities of Parliament, what are its special strengths and its special roles. I would agree with Peter that it is critical for there to be a public understanding of the judicial philosophy of these candidates.

I make a distinction, as they did recently in the discussions in the United States, between understanding the overall philosophy about democracy and about the actors in democracy, and putting questions to candidates about how they would decide a particular case. I think it was Judge Ginsburg who, when she was being considered for the Supreme Court of the U.S., declined to answer certain questions because they were asking her to pre-judge cases that might come before the court. I believe she was right about that, but an overall understanding of a candidate's philosophy of democracy and of the roles of various actors in a democratic state is crucial.

The Chair: Thank you.

Mr. Macklin, welcome to the committee.

● (1715)

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

My apologies for coming in late on your presentation, but thank you for being with us and sharing your thoughts, because clearly we are very interested in the broad perspective of views within our community of interest.

I suppose one thing that draws me—perhaps as you, Professor Russell—is that as a political scientist, you research and build up your body of positions based on evidence you've been able to collect. What seems to be pervasive in all of this—and maybe I'm inaccurate in this, but it appears it is unsaid—is that we have some type of crisis in our judiciary. A great deal of our presenters point to politics and the influence of politics in the process, and I would therefore ask you if, based on your evidence, you see this political bias is coming through in the judiciary, such that it's constituting a problem within our courts.

For example, are the conservative judges in Alberta showing their conservative bias in the way they make decisions? I think there is something fundamental here, in this process we're going through, that asks what's wrong with the system. Are people saying, and do you have political evidence that would suggest, that in fact there are problems that might constitute a crisis within our judiciary if we don't amend the process of selection?

Prof. Peter Russell: You mentioned Alberta at the provincial court level; far from having a crisis, I think we reformed, and people aren't appointed to the provincial courts in Alberta on political grounds.

Our problem is with federal appointments. It's a problem of settling for mediocrity and excessive use of political favouritism in choosing judges. I say, at the end of my written brief, that we have a pretty fine federal judiciary. It's pretty good; it could be a lot better.

I don't know about you, Mr. Macklin, but I take great pride in my country's institutions. When I go abroad, I'm ashamed when I tell about the federal appointment system. I go to a lot of international conferences. They say you've cleaned up the provinces; you have balanced independent appointing committees; you're doing a good job. How come the highest judges in your provinces are appointed in a kind of hidden way that's open to political manipulation?

I'll tell you something that really bothers me. I sometimes meet judges, often on the subway, who are on those courts. They say,"Peter, you don't know how red the last set of appointments has been." Do you know what that means? Well, you know what it means. They're not bad judges.

Here's one of the most brilliant lawyers we've had. Why don't we go for the best? Are we really content with mediocre appointments who happen to have connections to the governing parties? Is that good enough for you, Mr. Macklin? I'll tell you, it's not good enough for me. If that's a crisis, that's a crisis for me—not living up to what this country should be.

Hon. Paul Harold Macklin: What is the evidence you use to say our court is in crisis?

Prof. Peter Russell: If you want to defend mediocrity by saying it's not in crisis—

Hon. Paul Harold Macklin: I'm just asking you what your evidence is.

Prof. Peter Russell: I didn't say it was in crisis. I said I regard.... That my governing party, the party that's governing the country, is content with something that's not the best we could have is terribly disappointing.

We have a lot of young people. I came up here yesterday to be with the Teachers Institute on Canadian Parliamentary Democracy, which is trying to get our young people more interested in Parliament. This is the kind of thing—when they're told that the party that governs us, the government that's in power, is content with mediocrity, that's what drives them to cynicism. That's a crisis.

Hon. Paul Harold Macklin: Well, let's just accept one thing that you said. You're saying, then, that the judiciary isn't in crisis. All right. Then I go to your point that your broad aim, I believe, in reform is to try to make a good judiciary better.

Prof. Peter Russell: That's exactly right.

Hon. Paul Harold Macklin: Now, what do you think ought to be the ultimate test, the criteria, for creating that better justice system?

● (1720)

Prof. Peter Russell: What are they—criteria when you're looking for excellence?

Hon. Paul Harold Macklin: Yes, the criteria for selection. What do you think ought to be...?

Prof. Peter Russell: I'll stick with the trial level, because it's the level at which I chaired a committee that was very, very concerned with that. As a committee, we were asked to draw up criteria.

We worked on three areas. One was professional competence. You'd say, what else is there? Professional competence, by the way, included information—handling information, being computer literate. Professional competence meant good administrative skills. A lot of judges may know some law, but if they can't run their courts, they'll be terrible.

We looked at social awareness. We wanted judges...not because they had a particular view on an issue, but if they were going into a family court setting, we wanted them to be up on the literature about custody of children and whether joint custody works or not. What are they reading about that? If they're going into criminal court, what do they know about prisons, and the impact of prisons on their inmates? We wanted those who are going into those positions to have knowledge of how their decisions are going to affect people. That's social awareness.

The other was character and personality. We wanted people who, unlike me, will listen and not be pompous. We wanted hard-working people. We wanted them in fairly good health and in very good mental health. We wanted very much a sense of humour in our trial judges, and a sense of humility.

I'm just briefly summarizing what we were looking for.

Hon. Paul Harold Macklin: One other thing you raised is of some concern to me—

The Chair: You may have one quick last question.

Hon. Paul Harold Macklin: When you talk about judges having expertise in a particular area, I understand that within our country, in many cases, the principle is that we need bilingual judges in order to be able to meet certain requirements of our constitution.

Do we pick judges, and should we be picking judges, because of their expertise in a particular area for a particular court? Wouldn't it be better to say we're trying to find people who have characteristics that would allow them to fit into the court in its broadest sense?

Prof. Peter Russell: It depends on the court. In federal court, if you don't have anyone who knows anything about admiralty law or patents, you have a problem. You'd better make sure that when your admiralty person's gone, you replace him with someone who knows about maritime law.

It's a little hard to generalize. I used to talk a lot to the provincial attorney general about what the real needs were. In some areas, it really was mainly in the criminal area. In other areas, it would be family. Those are important. They're not exclusive; someone who's doing family law knows a lot about the criminal justice system, particularly in relation to young offenders. You often do look for that kind of specialization. That's not a bad thing.

There are generalists. A lot of the candidates who came before us were generalists. They would make very good judges. Mr. Toews talked earlier about someone he knew who was in civil corporate law and made a good criminal law judge.

Still, you don't want to rule out finding specialists for areas where you find a real gap.

The Chair: Thank you, Professor.

Mr. Breitkreuz is next. We have another committee coming at 5:30.

Mr. Garry Breitkreuz (Yorkton—Melville, CPC): Thank you. I will try to make this as brief as possible.

The Chair: I'm sure you will.

Mr. Garry Breitkreuz: You have made some statements that concern me. We could have a court system that is much better than it actually is. I am asking a question now as someone who is not a lawyer and looks at what we're doing here through the eyes of the average Canadian.

Can you give me an example—and maybe you want to create this, but if it's fiction, make it as close to reality as you can—of why the average Canadian should care about what we are talking about here today? What if an appointment is politicized?

You mentioned things like ensuring the rule of law, or the fundamentals of civil liberties could be threatened, but can you become more specific as to what may happen in court decisions if we don't get the best judges we can possibly get? Can you each think of a couple of examples of where the rubber hits the road?

Ms. Mary Eberts: I'm going to start my answer by telling you that each time I am in court before a judge and a witness gets into the stand and takes an oath and I start asking that witness questions or cross-examining that witness, part of me says there is absolutely no reason in the world why this person should sit there and take this from me. There's no reason why somebody should come, somebody should spill their guts sometimes in court and talk about the most intimate things they could possibly be asked, except that these people who are coming to the court have a respect for it. They believe it's important. They believe their honest and faithful participation in that court process is important, and people who are chosen for juries feel the same thing.

For me, every time I go through that process with a witness it's a small miracle, because it's about the rule of law. You don't have enough police in this country to make everybody behave or to enforce every court order. The reason the system works is that people respect it and that people believe it has a role to play. If ordinary citizens stop respecting the courts, you will not be able to force what they now give voluntarily, which is their willing adherence to a legal order.

That's why it's so important. Once you lose that, it's gone, and you don't even know it's gone until it's gone. Every time somebody gets wind of some judge being appointed because he's somebody's buddy, or some judge makes a horrible racist remark from the bench and nobody does anything about it, then that legal order is fraying.

Here's one last example. There are really a lot of cases in which judges make bad remarks about aboriginal people from the bench. There is a well-known decision of our Supreme Court of Canada called Regina v. Gladue in which the Supreme Court of Canada says right from the bench that our legal system has failed aboriginal people. It is the most dramatic admission of system failure you'd ever want to see in a case.

These complaints come from the Assembly of First Nations, from regional chiefs, from bands, from other organizations such as the Inuit Tapirisat. They come to the Canadian Judicial Council, and do you know what happens to them? They're blown away. They say, “This didn't make any difference to the result”, and that's it. The Supreme Court says the system has failed aboriginal people, and the Canadian Judicial Council goes on failing people. When we have a loss of individuals' willingness to put up with the rule of law, we will never recover it. That's why this is important.

● (1725)

[*Translation*]

The Chair: Mr. Russell.

[*English*]

Prof. Peter Russell: Last May, a woman called me and told me about a case. She's a woman of lower-middle-class status, and that's important. She didn't qualify for legal aid. She was in a very important property dispute in the Superior Court. She'd been absolutely humiliated by two judges who had her crying and weeping and who really dismissed her case with the other side hardly having to open their mouths.

I got the court records and found a lawyer for her. She's a newcomer to our country. I was ashamed. I was ashamed—that's important.

Ms. Mary Eberts: I've had that reaction too.

[*Translation*]

The Chair: I'm going to ask the final question.

Professor, in your opinion—and this is a very precise question—if we were to have a system whereby the committee submitted a short list of candidates to the minister from which he would select a judge, would there be any constitutional impediment to this under section 96 of the Constitution, yes or no?

[*English*]

Prof. Peter Russell: Absolutely. I would use the Canadian Bar Association's 1985 report. On that committee were John Robinette, Neil McKelvey, Robert McKercher, a star-studded band of lawyers. I was just their research assistant. We went over that, and unless the law officers of the Crown in Britain are wrong and in the provincial capitals are wrong, there is no constitutional problem in having that kind of system.

● (1730)

[*Translation*]

The Chair: Thank you very much.

Tomorrow, we will discuss which witnesses will appear in the future and we will finalize the arrangements. Should you have any one else to suggest, please make this known tomorrow, at the end of the meeting.

Thank you all. I'd like to thank the witnesses. Have a good evening.

The meeting is adjourned.

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