PROPOSAL TO REFORM
THE SUPREME COURT OF CANADA
APPOINTMENTS PROCESS

MINISTER OF JUSTICE

APRIL 2005

I. INTRODUCTION

a. Background

On December 12, 2003, the Prime Minister announced that the government would "specifically consult the Standing Committee on Justice and Human Rights on how best to implement prior review of appointments of Supreme Court of Canada Judges". On February 4, 2004, the Government released its Action Plan for Democratic Reform. The Action Plan indicated that "the government will specifically consult the appropriate parliamentary committees on how best to implement prior review of appointments of Supreme Court of Canada Judges."

In March and April 2004, the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness (the "Justice Committee") held hearings on the issue. It heard from domestic and foreign academics, legal organizations such as the Canadian Bar Association and the Law Society of Upper Canada, a former Supreme Court of Canada justice and the Minister of Justice. The Justice Committee had previously embarked on a review of the Supreme Court of Canada and Court of Appeal appointments process in November 2003. This review resulted from Motion M-288, which was passed unanimously by the House of Commons.

At his March 30, 2004 appearance before the Justice Committee, the Minister described the current appointment process including releasing a protocol on the nature and scope of the consultation process and the criteria for nomination of candidates. The Minister's presentation is available on the web at http://canada.justice.gc.ca/en/news/sp/2004/doc_31152.html.

On May 10, 2004 the majority of the House Justice Committee recommended an interim process for the vacancies created by the unexpected resignations of Justices Louise Arbour and Frank Iacobucci. The majority also recommended a permanent process but noted that further study of its proposals would be required.

On August 24, 2004, an *ad hoc* committee was established to review the two nominations for the Iacobucci and Arbour vacancies. The Interim *Ad Hoc* Committee on the Appointment of Supreme Court Judges (the "*Ad Hoc* Committee") was composed of Members of Parliament, a representative of the Canadian Judicial Council and a representative of the Law Society of

Upper Canada. The *Ad Hoc* Committee's report was issued on August 27, 2004. In addition to its comments on the two nominees, the Committee also commented on its own process and requested that the Government respond to the Justice Committee's May 10 Report by the end of October 2004.

On October 29, 2004, the Minister of Justice wrote to the Justice Committee, advising that the Government supports the principal recommendation of the Justice Committee that an advisory committee should be established as required for the purpose of filling vacancies on the Supreme Court of Canada as they arise. In the Government's view, such a process would enhance the transparency of the appointments process, while maintaining the exceptional quality of nominees for positions on the Court.

The Minister advised that he would continue his consultations and return to the Justice Committee to outline a "fully developed proposal".

In a further letter dated November 30, 2004, the Minister provided the Justice Committee with an outline of "the principles and overriding considerations that the Government considers central to the design of a revised process". This letter also set out "an early indication of our thinking in regard to some of the critical elements that were addressed by both the (Justice) Committee Report and the dissenting opinions, and that will inform our final proposal".

b. Building on the Strengths of the Current Process

The Government's proposal is grounded in two themes that characterized the Justice Committee's deliberations, themes that the Minister of Justice recalled and reaffirmed in his March 2004 address to the Committee. First, the review of the appointments process is a task of great importance to our country, given that the Supreme Court is at the pinnacle of our court system and that our court system is a fundamental pillar of our constitutional democracy.

The Minister noted that our Constitution frames both the distribution of governmental power between the federal government and the provinces – otherwise known as legal federalism "or the powers process" – as well as the limits on the exercise of governmental power – whether federal or provincial – otherwise known as human rights, or the "rights process."

The Supreme Court has the constitutional responsibility of holding governments to account when they trespass these limits – either by way of a jurisdictional trespass in the matter of federal-provincial relations, or by way of a rights violation under the Charter. This responsibility has been vested by Parliament in the Supreme Court, and it is a responsibility that the Supreme Court has discharged with diligence, sensitivity, and fairness.

The second theme that characterized the Justice Committee deliberations was that of the Supreme Court of Canada as the exemplar of excellence, whose juridical legacy has resonated beyond Canada. The Minister reiterated what many other witnesses had observed: it is not only Canadians that are proud of our Supreme Court. Rather, our Supreme Court is respected throughout the country – indeed, around the world – as a model of what a vital, modern and independent judicial institution should be.

The Minister then turned to discuss the constitutional framework within which any reform must be situated. The *Supreme Court Act* vests the constitutional authority for the appointment of Supreme Court judges with the executive branch of government, and the executive remains responsible and accountable for the exercise of this important power.
The threshold consideration in this appointments process is to get the best possible candidates and the best possible Court.

The Minister explained that to date this constitutional responsibility has been fulfilled through a comprehensive consulting process which included:

1. The identification of candidates from the region where the vacancy originated – be it the Atlantic, Ontario, Quebec, the Prairies and the North, and British Columbia regions. This is a matter of practice, except for Quebec where the *Supreme Court Act* establishes a requirement that three of the justices must come from Quebec.

   The candidates are drawn from judges of the courts of jurisdictions in the region, particularly the courts of appeal, as well from senior members of the Bar and leading academics in the region. Sometimes, names may be first identified through previous consultations concerning other judicial appointments.

   In particular, the identification and assessment of potential candidates is based on consultations with various individuals, including:

- the Chief Justice of Canada and perhaps other members of the Supreme Court of Canada
- the Chief Justices of the courts of the relevant region
- the Attorneys General of the relevant region;
- at least one senior member of the Canadian Bar Association;
- at least one senior member of the Law Society of the relevant region.

2. The second step is the assessment of the merit of the potential candidates based on the following criteria:

Professional Capacity

- Highest level of proficiency in the law, superior intellectual ability and analytical and written skills;
- Proven ability to listen and to maintain an open mind while hearing all sides of an argument;
- Decisiveness and soundness of judgement;
- Capacity to manage and share consistently heavy workload in a collaborative context;
- Capacity to manage stress and the pressures of the isolation of the judicial role;
- Strong cooperative interpersonal skills;
- awareness of social context;
- bilingual capacity; and
- specific expertise required for the Supreme Court. Expertise can be identified by the Court itself or by others.

Personal Characteristics

- Highest level of personal and professional ethics: honesty; integrity; candour;
- Respect and consideration for others: patience; courtesy; tact; humility; fairness; tolerance; and
- Personal sense of responsibility: common sense; reliability.

Diversity

- the extent to which the composition of the Court appropriately reflects the diversity of Canadian society.

The Minister concluded his description of the current process by explaining that after the assessments and consultations are completed, he discusses the candidates with the Prime Minister. The Prime Minister recommends a candidate to Cabinet and the appointment is made by Order in Council.

There is little doubt that the current process has been successful in identifying and appointing judges of highest professional qualification and personal capacity to the Supreme Court of Canada. The Government's proposal will build on the strengths of this process, while at the same time enhancing the transparency and credibility of the manner in which the identification and selection of candidates are made. The next section elaborates on the considerations that have informed these improvements.

c. General Principles

A number of overarching principles have informed the development of the Government's proposal for a revised process.

Merit

The overriding objective of the appointments process must continue to be to ensure that the best candidates are appointed, based on merit. The Government has developed and applied criteria, set out above and described in the Minister's appearances before both the Justice Committee and the *Ad Hoc* Committee. These should continue to provide appropriate benchmarks for assessing candidates for judicial office – both at the Supreme Court of Canada and other federally appointed courts. The needs of the Court in terms of expertise are also an important consideration.

Within this framework and to the extent possible, the Supreme Court of Canada bench should reflect the diversity of Canadian society. A diverse bench ensures that different and plural perspectives are brought to bear on the resolution of disputes.

Constitutional Framework for Appointments

Any revised appointments process must be rooted in the recognition that the appointment of Supreme Court judges is within the constitutional authority of the Governor-in-Council. This ensures that the executive branch of government remains responsible and accountable for the exercise of this important power.

Judicial Independence and the Integrity of the Courts

The system should protect and promote the reality and perception of judicial independence. The independence of the judiciary is essential for the rule of law and a cornerstone of our legal system. Judicial independence ensures that legal claims are adjudicated by fair, impartial and open-minded judges who are not beholden to any group, interest or stated public position.

By the same token, the system should preserve the integrity of the Supreme Court of Canada and the court system. The judiciary is an institution that is vital for the maintenance of the rule of law and the health of Canada's democracy. Any reforms must be mindful of the impact that public commentary may have on the reputation of individual judges and the potential loss of public confidence necessary to discharge their judicial functions. This could also have the effect of deterring excellent candidates from allowing their names to be considered.

Transparency

The system should be more transparent. Transparency is accomplished by enhancing public knowledge and understanding of the process and can be seen as a goal in itself. Another goal of transparency is to ensure public confidence that appointments are made for legitimate reasons that are not linked to political favouritism. The Government agrees with the Justice Committee that transparency does not require candidates to be subject to direct, public questioning.

Parliamentary Input

The Government has clearly committed itself to ensuring meaningful Parliamentary input. Parliamentarians are the representatives of Canadians

and are therefore in a unique position to contribute to the transparency of the advisory committee process. The Justice Committee report recommended a role for Parliamentarians in the advisory committee, a recommendation echoed in the dissenting report of the Bloc Québecois. The dissenting report of the New Democratic Party recommended that Senators not sit on the advisory committee. The dissenting report of the Conservative Party would require a further Parliamentary role – namely, ratification of the chosen nominee in a way that would not infringe on the constitutional right of the Governor-in-Council to make the appointment.

In addition, the Justice Committee recommended that once an appointment is made, the chair of the advisory committee and/or the Minister would be required to appear to explain the process by which the appointee was selected and the person's qualifications. The New Democratic Party recommended that the appearance occur before the appointment is made.

Provincial Input

The federal government has consistently acknowledged the importance of provincial input through consultation with appropriate provincial Chief Justices, Attorneys General, provincial bar leaders, and other interested provincial bodies that may wish to make recommendations. The extent of provincial input into the appointments process is an issue raised by the Conservative Party and the Bloc Québecois in their dissenting reports.

d. Practical and administrative considerations

There are several practical considerations which, in the Government's view, should also inform the design of a new appointments system.

Timeframes

As recent experience informs us, vacancies on the Supreme Court of Canada can arise unexpectedly – for instance as a result of an unanticipated opportunity for a member of the Court, death or serious illness, or a judge's personal decision, for example, to spend more time with family.

Given its caseload and the importance of timely decision-making, the Supreme Court of Canada should ideally operate with a full complement at all times. This suggests that a revised appointments process must be capable

of being established, mandated and having completed its considerations and recommendations, in a fairly constrained time frame.

It must also be recognized that members of the advisory committee – whether they be Parliamentarians, prominent academics, judges, representatives of legal organizations or other prominent Canadians – must juggle myriad other obligations in addition to the demands of participation in this process.

Moreover the practice of regional representation on the Court likely means that members will be located in different parts of the country and will require a highly organized consultation, travel and deliberation agenda if their task is to be completed in a timely manner. The advisory committee process would require sufficient flexibility, as well as a focussed and manageable mandate, to allow members to properly prepare and participate in the work of the committee.

Size of advisory committee

Similarly, the Government agrees with the Justice Committee's view that the advisory committee should be of a manageable size. This will facilitate co-ordination of the committee's work, aid in the development of cohesion and consensus within its membership and promote the goal of achieving a work product in a timely fashion.

Administrative Support

An advisory committee would require the resources necessary to ensure effective administrative support, as well as reasonable research capacity.

Mechanisms for Ensuring Confidentiality

The Justice Committee emphasised the need for the confidentiality of the committee process and deliberations in order to maintain the integrity of our courts and public confidence in individual judges. For example, the Justice Committee recommended that deliberations of the advisory committee be conducted in private and in confidence.

Confidentiality is the most critical prerequisite to ensuring the effective operation and public credibility of the revised process. The prospect of

breaches of confidentiality could result in a future reluctance on the part of those consulted to provide candid and forthright assessments, and thereby undermine the effectiveness of the process.

e. Achieving a Balance

The Government's proposal reflects the need to balance and accommodate these principled and practical considerations in a manner that achieves the stated objectives of greater transparency and credibility of the process while preserving the authority and the responsibility for these appointments in the Governor-in Council.

II. OVERVIEW OF PROPOSAL

The Government's proposal consists of a four-stage process.

a. The Minister would conduct consultations as under the current process (with the Chief Justice of Canada, the provincial attorneys general in the region, the chief justices in the region, the local law societies and the Canadian Bar Association). From these consultations, an initial list of candidates would be developed. Ordinarily, the list would be between five and eight names, depending on the size of the region.

b. An advisory committee would be established as each vacancy arises to reflect the regional nature of the appointments. The advisory committee would assess, on a strictly confidential basis, the merit of candidates provided to it by the Minister. The work of the Committee would be based on a written mandate from the Minister and established criteria. The Committee would provide an unranked short list of three candidates with an assessment of their merit and a full record of the consultations conducted.

c. The Minister would complete such further consultations as considered necessary and provide his advice to the Prime Minister. The Prime Minister would make his recommendation to Cabinet and, in all but the most exceptional circumstances, the appointment would be made from the short list.

d. The Minister would appear before the Justice Committee after the appointment to explain the appointment process and the professional and personal qualities of the appointee.

III. DETAILED PROPOSAL

a. First stage: Minister of Justice Consults and Develops an Initial list of Candidates

The Government proposes that an initial list of candidates would be prepared by the Minister and referred to the advisory committee for assessment as to merit. Ordinarily, the list would be between five and eight names, depending on the size of the region.

In creating the list, the Minister would consult with the Prime Minister, the Chief Justice of Canada, the provincial Attorney General(s) for the region in question, the Chief Justices of the courts for the region in question, the local law societies for the region in question and the Canadian Bar Association. At the outset of the process, the Minister would also publicly invite the views of any person or group with respect to candidates who merit consideration.

The Government recognizes that this is a departure from the Justice Committee Report, which proposed that the advisory committee would initially develop "the most comprehensive possible list of candidates" from a wide range of sources, and would then be to narrow this list down to a short list of three to five names.

There are both principled and practical reasons for this departure from the Committee's recommendation. On principle, the Minister's continued responsibility to consult and develop the initial list is consistent with the constitutional and legal framework to which the Government remains committed. It also reflects the advisory nature of the Committee's role.

In practical terms, as indicated above, vacancies on the Supreme Court of Canada often arise without a great deal of prior notice. Given its workload and the significance of its decision making, it is of critical importance that the Court is capable of operating with a full complement of nine judges. In the ordinary course, two to three months would be the likely timeframe for the Committee's establishment and operation, including the nomination of committee members and organization of administrative support.

It must be recognized that the advisory members will be members of Parliament, professionals and other persons of significant stature and responsibility who can be expected to organize their participation in light of other major commitments. It would simply be unrealistic to expect that the advisory committee could develop a comprehensive list of all possible candidates, conduct all necessary consultations and undertake in-depth written analysis, deliberate and report to the Minister in this time frame. Development of the initial list with the input of Chief Justices, Attorneys General and senior members of the legal profession will allow the Committee to focus its time and resources on those candidates who have been identified as meeting a threshold of merit and capacity.

It should be noted that while the Government does not accept the Bloc Quebeçois proposal that the initial list be prepared by the provincial governments, the Minister will actively seek the views of the Attorneys General of the region in the development of the initial list. This consultation, together with direct provincial participation on the Advisory Committee described below, will provide significant and meaningful provincial and territorial input. It is also consistent with the current constitutional framework.

Under the current process, candidates are not advised that they are being considered for appointment. Under this proposal the Minister would seek the consent of the proposed candidates prior to their assessment by the advisory committee. There are two reasons for this. First, for reasons of courtesy and personal privacy, the qualities of a candidate should not be reviewed by an independent committee without the prior knowledge and consent of the candidate. Second, some candidates may not want to be considered for the appointment. Prior consent ensures that the advisory committee will only be considering candidates who are willing to accept the position if offered– thereby optimizing the advisory committee's time and resources.

As indicated, the Government proposes that the mandate of the advisory committee be to review and assess a list of ordinarily between five and eight candidates for the Supreme Court of Canada. However it is recognized that there may be instances where the advisory committee's consultations identify a candidate who is not on the Minister's list. The advisory committee would be entitled to seek the consent of the Minister to assess

additional candidates. Upon receipt of such a request, the Minister would conduct the same consultations as undertaken in the development of the list. If the Minister agreed that the additional candidate should be assessed, he would seek the consent of the additional candidate to being assessed.

b. *Second stage: Composition and Functions of the Advisory Committee*

Committee Composition

The Government shares the Justice Committee's view that advisory committee members should be drawn from a range of constituencies in order to have a complete and balanced perspective and expertise. However we think it important to emphasize that, once nominated, these members are not participating in order to "represent" particular interests or constituencies. Rather, all advisory committee members will be expected to bring their diverse experience to contribute in an objective and impartial manner to the collective assessment of merit in developing a short list.

Parliamentary Membership

There was a general consensus among the witnesses before the Justice Committee that Parliamentarians should be represented on the advisory committee. Such participation is a key component of the Government's commitment to democratic reform more broadly. The involvement of the elected representatives of Canadians will enhance the transparency and the credibility of the process.

The Government agrees with the formula proposed by the Justice Committee. Representation from each political party recognized by the House of Commons (as that term is interpreted from time to time by the House) would permit a divergent range of backgrounds to be reflected on the advisory committee. The Government would not otherwise limit the ability of the political parties to nominate a member (for example, by requiring that the individual be a member of the Justice Committee).

The Government agrees with the position of the New Democratic Party that Senators should not participate on the advisory committee. From a principled perspective, the Government's commitment to democratic reform is intended to ensure enhance and meaningful participation of Canada's

elected representatives, our Members of Parliament.

Judicial Membership

There would be distinct advantages in having a member with judicial experience on the advisory committee. As one witness before the Justice Committee pointed out, judges are well placed to help the advisory committee understand and assess the desirable attributes for judicial candidates. No doubt that is the main reason why judicial members sit on other judicial selection bodies – for example, in Ontario and in South Africa.

That said, the participation of a sitting judge may not be appropriate. It would be ideal to have a judicial nominee with knowledge of the courts of the region in question. A sitting judge would obviously be in a sensitive position in assessing the merit of judicial colleagues. And that judge would obviously not be considered for assessment. This might suggest, perhaps unfairly, that he or she is not sufficiently meritorious. Accordingly the Government proposes that the advisory committee include one member who is a retired judge, to be nominated by the Canadian Judicial Council.

Provincial Membership

Provincial participation plays an important role in the current process. In particular, the views and information provided by provincial attorneys general are very important in identifying and assessing candidates. Local interests are also taken into account through consultations with the chief justices of the courts in the region and with the local law society.

We appreciate that provincial governments have traditionally sought a more formal role in the appointments process. As indicated earlier, this longstanding expectation led to proposals for constitutional reform which would have seen appointments being made from a list generated by the provinces in the region where the vacancy has arisen. These proposals for constitutional reform are echoed in the dissenting report of the Bloc Québecois to the Justice Committee Report. In a similar vein, the Conservative Party has suggested that there be “substantive input from all of the provinces and territories” into the compilation of an initial list of candidates. And we appreciate – as is said elsewhere – the juridical specificity of Quebec’s civil law tradition, which finds expression in the

legal protection of three justices from Quebec on the Supreme Court of Canada.

The Government's proposal responds to provincial expectations of more formal participation in the appointment process in three ways. First, attorney(s) general of the region in question would be consulted by the Minister in the initial development and identification of the list of candidates to be assessed by the advisory committee. Second, the provincial attorney(s) general from the region would nominate a member of the advisory committee. Third, the advisory committee, with ample provincial representation, would have participated in the consultation and evaluative process of the initial list of candidates, and the determination of the short list of three candidates.

We have considered various options as to how provincial nomination would be determined in regions including multiple provinces. It might be suggested for example that each province nominate a member. However this approach would either undermine the overall balance of the committee composition, or result in a completely unwieldy size if the balance were to be re-established.

The Government is proposing that the provincial attorneys general of the region would collectively nominate a single member. This will ensure that provincial membership on the committee is numerically consistent irrespective of region.

Legal Organizations

Traditionally, legal organizations such as the provincial law societies or the Canadian Bar Association have been consulted by the Minister of Justice in relation to Supreme Court appointments. This involvement recognizes the key role that lawyers play in the justice system, their understanding of the attributes necessary for a good judge and their knowledge of lawyers in the region who may be considered as potential candidates. The Minister of Justice will continue to undertake these consultations in developing the list to be considered by the advisory committee.

The Government recognizes that the perspective and expertise of the legal profession will be important to the work of the advisory committee and accordingly proposes that one committee member should be a member of the

legal profession. Given the primary statutory responsibility of the law societies in regulating the legal profession, the Government proposes that the member be nominated by the law society of the region. As with the provincial nominee, and for the same reasons given above, in regions of multiple provinces, the law societies would nominate a single representative.

Lay Membership

The Justice Committee recommended, and several witnesses supported, inclusion of so-called "lay" members – persons who are neither judges nor lawyers. We agree that the participation of lay members would provide an important perspective to the committee's work, particularly in relation to assessing personal suitability. Lay members would also help promote public confidence in the process by signalling in a concrete manner that appointments to the Court are not the sole preserve of lawyers, judges and politicians.

Accordingly the Government proposes that the advisory committee should include two persons, to be nominated by the Minister of Justice, who are neither active nor retired judges nor lawyers. These will be eminent Canadians of recognized stature in the region – persons of integrity and distinction.

Diversity on the Advisory Committee

It is clearly desirable that the advisory committee membership, to the extent possible, reflects the diversity of Canadian society. A diverse committee will help ensure that a wide range of insights and experiences will be reflected in the assessment process. The Government is committed to taking diversity into account in making its own nominations and will also encourage all parties to consider nominating members from diverse backgrounds.

Chair of the Advisory Committee

The Government proposes that the advisory committee select a chair from its own members.

Committee Mandate

As indicated, the mandate of the Supreme Court of Canada Appointment Advisory Committee will be to assess, on a strictly confidential basis, the merit of candidates provided to it by the Minister. The work of the Committee will be based on a written mandate from the Minister and established criteria. The Committee will provide an unranked short list of three candidates with an assessment of their merit and a full record of the consultations conducted.

The advisory committee will be asked to conduct a full, balanced and objective assessment of the candidates. In receiving the committee's advice, the Minister will want to ensure that the recommendations are fully and consistently developed, and have taken into account all of the criteria. The Minister will also have an interest in knowing that the committee's process has been consistently and fairly applied in respect of all candidates.

The Minister would provide a mandate letter in order to outline his expectations and to assist the Committee in undertaking its important responsibilities. In general terms, the letter would elaborate the objectives of the process and the criteria to be applied in assessing merit. It would also set out which persons, at a minimum, should be consulted. It would underscore the critical importance of confidentiality and establish the requirement of written confidentiality undertakings. The mandate letter would also establish certain procedural guidelines that will be discussed more fully below. The Committee would otherwise be able to decide how it will go about its business in terms of conducting consultations, undertaking written analysis and reporting.

The mandate and operations of the Committee would be fully explored at a preliminary meeting between the Minister and the committee soon after the initial identification of candidates is completed. This will serve not only to allow for a collective discussion of the Minister's needs and expectations, but also to develop collegiality between the committee members and to develop a common sense of purpose between the Minister and the Committee. It seems likely that, given the novelty of this new process, these discussions would proceed on the basis of a draft mandate letter that would be finalized following that first meeting.

It would also be both reasonable and appropriate that the advisory committee and the Minister should have ongoing communications, as necessary, with respect to issues that may arise during the course of the Committee's work.

In order to benefit from the experience of the committee and to build on the strengths of the process, it would be valuable for the Minister to meet with each advisory committee after the appointment is completed to hear their views on the committee's procedure and how its effectiveness might be improved for the future.

The Government proposes that the advisory committee be responsible for determining its own process, subject to guidelines established in the mandate letter provided to the advisory committee – which would reflect the principles contained in this proposal. Major decisions of the advisory committee would require the consensus – or, failing that, a majority vote – of committee members. These would include decisions as to whether the advisory committee would seek the consent of the Minister to add a candidate to the initial list, whether and how the committee would consult with a certain individual or group, and which candidates should be on the short list.

Committee Assessment Process

The Government proposes that the committee would conduct its assessment in light of the merit-based criteria set out above. The committee would use two sources of information: first, analysis of written materials and documentation, and second, consultations.

Documentary Information

The Committee would be responsible for undertaking in-depth analysis of written documentary information, including *curriculum vitae*, relevant experience and expertise, judgments, and academic articles. Documentary review might also include, where the nominees are judges, preparation of profiles of the candidates, whether of a statistical nature (e.g. number of cases decided, in what areas of the law, number of cases that have been followed by others) or of an analytical nature (e.g. analysis of case law decided by the candidates).

Committee Consultations

Critically important information would be gathered through consultations by the advisory committee with third parties. The Justice Committee indicated

that a wide process of consultation would need to take place, encompassing at least the consultations currently undertaken by the Minister.

The Government agrees with the Justice Committee proposal that the advisory committee's consultation should encompass at least the consultations that are currently undertaken. The mandate letter for the advisory committee would specify the persons with whom the advisory committee must consult. This would include the Chief Justice of Canada as well as the chief justices, attorneys general, law societies and branches of the Canadian Bar Association in the region where the vacancy arose.

The Government proposes that the Committee should be free to determine what other consultations should be conducted. However given the sensitivities that can arise with respect to views expressed and the risks inherent in breaches of confidentiality, it is proposed that decisions as to additional consultations should be made on consensus – or, failing that, a majority vote – of the committee.

It may not be practical for all members of the Committee to participate in every consultation. However, to ensure that all advisory committee members are making their contribution to the assessments based on the same information, all information gathered and analysis undertaken would be shared with the entire committee. And it is more likely that a consistent and balanced assessment would be achieved if consultations were conducted by representative panels of the advisory committee – consisting, for example of one M.P., one lawyer and one lay person.

No In-person Interviews of Candidates

The Government proposes that there should not be any in-person interviews of candidates, either *in camera*, or in public. The risks inherent in public interviews have been well explored and we agree with the Justice Committee's recommendation that there be "a process of file review only".

In terms of *in camera* interviews, the Government is of the view that in-person interviews are unlikely to elicit any relevant information that is not otherwise available through consultations and documentary analysis. The real concern with direct candidate interviews is that, even with a strong chair and prior established rules as to the scope of questioning, questioning may stray into ground that is inappropriate or embarrassing for the candidate. In

addition, the prospect of being examined in a context where confidentiality cannot be completely guaranteed, could very well deter good candidates from allowing their names to be considered. In our view, the risks of in-person interviews out-weigh the minimal benefits that would be derived.

Mechanism to Ensure Confidentiality

The Government proposes that all aspects of the information-gathering, analysis and deliberations of the advisory committee, including the identity of the candidates being assessed, would remain completely confidential.

As indicated earlier, the importance of this issue cannot be overstated. In the Government's view, the overall success and effectiveness of the proposed advisory committee process depends on the confidence of all participants and observers in the confidentiality of every aspect of the committee's work. Without assurances that the process will be confidential, excellent candidates may be hesitant to have their names put forward. Those consulted with respect to individual candidates may be reluctant to provide a candid assessment. Indeed, potential members of the Committee may decline to participate without assurances that other members are committed to maintaining total confidentiality. The requirement of confidentiality would be a continuing obligation on the part of all persons involved in the advisory committee's work, including committee members and staff, as well as to persons consulted with respect to candidates.

In order to underscore the importance of preserving confidentiality, the Government proposes that all committee members and staff would be required to provide written undertakings of confidentiality. The Committee would also be required to obtain prior written undertakings from any person consulted by the advisory committee.

Complete Record of Consultations and Deliberations

Given the advisory nature of the committee's work, the Minister needs to be informed of the results of all consultations engaged in by the committee as well as the details of all of the committee's deliberations. In addition, the Minister will need to be satisfied that the consultation process has been applied consistently and fairly to all candidates.

In view of these considerations, the advisory committee will be required to maintain a detailed record of all of its consultations and deliberations, as well as of all documentary materials and analysis. All of these records would be provided to the Minister when the advisory committee delivers its report and short list.

Committee Report and Short List

The Government proposes that the committee would provide to the Minister on or before a deadline to be established by the Minister a written report containing a short list of three candidates. The short list would not be ranked but a commentary assessing the strengths and weaknesses of each of the candidates would be provided.

c. Third stage: Advice to the Prime Minister and Appointment by Governor-in-Council

On receipt of the assessments and recommendations of the advisory committee, the Minister would finalize consultations and make a recommendation to the Prime Minister.

The Government is not proposing, as did the Justice Committee, that the Minister be able to request a further short list in the event that the Governor-in-Council is not prepared to appoint from the original short list. The Government is confident that the fact that the Minister will prepare the initial list of candidates, and would consent to the assessment of any additional candidates will ordinarily be sufficient to ensure that the prerogative of the Governor in Council is preserved.

However, in the Government's view the Governor in Council should retain the discretion – in exceptional circumstances as explained below – to appoint from outside the short list provided by the Committee. We are clearly mindful that any exercise of this residual discretion in anything other than exceptional circumstances would call into question our commitment to, and undermine the credibility of, this revised appointments process. It might even dissuade prominent members of the community from participating in a future advisory committee.

Accordingly, the question will be reasonably asked: in what circumstances would the Government take this exceptional step, in light of the longer term

implications for the new process? In the Government's view, such an exceptional remedy arises from an appreciation of the risks in undertaking any new and untried process in such a critical issue. While it is difficult to anticipate all of the circumstances that might arise that would lead to such an exceptional step, it is only prudent to anticipate the possibility, for example, that a major breach of confidentiality might significantly undermine the credibility of the process, and pose possible harm to individual candidates or the Court itself. In such instances it would not only be the right of the Government, but its responsibility, to put a stop to such a prejudicial process, and make the appointment in the manner it has been done to date.

d. Fourth stage: Appearance of Minister of Justice before the Justice Committee

The Government agrees with the Justice Committee proposal that the Minister should appear before the Justice Committee, as soon as possible following the appointment, to explain the identification and evaluative processes by which the appointee was selected, and that person's qualifications. This appearance would contribute in an important way to the increased transparency and credibility of the process. It would also increase public knowledge of the new member of the Supreme Court of Canada and raise overall awareness of the important functions of the institution of the Court itself.

The Government has considered the New Democratic Party proposal that the Minister's appearance should take place before the appointment. The rationale would be to allow the Committee to alert the Governor in Council where the Committee was of the view that the Minister had not followed due process or exercised due diligence. However, the transparency of the Minister's due diligence exercise as set forth in this proposal, the public protocol regarding consultations, the clear mandate and significant role of the advisory committee, together with the strength and stature of its membership, will ensure the completeness and the fairness of the process.

The Government has already explained why the identity of candidates being assessed should be kept confidential. The Government has also identified the risks that make unacceptable public interviews of candidates. The Government is not prepared to accept the Conservative Party proposal for public review of the short list before a Parliamentary committee and a form of Parliamentary "ratification" of the Government's chosen nominee.

IV. CONCLUSION

The Government wishes to express its appreciation to all of those who have taken part in the public debate on this important issue. It particularly wishes to thank the members of the Justice Committee who participated in the preparation of the May 2004 Report as well as the members of the *Ad Hoc* Committee, as well as those individuals and groups who contributed to the Justice Committee hearings.

The Government has considered the various options and has put forward a proposal which, in its view, strikes an appropriate balance among all of the various principled and practical considerations. This proposal achieves the stated objectives of greater parliamentary and provincial participation – and increased transparency and credibility of the process – while preserving the constitutional authority and the responsibility for these appointments in the Governor-in Council, and protecting the independence of the judiciary and the integrity of the court.