SUMMARY

Inquiry Commission on THE PROCESS FOR APPOINTING JUDGES

of the Court of Québec and Municipal Courts and Members of the Tribunal administratif du Québec

LES PUBLICATIONS DU QUÉBEC

Québec

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and Municipal Courts and Members
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NOTE

The purpose of this summary is to provide the public with an overview of the content of the report and its conclusions.

The nature of this summary necessarily implies the omission of a significant amount of detail. In the event of inaccuracy or conflicting interpretations, the full version of the report prevails.

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This publication was drafted following the work of the
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CHAPTER 1

MANDATE OF THE COMMISSION AND OVERVIEW OF ITS ORGANIZATION AND OPERATION

Mtre. Marc Bellemare served as Minister of Justice from April 29, 2003, to April 27, 2004. Between April 10 and 13, 2010, he publicly stated to several journalists in Montreal and Québec that third parties had influenced the Government's appointment of three judges to the Court of Québec. According to Mtre. Bellemare, individuals involved in fundraising for the Quebec Liberal Party had influenced the selection of persons appointed to the Court of Québec during the period that he served as a minister in the Government of Québec. In the wake of these public statements, the Premier of Québec announced the creation of a commission to inquire into Mtre. Bellemare's allegations. The same day, he brought an action in defamation against Mtre. Bellemare.

1.1 Mandate

The Commission was given the following mandate:

> *1. to inquire into the allegations made by Mtre. Marc Bellemare respecting the process for appointing judges to the Court of Québec, in particular, respecting the influence exercised by third parties in this process, and to inquire into the process for appointing judges to the municipal courts and members to the Administrative Tribunal of Québec;*
>
> *2. if appropriate, to make recommendations to the Government with respect to potential changes to the process for appointing such judges and members;*

The Order in Council establishing the Commission stated that a report was to be delivered no later than October 15, 2010. A second Order in Council extending the deadline for delivery of the report was issued on September 22, 2010. The new deadline was January 31, 2011.

Inquiry commissions are agencies constituted by governments to examine, in a structured and independent manner, the facts and events surrounding tragedies, disasters or scandals that are of public interest and that affect public confidence in government institutions.

There is no lawsuit before this Commission. The procedure to be followed in the inquiry is not adversarial, as it would be in a trial. This Commission does not have the mandate to make pronouncements on any individual's civil liability or criminal culpability and it cannot legally do so. The Supreme Court of Canada has stated that a commissioner chairing an inquiry commission must refrain from expressing his or her factual findings in words that imply a conclusion of civil liability or criminal culpability, in order to avoid their being interpreted by the public as declarations of legal liability.

This reminder is particularly important in light of the action in defamation, which is partly based on the facts alleged by Mtre. Bellemare that are the subject of this Commission's inquiry. This Commission and the legal action brought by Jean Charest are two separate proceedings. It is important to distinguish between the mandate of the judge who will be called upon to decide the lawsuit between Mr. Charest and Mtre. Bellemare and my role as Commissioner.

1.2 Scope of the mandate

The purpose of the first phase of the inquiry was to determine whether the third parties identified by Mtre. Bellemare (Franco Fava, Charles Rondeau and Guy Bisson) had indeed been involved in the appointment of two judges (Marc Bisson and Line Gosselin-Després) and the promotion of a third (Michel Simard). It also had to be determined whether this involvement was sufficiently influential to cause the Minister to make the requested recommendations against his will. These are the allegations that gave rise to the creation of this inquiry commission.

The purpose of the second phase was to examine the process for selecting and appointing judges of the Court of Québec and municipal courts and members of the Administrative Tribunal of Québec ("TAQ") and to make recommendations if appropriate.

The issue at the heart of the second phase was the integrity of the system. To address this properly, it was necessary to cover a sufficiently long period to be able (1) to analyze the existing regulations, their application, and the practices that have developed and (2) to determine whether these differed according to which government was in place. I decided that the Commission's examination would cover a ten-year period, from 2000 to 2010. I made it clear in my opening statement on August 24, 2010, that the objective was not to inquire into undue interference by third parties, but rather to discover how the judicial selection and appointment process was in fact designed and implemented before, during and after the period covered by Mtre. Bellemare's allegations.

1.3 Rules of practice and procedure

The Règles de procédure et de fonctionnement ("Rules"), promulgated by the Commission following consultation with the participants, established the principles applicable regarding participant status, preliminary interviews, evidentiary rules, the manner and order for examining and cross-examining witnesses, documentary evidence and media coverage. The Rules were developed in accordance with established principles of fundamental justice and procedural fairness. They are similar to those adopted by other recent inquiry commissions.

Beyond these formal Rules, Commission counsel also took great care to act with fairness throughout the proceedings of the Commission. For example, they held several meetings with counsel of the participants and witnesses, both individually and collectively, in order to ensure that their concerns were taken into account. Each of their requests was evaluated and addressed with a view to maintaining at all times the integrity and fairness of the proceedings for all.

1.4 Participants

As in every inquiry commission, individuals or entities wishing to be granted participant status had to persuade me that they had a direct and significant interest in one of the subjects of inquiry. More specifically, I had to be persuaded that their rights, obligations or reputation or another legal interest were affected, or that they were directly involved. To grant intervener status, I had to be persuaded that the individual or entity had a genuine interest in the specific issues raised by the inquiry, as well as a particular perspective, experience or expertise that could assist me in the performance of my mandate.

The Commission received eleven applications for participant or intervener status. Participant status was granted to the following individuals and entities:

- The Government of Québec;
- The Premier of Quebec, Jean Charest;
- The Conférence des juges du Québec;
- The Tribunal administratif du Québec;

- The Barreau du Québec;
- The Quebec Liberal Party;
- Mtre. Marc Bellemare.

The status applications of the following individuals and entities were rejected:

- The Official Opposition in the National Assembly of Québec;
- Dr. C.W. Herten-Greaven;
- André Krysiewski;
- Jean-Claude Valfer.

1.5 Public hearings

The Commission spared no effort in ensuring the transparency of and public access to its proceedings. The hearings were all broadcast live on the Commission's Web site. The video recording of each hearing was made available the following morning. Similarly, the transcript of each hearing was made available the following day on the Commission's Web site. All of the exhibits filed before the Commission, except for those subject to a publication ban or placed under seal, were made public at the time they were filed. All of this content shall remain available on the Commission's Web site for at least the next two years. It is also worth noting that long excerpts of the hearings were broadcast on two of the province's major television channels, LCN and RDI.

The Commission first sat on June 14, 2010, and then sat regularly during the period from August 24 to October 22, 2010. It heard 39 witnesses in the context of the first phase of its hearings (the allegations of Mtre. Marc Bellemare) and 19 experts in the context of the second phase (the examination of the selection and appointment process).

CHAPTER 2

INQUIRY INTO ALLEGATIONS OF THIRD-PARTY INFLUENCE IN JUDICIAL APPOINTMENT PROCESS

2.1 General conclusion from inquiry into the allegations of Mtre. Bellemare

Based on a thorough and detailed review of all the evidence, I conclude that the facts do not demonstrate that Mtre. Bellemare acted under the pressure or orders of third parties, disregarding his own conscience and opinions, in recommending the appointments of Judges Marc Bisson and Line Gosselin-Després and the promotion of Judge Michel Simard to the position of Associate Chief Judge.

I conclude on the balance of probabilities that Mtre. Bellemare was not forced to act against his will in recommending the appointments of Judges Bisson and Gosselin-Després and the promotion of Judge Simard. The facts supported by the objective evidence demonstrate that Mtre. Marc Bellemare acted voluntarily and independently.

In addition, the testimony of the participants in the judicial selection and appointment process pointed to several weaknesses.

The evidence reveals that there are no standards governing the operation of the selection committees. The choice of members of the public to sit on selection committees is not subject to any guidelines, nor is any training provided for them. The information asked of the candidates has not been standardized. Concerns regarding the confidentiality of the selection committees' reports have also been raised.

The evidence also demonstrates the existence of several inefficiencies in the current operation of the selection committees. For example, that a committee might need to interview dozens, or even hundreds, of candidates for a single vacancy, as has occurred in the past, raises questions regarding best practices in recruitment and hiring. These issues must be addressed.

In general, the process lacks transparency both at the time of selection by the committee and between the time candidates are declared apt by the committee and a decision is made by Cabinet.

Moreover, the evidence shows that at this second stage, the process is vulnerable to all manner of interventions and influence, particularly by members of the National Assembly, members of political parties, lawyers and the candidates themselves. The candidates' political affiliation or acquaintance with representatives of the political party in power may play a role. There are no standards governing the handling of the files or the conduct required of the Minister of Justice, the Premier, the members of their political staff or other stakeholders, particularly with respect to which persons may be consulted for the purpose of recommending an appointment. There are no criteria in place to guide the Minister in making recommendations. Every Minister of Justice has had to establish his or her own guidelines in these areas.

It is necessary to consider these significant deficiencies to ensure that the Commission's second phase is not purely academic. My aim is to propose the changes that would respond to public expectations and reinforce public confidence in the administration of justice in Quebec.

2.2 General analytical framework

Nature of influence

Mtre. Bellemare stated that the appointments of Judges Bisson and Gosselin-Després and the promotion of Judge Simard to the position of Associate Chief Judge of the Court of Québec were made as a result of pressure from Franco Fava, Charles Rondeau and Guy Bisson, fundraisers for the Québec Liberal Party. Minister Bellemare considered the interventions of Mr. Fava and Mr. Rondeau to constitute undue influence because of the importance of these individuals within the Liberal Party, their alleged friendship with the Premier and the forcefulness of their demands.

Mtre. Bellemare spoke of [TRANSLATION] "colossal pressure", stating that the pressure exerted by Mr. Fava and Mr. Rondeau was sufficient to force him to make a decision that he would not otherwise have made.

I must decide whether the influence alleged by Mtre. Marc Bellemare prevented him from making decisions on the basis of his own conscience and opinions regarding the recommendations he had to make to Cabinet with respect to the appointment of two judges and the promotion of a third.

Difficulties associated with the time elapsed since the events

Inconsistencies and contradictions were observable in some of the testimony related to the same facts. This is unsurprising given how much time has elapsed since the events. Sometimes, the explanations indicate that the problem was one of perception or interpretation. In other cases, the problem was one of memory. It is also possible that some of the participants were simply mistaken. Finally, I would add that the analysis of specific facts was rarely a sufficient basis for sound conclusions and that it would be hazardous, at the very least, to attach too much significance to any one incident or statement.

In light of the above, it would be neither desirable nor fair to draw firm conclusions on the sole basis of my impressions of the witnesses' ability to remember the facts precisely. It would be imprudent at best to conclude that everything depends on a determination of the credibility of each of the witnesses. Therefore, despite the expectations that some have expressed regarding the content of this report, I do not believe that my mandate is to decide which witnesses were telling the truth. In my view, a general description of the events will provide the best basis for establishing the facts.

Reliability of documentary evidence

I attached heavy evidentiary weight to the notes taken by public servants, deputy ministers and other departmental employees. The notes were taken in the ordinary course of the duties of these employees and other public servants. They are necessary to the performance of their duties, as they serve as reminders to help them carry out their assigned tasks. They were taken at the time of the events they describe and are essentially corroborated by internal memos or other documents drafted contemporaneously. This indicates that these documents are highly reliable. For these reasons, this documentary evidence would be admissible before courts of justice.

However, the piece of cardboard filed by Mtre. Bellemare is different in nature and does not meet the reliability criteria established by the general rules of evidence. The document was created in an unusual manner, incompatible with the importance of the information it contains. It was not created at the time of the events it describes. I have reviewed the complete,

unredacted version of the document. Almost all of the notes are fully written out and are easily legible by anybody, without need of explanations to understand them. The only notes that are written in shorthand are those related to the Commission's mandate; these are practically impossible to understand without explanation by their author, and so they cannot possibly serve as independent evidence in corroboration of his testimony. The shorthand notes are also written in a different ink from that used to write the rest of the document. Moreover, they are placed in a highly unusual way relative to the rest of the text.

The Post-it notes filed by Mtre. Georges Lalande also raise several questions. Some were created after the events; according to Mtre. Lalande, they were copied from other, smaller Post-it notes, the content of which is unknown, and which, in at least one case, were supposedly written in the presence of Mr. Fava, who denies it. It is difficult to understand why Mtre. Lalande would in 2004 have purged the contents of his agendas while keeping only the Post-it notes on the subject of the issues related to the Commission's mandate.

It should also be noted that Mtre. Lalande testified with the aid of notes that he had prepared in August and September 2010, during and after the testimony of Mtre. Bellemare, based on his agendas, the Post-it notes and unwritten facts. Some of his memories are problematic. As will be discussed in more detail below, he stated that Mr. Fava had alluded to Mtre. Bellemare's resistance to his suggestions, even before the latter had acknowledged being subject to any pressure. He also stated that Mr. Fava had mentioned the possibility of Judge Guy Gagnon's appointment as Chief Judge of the Court of Québec, before the latter's name had even been considered by Mtre. Bellemare.

In light of the above factors, I conclude that the Post-it notes do not satisfy the applicable reliability criteria.

Standard of clear and convincing evidence

My mandate is not to make pronouncements on the civil liability or criminal culpability of any of the persons involved or of the Commission's witnesses. It is to decide whether the facts related to Mtre. Bellemare's allegations have been proven.

Mtre. Bellemare made very serious allegations before the Commission regarding the conduct of several individuals, particularly the Premier of Québec. In fairness to these individuals, and given the degrees of proof available within the balance of probabilities standard, I conclude that in order to determine whether the allegations are well founded, the Commission must rely on clear and convincing evidence.

2.3 Appointment of Judge Marc Bisson

Allegations

Mtre. Bellemare testified that between July 7 and August 24, 2003, over the course of several meetings and telephone calls to his office and to his residence, Mr. Fava subjected him to increasingly intense pressure, to a point he said that by the end of the summer could be described as [TRANSLATION] "colossal," to appoint Marc Bisson a judge. He said that he confided in his chief of staff and his press secretary about the situation. On August 24, he called the Premier to schedule a meeting to discuss this pressure, a meeting that he said took place on September 2, 2003. At that meeting, the Premier allegedly told him that [TRANSLATION] "if Franco told you to appoint Bisson and Simard, appoint them." The Premier denies that such a meeting was ever requested. He states that the meeting never took place. Finally, he denies having made the statements attributed to him by Mtre. Bellemare.

Facts adduced in evidence

Mr. Fava denies Mtre. Bellemare's allegations. Mtre. Bellemare's chief of staff and press secretary deny that the Minister told them about the pressure he was under with respect to the judicial appointments.

Mtre. Georges Lalande, who was then an associate deputy minister in the Department of Justice responsible for plans to reform administrative tribunals, testified that he had met with Mr. Fava on July 8, 2003. On that occasion, he said, the latter mentioned, without naming him, a prosecutor from the Outaouais region and son of a [TRANSLATION] "fundraiser" whom Mr. Fava wished to see appointed to the Court of Québec in Longueuil. Mr. Fava allegedly expressed his astonishment at Minister Bellemare's [TRANSLATION] "stubbornly purist" attitude and resistance to his requests. Mtre. Lalande tried to speak with Minister Bellemare on several occasions about Mr. Fava's requests, but the Minister went out of his way to avoid the topic. It was not until March 2004 that Minister Bellemare finally talked to Mtre. Lalande about the pressure exerted by Messrs Fava and Rondeau and about the Premier's attitude. However, his testimony on the last point is inconsistent with his own notes, taken the day of the meeting. Moreover, Mtre. Bellemare in his own testimony never once mentioned this March 2004 meeting.

Marc Bisson was declared apt for appointment as a judge following a vacancy in the judicial district of Hull in 2002. Another candidate was appointed to that position, but in accordance with the regulations, Mr. Bisson's name remained on the list of candidates considered apt for appointment.

On November 1, 2002, a notice of positions to be filled was published for another vacancy, this time in the Criminal and Penal Division of the Court of Québec in Longueuil. On March 13, 2003, the selection committee submitted a report to Minister of Justice Normand Jutras in which it identified three candidates it considered apt. This position was eventually given to Marc Bisson, who was not among the three candidates on the list, on November 26, 2003. In the meantime,

1. Chief Judge St-Louis made numerous calls to emphasize the urgency of filling the vacancy;
2. In September 2003, Minister Bellemare requested a review of the needs of the Court of Québec in certain districts, including Montreal and Longueuil (Criminal and Penal Division);
3. Also in September, Minister Bellemare requested the publication of a new notice of positions to be filled so that he would have a larger pool of candidates from which to choose. A legal opinion was requested on this issue;
4. On October 23, Minister Bellemare's chief of staff forwarded to the judicial selection and appointments coordinator, for the purpose of security clearance, the name of one of the candidates declared apt by the selection committee for the position in Longueuil. It is the established practice that security checks are requested for the purpose of making recommendations to Cabinet. On October 27, the Sûreté du Québec ("SQ") delivered its report, which indicated that the candidate had been convicted of an offence;
5. On November 3, again at the request of Minister Bellemare's chief of staff, a new request was filed with the SQ to check the two other candidates declared apt by the selection committee to fill the vacancy in Longueuil. The following day, the SQ delivered its report, which indicated that one of the candidates had been [TRANSLATION] "found guilty" of an offence, but which had nothing in particular to report about the third candidate;
6. On November 6, MNA Norman MacMillan met with Marc Bisson at "Le parlementaire," a restaurant at the National Assembly. The meeting had been requested by the latter

to inform Mr. MacMillan that he believed himself apt for a judicial appointment and to request his assistance in that regard. A few minutes later, Mr. MacMillan ran into Minister Bellemare and informed him of Marc Bisson's desire to become a judge;

7. On November 7, the SQ received a new request for a security check, this time for Marc Bisson. The report was delivered the same day and indicated nothing in particular;

8. On November 14, the Order in Council regarding Marc Bisson's judicial appointment to the Court of Québec was forwarded to the Conseil exécutif.

Analysis and conclusions

The documents filed before the Commission enabled me to build a much more detailed picture of the events regarding the appointment of Judge Bisson than that painted by Mtre. Bellemare. The lengthy period that passed before Judge Bisson's appointment to the position of judge in the Criminal and Penal Division of the Court of Québec in Longueuil, in late November 2003, does not support Minister Bellemare's claim that he was forced to submit to the undue pressure allegedly exerted by Mr. Fava in July and August 2003.

The evidence demonstrates that throughout September and October 2003, Minister Bellemare was pursuing his own objectives with respect to judicial appointments. He requested a review of the needs of the Court of Québec in various districts, including Longueuil, and he looked into the possibility of holding a new selection process to increase the pool of candidates.

Moreover, the evidence as a whole indicates that Minister Bellemare's first choice for the position in Longueuil, as communicated to his chief of staff on October 23, 2003, was not Marc Bisson, but one of the three candidates considered apt by the selection committee. That day, the Minister had to fill one vacancy in Montreal and another in Longueuil, as well as to appoint an associate chief judge to the Court of Québec. His candidates were Judge Michel Simard for the position of Associate Chief Judge, Suzanne Vadboncoeur for the position in Montreal, and one of the candidates listed by the selection committee for the position in Longueuil. He provided the judicial selection and appointments coordinator with the names of Suzanne Vadboncoeur and the candidate chosen for the position in Longueuil for security clearance. Ultimately, Judge Michel Simard was appointed Associate Chief Judge and Suzanne Vadboncoeur was appointed to the position in Montreal. It would be logical to conclude that the candidate chosen by Minister Bellemare for the position in Longueuil would also have been appointed had the security check not revealed anything relevant.

On November 3, 2003, a new request was made to conduct security checks for the two other candidates considered apt by the selection committee for the vacancy in Longueuil. Following this check, one of the two names was eliminated. From the selection committee's list, only one eligible name remained when, on November 6, 2003, Minister Bellemare ran into Mr. MacMillan, who spoke to him of Marc Bisson. The following day, November 7, Marc Bisson's name was submitted for a security check. The Order in Council appointing Marc Bisson to the position of judge in Longueuil was forwarded to the Conseil exécutif on November 14, 2003.

In short, it was only after Minister Bellemare's first and second choices were rejected following security checks that the name of Marc Bisson appeared in the notes of the judicial selection and appointments coordinator, immediately after the intervention by Mr. MacMillan. According to Mtre. Bellemare's own testimony, Mr. MacMillan's interventions on behalf of

Marc Bisson were courteous; they cannot therefore constitute interference preventing him from acting according to his own will.

In light of the above, the claim that the Government of Québec's appointment of Judge Marc Bisson was the result of third-party influence, in this case by Quebec Liberal Party fundraisers Mr. Fava and Mr. Rondeau, is not supported by clear and convincing evidence. The facts described above, which are supported by objective evidence, show that Mtre. Bellemare acted independently and voluntarily; the recommendation to appoint Marc Bisson was his own.

2.4 Promotion of Judge Michel Simard to the position of Associate Chief Judge

Allegations

Mtre. Bellemare testified that Mr. Fava and Mr. Rondeau also pressured him, during the summer of 2003, to appoint Judge Michel Simard to the position of Associate Chief Judge of the Court of Québec. His own choice for that position was the Honourable Claude Chicoine. He stated that Mr. Rondeau's initial approaches were not strong enough to force him to act against his will. However, once Mr. Fava joined forces with Mr. Rondeau, they became insistent.

During the meeting of September 2, 2003, the Premier allegedly told Minister Bellemare to appoint Michel Simard.

Facts adduced in evidence

Mr. Charest has no memory of such a meeting and denies having made the statements attributed to him by Mtre. Bellemare.

Mtre. Lalande testified that during his meeting with Mr. Fava on July 8, 2003, the latter told him that [TRANSLATION] "they" would allow Minister Bellemare to appoint Judge Guy Gagnon to the position of Chief Judge, but that he would have to appoint Michel Simard to the position of Associate Chief Judge. However, on July 3, 2003, Minister Bellemare wrote a letter to the Premier, in which he recommended for the position of Chief Judge a candidate other than Judge Gagnon, Judge Chicoine and Judge Simard. Mtre. Lalande also testified that on March 8, 2004, Minister Bellemare had told him that the choice of Judge Simard for the position of Associate Chief Judge had been imposed on him.

In another letter to the Premier, dated August 12, 2003, Minister Bellemare maintained his July 3 recommendation for the position of Chief Judge. That judge's name appears at the top of a list of six candidates that Minister Bellemare says he identified after consulting with judges, while the name of Judge Michel Simard appears in the second position and Judge Chicoine in the fourth (Mtre. Bellemare maintains that the order of presentation was not indicative of his preferences). The choice of a new chief judge was also discussed during a meeting held on August 18, 2003, between Minister Bellemare and the Premier, according to the latter's testimony.

Mr. Rondeau admitted to having approached Minister Bellemare in late July or early August to tell him that Judge Simard was interested in the position of Chief Judge, not the position of Associate Chief Judge, as claimed by Mtre. Bellemare.

On September 24, 2003, the Honourable Guy Gagnon was appointed Chief Judge of the Court of Québec. The first meeting between Minister Bellemare and the new Chief Judge took place on October 17, 2003. The appointment of an associate chief judge to the Civil Division appears

on the agenda. Mtre. Bellemare testified that during that meeting, he informed Chief Judge Gagnon of his intention to appoint Michel Simard to the position of Associate Chief Judge. The Deputy Minister, Mtre. Louis Dionne, who attended that meeting, did not recall Mtre. Bellemare having given that information to Chief Judge Gagnon in his presence. Mtre. Dionne did state, however, that during that meeting, Chief Judge Gagnon had provided Mtre. Bellemare with a list of names of potential candidates for the position of Associate Chief Judge of the Civil Division. This is confirmed by a memorandum signed by Mtre. Dionne following the meeting. On October 29, 2003, Michel Simard was appointed Associate Chief Judge of the Court of Québec, Civil Division.

Analysis and conclusions

In my view, the evidence relating to the promotion of Judge Simard is inconsistent with Minister Bellemare's claim that he was forced to recommend Judge Simard for the position of Associate Chief Judge as a result of the pressure exerted by Messrs Fava and Rondeau and endorsed by the Premier on September 2, 2003.

The evidence reveals instead that Judge Simard was initially presented as a potential candidate for the position of Chief Judge of the Court of Québec and that it was not until after his meeting with Chief Judge Gagnon on October 17, 2003, that Minister Bellemare chose to recommend him for the position of Associate Chief Judge.

This is confirmed by a letter from Chief Judge Gagnon's executive assistant, dated October 8, 2003, indicating that one of the subjects to be discussed at the October 17 meeting was the appointment of the Associate Chief Judge of the Civil Division. It is also confirmed by an exchange of memorandums between Mtre. Dionne and Mtre. Nicole Breton, the judicial selection and appointments coordinator, on October 20, 2003, confirming that the Chief Judge had provided the Minister with a list of names for the position of Associate Chief Judge of the Civil Division during that meeting. This conclusion is consistent with the evidence as a whole, including the Order in Council signed by the Clerk of the Conseil exécutif on October 29, 2003, indicating that the Chief Judge had been consulted in accordance with the *Courts of Justice Act*.

I note that Mtre. Bellemare and Mr. Rondeau agree that the latter approached Mtre. Bellemare about Judge Simard in late July or early August 2003. Mr. Rondeau maintains that he suggested Judge Simard's name for the position of Chief Judge, not Associate Chief Judge. It appears from the letter from Minister Bellemare to the Premier of August 12, 2003, that the former had indeed included Judge Simard's name in the list of potential candidates for the position of Chief Judge. This fact tends to support Mr. Rondeau's statement that he had approached Minister Bellemare in late July or early August 2003 and that he had suggested Michel Simard's name in connection with the position of Chief Judge. It also appears that even though this name was on the list of potential candidates for the position of Chief Judge, as Mr. Rondeau had suggested, it was not Judge Simard whom Minister Bellemare had recommended to the Premier, but rather another judge.

I therefore conclude that the evidence does not establish that Minister Bellemare was forced to recommend Judge Simard for the position of Associate Chief Judge of the Civil Division of the Court of Québec. The clear and convincing evidence indicates instead that this choice was made by Minister Bellemare after a meeting with Chief Judge Guy Gagnon, one of the purposes of which was to discuss the appointment of an Associate Chief Judge of the Civil Division of the

Court of Québec. It was not, according to the evidence, a decision made on the orders of a third party, be it Mr. Fava or Mr. Rondeau.

2.5 Appointment of Judge Line Gosselin-Després

Allegations

Mtre. Bellemare testified that in late December 2003 or early January 2004 he was subjected to pressure from Mr. Fava to appoint Line Gosselin-Després. Mtre. Bellemare later specified that the pressure by Mr. Fava likely began in January 2004 and, more precisely, after January 5. On this point, Mtre. Bellemare stated that Mr. Fava had called him only once regarding Mtre. Gosselin-Després's appointment. During this call, Mr. Fava informed Minister Bellemare of the family connection between Mtre. Gosselin-Després and Minister Michel Després. Moreover, still according to Mtre. Bellemare, Mr. Fava told him that Line Gosselin-Després [TRANSLATION] "was on the list." Mr. Fava denies having called Mtre. Bellemare to ask him to appoint Line Gosselin-Després, whom he says he does not know.

According to Mtre. Bellemare, the decision to appoint Line Gosselin-Després was made at a meeting held in the Premier's office on January 8, 2004, at which the latter allegedly told him to comply with Mr. Fava's order. It was [TRANSLATION] "the choice of Fava, Franco Fava, and therefore it was the choice of the Premier."

Facts adduced in evidence

On February 15, 2003, a notice of positions to be filled was published in connection with a vacancy in the Youth Division of the Court of Québec in Québec. The deadline for submission of applications was March 7, 2003.

On October 28, 2003, Minister Michel Després was informed by his cousin that the latter's wife, Line Gosselin-Després, had submitted her application for a judicial appointment to the Youth Division of the Court of Québec in Québec. His cousin telephoned him in February 2004 to let him know that his wife had [TRANSLATION] "been successful in the competition."

Mtre. Lalande testified that Mr. Fava, during a meeting with him on December 12, 2003, had mentioned to him that Michel Després's cousin should be given a judicial appointment because she was [TRANSLATION] "a good Liberal and well known for her work in youth matters."

Between November 10 and December 18, 2003, Minister Marc Bellemare signed several letters regarding the replacement of members of the original selection committee. For these reasons, the final selection committee for selection process CQ-160 was not constituted until December 2003. On January 6, 2004, the selection committee members signed their oaths and interviews with candidates were held between January 12 and 19, 2004.

On January 21, 2004, the selection committee's report was forwarded to the Department of Justice. Line Gosselin-Després was listed therein as a person declared apt for appointment as a judge. This report was sent to Minister Bellemare's chief of staff on January 26, 2004.

Mtre. Marc Bellemare testified that Minister Després had approached him before the Cabinet meeting of January 15 or 22, 2004, to ask him whether Line Gosselin-Després would be appointed to the Youth Division. Mr. Després, for his part, stated that either on February 18 or March 3, 2004 (probably the former), he had approached Minister Bellemare between a meeting of the social development committee (February 18) or the legislation committee (March 3) and the Cabinet meeting. It was then, without mentioning any candidates by name, that he asked Minister Bellemare whether the Government would soon be making a decision about the judicial position in the Youth Division of the Court of Québec in Québec. During that discussion, Minister Bellemare allegedly told Minister Després, [TRANSLATION] "I believe one

of the candidates is a member of your family." Following this remark, Minister Després allegedly replied, [TRANSLATION] "Yes, it's my cousin's wife; her name is Line Gosselin-Després." During the same conversation, Minister Bellemare told Minister Després that Mtre. Gosselin-Després had been recommended by the judiciary.

On March 17, 2004, the Cabinet was supposed to appoint Line Gosselin-Després judge of the Court of Québec. At the Premier's request, the appointment was postponed to the following week, March 24, 2004.

On March 24, 2004, the Cabinet appointed Line Gosselin-Després to the Court of Québec. The Cabinet minutes for that session indicate that Minister Després left the room before the moment of appointment.

Analysis and conclusions

In my opinion, the clear and convincing evidence does not establish that Minister Bellemare was forced to appoint Line Gosselin-Després as a judge of the Youth Division of the Court of Québec in the city of Québec. I have reached this conclusion primarily on the basis of the date on which, according to Mtre. Bellemare's allegation, the Premier ratified the decision to appoint Line Gosselin-Després, namely, January 8, 2004.

The evidence before me indicates that on January 8, 2004, the selection committee had not yet begun conducting interviews. These were conducted between January 12 and 19, 2004. Moreover, the selection committee's report was not submitted to the Minister until January 21, 2004.

Based on the evidence, Mr. Fava could not have been aware in late December 2003 or even early January 2004 that Michel Després's cousin had [TRANSLATION] "been successful in the competition" and so could not have told Minister Bellemare to appoint her. The same applies to Mtre. Lalande's testimony to the effect that Mr. Fava told him on December 12, 2003, that Minister Bellemare should appoint Michel Després's cousin in Québec. On the dates mentioned by Mtre. Bellemare and Mtre. Lalande, Line Gosselin-Després had not yet been interviewed by the selection committee.

At the time Mr. Fava was allegedly pressuring Mtre. Bellemare, according to the latter's testimony, Line Gosselin-Després was but one candidate among others awaiting a meeting with the selection committee. Mtre. Bellemare could not, therefore, have believed that he was being forced to recommend a person who had yet to be declared apt by the selection committee, as he was fully aware that he had no control over the outcome of the selection process.

Despite the alleged [TRANSLATION] "order" to appoint Line Gosselin-Després, made, according to Mtre. Bellemare, on January 8, 2004, two months passed between the submission of the selection committee's report on January 21, 2004, and March 17, 2004, the date on which Line Gosselin-Després's appointment was first put to Cabinet.

As for the interventions by Michel Després, Mtre. Bellemare stated that he had been approached courteously and that the action could not be described as [TRANSLATION] "undue" pressure or influence.

It is possible that the choice of Line Gosselin-Després was influenced by the fact that she was a family member of Mr. Després's or that she had been [TRANSLATION] "recommended by the judiciary," according to Mr. Després's account of the statements made to him by Mtre. Bellemare. Either way, there is no evidence of undue influence by third parties involved in fundraising for the Quebec Liberal Party.

In light of the above, I conclude that clear and convincing evidence does not establish that Mtre. Bellemare was forced to disregard his own conscience and opinions in recommending Line Gosselin-Després's appointment to the Court of Québec, Youth Division.

2.6 Allegations of Mtre. Bellemare regarding statements made by the Premier on September 2, 2003, and January 8, 2004

Allegations related to September 2, 2003

Mtre. Bellemare said that he had telephoned Mr. Charest at his residence at about 3:00 p.m. on August 24, 2003. Mtre. Bellemare requested a meeting to discuss, among other topics, the pressure being exerted by Messrs Fava and Rondeau. Mtre. Bellemare stated that on August 25 or 26, 2003, he received confirmation from Mr. Charest's [TRANSLATION] "staff" that they would meet in Mr. Charest's office in Québec on September 2, 2003.

According to Mtre. Bellemare, during the week preceding the meeting, probably at the buffet table during the Cabinet meeting of August 27, 2003, Mtre. Bellemare and Mr. Charest saw each other briefly. Mr. Charest said to Mtre. Bellemare, [TRANSLATION] "So, you're having problems with Franco?" Mtre. Bellemare replied that he would give him more details on September 2, 2003.

During the meeting on September 2, 2003, Mr. Charest told Mtre. Bellemare, after listening to the latter's grievances regarding Marc Bisson and Michel Simard, [TRANSLATION] "Franco is a personal friend, he's an influential party fundraiser, we need these guys, we need to listen to them, he is a professional fundraiser, if he tells you to appoint Bisson and Simard, then appoint them." Mr. Charest also trivialized the affair, suggesting that "appointing a judge" was not the same as "contacting a sitting judge." Mtre. Bellemare then expressed his disappointment, finding it "inappropriate" that fundraisers could hold such influence. He also expressed his surprise that Mr. Fava had been given access to a confidential list. Mtre. Bellemare wanted Mr. Charest to "send Mr. Fava packing," but Mr. Charest did not do so, preferring to accept "the Franco Fava way."

By the end of the meeting, however, Mtre. Bellemare did feel that he had made some headway, as Mr. Charest had told him that the Government would be proceeding that fall with various reforms that were important to him: the no-fault system and administrative tribunals. According to Mtre. Bellemare, the subjects of Guy Gagnon and the Chief Judge position at the Court of Québec were not raised during that meeting.

Jean Charest's version

Mr. Charest stated that he had never been informed that Mtre. Bellemare was under pressure to appoint Marc Bisson and promote the Honourable Michel Simard. He recalled neither a telephone call from Mtre. Bellemare on August 24, 2003, nor any encounter on August 27, 2003, the purpose of which, according to Mtre. Bellemare, was to schedule a meeting with the Premier for September 2, 2003.

Mr. Charest stated that the meeting alleged by Mtre. Bellemare to have taken place on September 2, 2003, had never happened.

Evidence gathered in public hearings related to September 2, 2003

The meeting of September 2, 2003, is mentioned on the piece of cardboard submitted by Mtre. Bellemare to Commission counsel. Mtre. Bellemare explained that this note referred to Mr. Fava, Mr. Rondeau and Denis Roy, as well as the no-fault system and the TAQ, the subjects raised with Mr. Charest during the meeting of September 2, 2003. Mtre. Bellemare acknowledged that the note made no reference to judicial appointments.

Under the date of September 2, 2003, Mtre. Bellemare's agenda records an executive meeting at the headquarters of the [TRANSLATION] "Liberal Riding Association" for Vanier at 1535, chemin Ste-Foy, from 7:00 p.m. to 8:30 p.m. Mtre. Bellemare did not mention this meeting in his initial testimony. Just underneath, there is a second entry that reads, [TRANSLATION] "7:30 p.m. – PREMIER'S OFFICE QUÉBEC – Meeting with Mr. Charest." The diskette on which Mtre. Bellemare's agenda was saved was authenticated by expert Yvon Baril.

The minutes of the Liberal Riding Association for Vanier's executive meeting of September 2, 2003, indicate that the meeting commenced at 7:00 p.m. Eight items were listed on the agenda. The first three items, in order, were [TRANSLATION] (1) "Adoption of agenda," (2) "Adoption of minutes of last meeting" and (3) "Remarks by Member and Minister." The minutes record Mtre. Bellemare's remarks, which focused on, among other points, "the support of the members of the executive," the daycare system, municipal mergers and the bills to be tabled in the fall. The minutes do not indicate that Mtre. Bellemare left the meeting early to attend another appointment. The minutes of the Liberal Riding Association meeting of October 26, 2003, do, however, indicate that Minister Bellemare left before the end of that meeting.

Jean Charest's agenda contains no record of the meeting of September 2, 2003. The last item listed in his agenda for that date was a meeting from 5:30 p.m. to 7:30 p.m. with Mr. Dicaire and Mr. Bertrand. Mr. Charest stated that he occasionally held meetings that were not recorded in his agenda, but that the meeting of September 2, 2003, was not one of those and that it had never taken place.

Mtre. Bellemare stated that the Premier's staff had confirmed the meeting, which would imply that it should have been entered in the Premier's agenda.

Allegations related to January 8, 2004

On December 3 or 10, 2003, [TRANSLATION] "more likely December 3," after Mtre. Bellemare had "happened to witness" an exchange of cash between Mr. Fava and an employee of the Quebec Liberal Party, he approached Mr. Charest at the buffet table during a Cabinet meeting and informed him of the situation. Mr. Charest replied, [TRANSLATION] "This is not the place to discuss it. Keep this to yourself; we'll talk about it later. You can come to my office, and we'll talk about it." Mtre. Bellemare later received a call from Mr. Charest's office confirming that the meeting would be held on January 8, 2004. Mtre. Bellemare recalled that he had confirmed this date with Mr. Charest at the Christmas party following a Cabinet meeting.

Mtre. Bellemare and Mr. Charest met on January 8, 2004, in Montreal, at around 6:00 p.m., in Mr. Charest's [TRANSLATION] "new offices." On his own initiative, Mr. Charest asked his chief of staff to leave for the first part of the meeting. Mtre. Bellemare and Mr. Charest spent around 20 minutes discussing three topics: (a) the cash, (b) Line Gosselin-Després and (c) Mr. Fava's opposition to Bill 35. Mtre. Bellemare told Mr. Charest that Mr. Fava [TRANSLATION] "wanted the sister-in-law or cousin of the labour minister," Michel Després, "to be appointed." According to Mtre. Bellemare, Mr. Charest replied, "We covered this last time we talked. If Franco wants you to appoint her, then appoint her."

Jean Charest's version

Mr. Charest testified that he had met with Minister Bellemare on January 8, 2004. However, Mr. Charest did not recall having spoken with Mtre. Bellemare at the Christmas party on December 10, 2003. He stated that everything Mtre. Bellemare alleged to have taken place in December 2003 was [TRANSLATION] "false." Mr. Charest believed that the meeting of January 8, 2004, may have been scheduled on January 5, 2004, according to his telephone record.

Mr. Charest testified that the allegation that he had discussed Line Gosselin-Després's appointment on January 8, 2004, was "completely false"; according to him, her name had never been uttered. Mr. Charest thought that the subject of the meeting had been the reform of the administrative tribunals.

Documentary evidence related to January 8, 2004

Mtre. Bellemare had written the following note on the piece of cardboard that he filed with the Commission:

"Nov-Dec $ Jan - chef FF ≠ pl 35 = cash = LGD à la CQ SAAQ ↓ et IVAC."

Mtre. Bellemare explained the note as follows: [TRANSLATION]: "Franco Fava does not support Bill 35, but is in favour of cash and Line Gosselin-Després at Court of Québec." According to Mtre. Bellemare, it also refers to the meeting he had with the Premier on January 8, 2004. He stated that the dollar sign ($) represented an exchange of cash. The SAAQ and compensation to victims of crime were also topics of discussion during that meeting with Mr. Charest, as was Line Gosselin-Després's appointment to the Court of Québec.

There is no record of the meeting of January 8, 2004, in Mtre. Bellemare's agenda. However, a note reading [TRANSLATION] "travel to Montreal," the location of the meeting, is entered in the afternoon.

The meeting of January 8, 2004, is recorded in Mr. Charest's agenda. However, there is no mention of the topics to be discussed.

The record of certain telephone calls to the Premier's office was filed as evidence before the Commission. It lists one call per day on December 2, 3 and 4, 2003, from Mtre. Bellemare to Mr. Charest. Only one of these listings included a subject, namely, "CSN." Mr. Charest said that he could not specifically remember these calls, but he did recall that "CSN" was likely related to the reform of the administrative tribunals.

Another telephone call from Mtre. Bellemare to Mr. Charest appears in the record for January 5, 2004. Mtre. Bellemare requested a meeting of 60 to 90 minutes. Mr. Charest testified that this was the date on which Mtre. Bellemare had requested the meeting for the following January 8, rather than in December 2003.

Also reviewed by Commission counsel were the notes of Mr. Charest's chief of staff. They contain no mention of the meeting of January 8, 2004.

Analysis and conclusions

The evidence is completely contradictory on the issue of whether the meeting of September 2 took place, as claimed by Mtre. Bellemare. The meeting was entered into Mtre. Bellemare's agenda, but not that of the Premier. Minister Bellemare's agenda indicates a scheduling conflict for September 2, 2003; he had two meetings scheduled that evening. The same problem is not found in the Premier's agenda. Moreover, Mtre. Bellemare's statement that the Premier's staff confirmed the meeting implies that it should have been recorded in the Premier's agenda.

Mtre. Bellemare stated that the meeting of September 2, 2003, was the first he had had with the Premier since becoming Minister of Justice. According to the evidence filed before the Commission, however, there were other significant meetings between Mtre. Bellemare and Premier Charest prior to September 2, 2003, which he did not mention during his examination in chief. Two of these meetings related to major issues. The meeting of July 3, 2003, related to Quebec's positions on justice for the Federal-Provincial Conference to be held in Charlottetown. The meeting of August 18, 2003, related to the appointment of the Chief Judge of the Court of Québec.

One might wonder why, during the meeting of August 18, 2003, Mtre. Bellemare failed to mention that Mr. Fava had been pressuring him, given that the purpose of that meeting, according to the Premier's testimony, was to discuss the Court of Québec, namely, the appointment of its Chief Judge. This question is all the more relevant given Mtre. Bellemare's testimony that the pressure had been increasing at around that time.

With respect to January 8, 2004, the evidence shows that a meeting did indeed take place between the Premier and Mtre. Marc Bellemare. The allegations regarding the discussions that took place at that meeting, particularly the Premier's statements about judicial appointments, are very serious, as they call into question the Premier's integrity and reputation.

I do not consider it necessary to decide whether the meeting of September 2, 2003, took place, nor to decide on the nature of any statements the Premier may have made on September 2, 2003, or January 8, 2004.

The first reason is that the documentary and testimonial evidence does not support Mtre. Bellemare's allegation relating to pressure, from third parties connected to fundraising for the Quebec Liberal Party, in relation to the appointments of certain judges. Mtre. Bellemare's conduct in no way demonstrates that he was acting under the orders of a third party in that context. According to the evidence before me, whether or not the meeting of September 2, 2003, took place, I must conclude that Mtre. Bellemare's actions, as I have described them in the chronology of events, demonstrate that he was not led to make a decision against his will.

I must also be conscious of the obligation of prudence suggested by the Supreme Court of Canada with respect to findings of fact that might be interpreted as an attribution of civil liability. The content of the Premier's statements during the meetings of September 2, 2003, and of January 8, 2004, as alleged by Mtre. Bellemare, is the very subject of the action in defamation brought by Jean Charest. It would be highly prejudicial to one of the parties were I to make findings on issues that will be debated in adversarial proceedings before the Superior Court. That is a task for the trial judge, should it come to that.

CHAPTER 3

STUDY OF THE PROCESS FOR APPOINTING JUDGES AND TAQ MEMBERS

3.1 Legal framework governing appointment of judges and TAQ members

By virtue of its powers under subsections 92(4) and 92(14) of the *Constitution Act, 1867*, the Quebec legislature has constituted the Court of Québec (formerly the Provincial Court) and, more recently, the Administrative Tribunal of Québec ("TAQ"). Also, in accordance with its jurisdiction under subsection 92(8) of the *Constitution Act, 1867*, the legislature of Quebec has granted to municipal councils the power to constitute a local municipal court to serve the territory of the municipality. The organization and operation of these tribunals are respectively governed by the *Courts of Justice Act*, *Municipal Courts Act* and *Act respecting administrative justice*, which establish the method for appointing judges and members.

These three statutes set the requirements for judicial appointment to the relevant courts. With respect to the selection process, the statutes empower the Government of Québec to enact regulations governing the steps to be followed. These regulations are the *Regulation respecting the procedure for the selection of persons apt for appointment as judges* (for Court of Québec judges), the *Regulation respecting the procedure for the selection of persons for appointment as municipal judges* (for municipal court judges) and the *Regulation respecting the procedure for the recruitment and selection of persons apt for appointment as members of the Administrative Tribunal of Québec and for the renewal of their term of office* (for TAQ members).

3.2 Judicial appointment process in Quebec

It must be emphasized that the judicial appointment process is directly related to the principle of judicial independence. Having a transparent and depoliticized appointment process contributes to both real and perceived judicial independence, which, in turn, strengthen public confidence in the justice system.

Quebec's system for appointing judges to the Court of Québec and the municipal courts and members to the TAQ is based on a model of direct appointment by the executive (by Cabinet). This system is the dominant judicial appointment model in several Commonwealth countries.

The process is divided into two steps, the first being selection by an independent committee and the second, appointment by the executive. The first step is dedicated to determining whether candidates are qualified on the basis of merit criteria. The second involves appointing a judge from the list of qualified candidates. The Government may name as a judge only a person who has been declared by a selection committee apt to perform the duties of a judge.

However, the statutes and regulations governing these processes are silent with respect to the roles of the Minister of Justice, the Premier and the Cabinet. It is most likely this legislative and regulatory vacuum that has resulted in the variety of ways in which each player interprets his or her role and responsibilities. Two principal views emerged from the testimony heard by the Commission.

On one understanding of the judicial appointment process, it falls to the Minister of Justice to choose the judges, while the role of Cabinet is to ratify or, exceptionally, to refuse that choice. On a second understanding, each judicial appointment is a collective decision made by the Cabinet.

The Government enjoys significant leeway in the process leading to judicial appointments by Cabinet. Accordingly, either one of these interpretations is plausible under the existing legislative and regulatory framework. Furthermore, subject to the guarantees of confidentiality set out in the regulations, the Minister of Justice may make any consultations he or she considers necessary.

The lack of legislative guidance on the duties of members of the executive with respect to judicial appointments contributes to a lack of transparency in the process, potentially rendering it vulnerable to the exercise of undue influence. Certainly it gives rise to a perception that such influence is exercised. This is a significant gap that must be corrected.

3.3 The TAQ

The TAQ's sole mandate is to decide cases arising between the Government of Québec and its residents, pursuant to grants of jurisdiction made by various statutes. The TAQ has broad powers and exercises its jurisdiction to the exclusion of any other tribunal or adjudicative body.

The TAQ has many of the characteristics of a court of justice and fulfils an important function in Quebec society. Following legal proceedings, the Government has acknowledged this fact. Since 2005, TAQ members are no longer appointed for five years, but rather during good behaviour. In other words, except in cases of misconduct, they enjoy security of tenure. Despite its status as a tribunal whose principal function is to decide disputes between the administration and those subject to it, the TAQ is considered part of the executive.

Witnesses explained how the TAQ has been subjected to the policy of cutting back full-time equivalent ("FTE") employees, which correspond to a salary budget determined annually by the Government. TAQ members are subject to the same policy as the rest of the public service. Given the progressive cutbacks to the TAQ's salary envelope implied by this policy, a strict application of these measures to the TAQ members could affect the tribunal's capacity to carry out its mandate. The possibility of making exceptions to these measures does not change the fact that the TAQ remains a part of the executive for administrative and budgetary purposes, thereby placing it in a situation of uncertainty with respect to the availability of resources.

As I have emphasized, the judicial appointment process is directly related to judicial independence. In this respect, the appearance of independence is as important as actual independence. The same principles apply to the process for appointing TAQ members. A transparent, depoliticized and merit-based appointment process will reinforce the TAQ's independence both in fact and in appearance.

There would be no use in having a rigorous appointment process if appointments of members to the TAQ were prevented, delayed or made more difficult by government-wide financial constraints applied indiscriminately and if the TAQ were therefore unable to carry out its mandate in a fully independent manner.

Equally problematic in this context is the regulatory requirement dictating that the report of the TAQ member selection committee be submitted to the Associate Secretary General for Senior Positions, to the Minister of Justice, and to the ministers responsible for the administration of statutes providing for recourse before the TAQ. The Regulations also state that upon being informed of a vacancy, the Associate Secretary General must forward the register of declarations of aptitude to the Minister of Justice and to the ministers responsible for the administration of statutes providing for recourse before the TAQ. This situation undermines the confidentiality

of the process and opens the possibility of undesirable interventions that are incompatible with the requirements of an independent appointment process.

Also addressed in the report are some more specific issues related to the processes for selecting and appointing TAQ members, namely, the appointment of bilingual members, the number of candidates considered apt and ministerial discretion, the appointment of part-time members and the age of retirement. Finally, the Commission heard several interveners who submitted that the TAQ should essentially be treated as a court of justice rather than as a branch of the executive. If such were the case, one would have to ask whether the principles, considerations and recommendations applicable to the judicial selection and appointment processes were equally applicable, subject to any necessary adaptations, to the processes for selecting and appointing TAQ members. While I believe that this is an issue that the Government should study, I consider it to fall outside the scope of my mandate.

3.4 Potential improvements to the process for appointing judges and TAQ members

3.4.1 Expert studies

To assist it in its exploration of potential improvements to the process for appointing judges and TAQ members, the Commission asked the following recognized experts to share their thoughts on how Quebec's existing judicial appointment process might be improved:

- Roderick A. Macdonald, F.R. Scott Professor of Constitutional and Public Law, Faculty of Law, McGill University, Montreal;
- Peter J. McCormick, Professor, Department of Political Science, University of Lethbridge, Alberta;
- Geneviève Cartier, Full Professor, Faculty of Law, Université de Sherbrooke; and
- Jocelyn Maclure, Associate Professor, Faculty of Philosophy, Université Laval, Québec.

There is a certain degree of consensus among the studies by the four experts. The points of agreement can be grouped into several main categories:

1. The executive model of judicial appointment is not challenged. None of the studies recommends granting judicial appointment powers to any body other than the Government or one of its members; instead, they propose various measures to direct better the manner in which the executive makes such decisions.
2. The need for a step prior to the executive's appointment of judges, namely, the evaluation of candidates by a selection committee, is not called into question either. The authors do, however, suggest improvements to the regulations governing the creation, composition and duties of selection committees and the scope of their recommendations.
3. All four of the studies submitted to the Commission emphasize the importance of transparency in the judicial appointment process. Whether it be achieved through more detailed legislative and regulatory provisions, improved public access to information, provision of reasons for judicial appointments, improved communication between the committee and candidates or other means, it is clear that transparency must be considered an essential ingredient of a legitimate judicial appointment process.
4. Any process for appointing judges must reflect the democratic principles upon which our society is built. The experts also seem to agree that greater participation by lay

members of the public in the process of evaluating candidates for judicial positions would be desirable.

5. Whichever mechanisms are incorporated into the judicial appointment process, three of the experts agree that the choice of a judge depends to some extent on subjective factors, which means that it may not always be possible to identify a single "best candidate" to fill a given vacancy. Professor McCormick, however, believes that it is possible for an independent committee to identify the best candidate.

3.4.2 Submissions

The Commission received submissions from several individuals and agencies with an interest in the judicial selection and appointment process, including the Barreau du Québec, the Conseil du statut de la femme, the TAQ, the Canadian Bar Association – Quebec Division, Professor Maxime Saint-Hilaire, Pierre Legendre (former judicial selection and appointments coordinator), Hughette Gagnon (retired lawyer who regularly serves as a grievance adjudicator) and Professor Michael J. Bryant (former Minister of Justice and Attorney General of Ontario).

Each of the submissions received covered different aspects of the processes for selecting and appointing judges and TAQ members and made various recommendations. The report contains a complete summary of these submissions, which are also available in full on the Commission's Web site.

3.4.3 Panels of experts and institutional representatives

On October 20, 21, and 22, 2010, the Commission held public hearings, during which five panels made up of experts, professors and institutional participants gathered to discuss their opinions about and understandings of the system for selecting and appointing judges and members of the TAQ. Each presentation was followed by a period reserved for questions from the chair and Commission counsel. The exchanges with the participants helped identify certain values that could orient a reform of the process for selecting and appointing judges and TAQ members.

The discussions focused in particular on the composition and role of the selection committee and the committee's procedure for evaluating candidates. The scope of the discretion conferred on the Minister of Justice or the Government in appointing judges, the importance of representativeness and diversity and the irrelevance of political ideology—whether publicized or not—were also raised. Finally, the panellists considered potential means of reconciling the objective of transparency with the objective of protecting confidentiality and the privacy of candidates.

CHAPTER 4

CONCLUSIONS AND RECOMMENDATIONS

Before making recommendations to improve the judicial selection and appointment process, I will first identify the guiding principles and fundamental values that must be promoted and that must underpin any appointment process.

These principles and values are not solely related to the qualifications that judges must possess, although appointing qualified judges is certainly a key concern. The principles and values underpinning the system for choosing judges are just as important as the qualifications of the judges appointed, given the extent to which they contribute to strengthening public confidence in the integrity of the appointment process and in our judicial system as a whole.

4.1 Principles and values

The existing system for selecting and appointing judges results in the appointment of capable judges whose qualifications the population does not question. However, I conclude from the testimony given before the Commission that our existing judicial selection and appointment process has not succeeded at maximizing the merit principle and other values essential to our justice system while minimizing the possibility that influences unrelated to merit should infiltrate the process. Because of the public perception of a relationship between judicial appointments and political allegiance, and given the evolution of the principles and values related to ethical decision-making and transparency in governance, the time has come to review this process and propose improvements to it.

Merit and selection criteria

The commentators and experts agree that judicial selection must be based on merit. Some of the characteristics of merit are universally accepted: legal knowledge, intellectual rigour, impartiality, integrity, good judgment, moderation, patience and experience with court procedure. However, the application of these criteria has traditionally resulted in the selection of judges with similar professional experience and sharing the same elite social, ethnic and cultural background. The evaluation methods and selection criteria must be modified to reduce obstacles to the appointment of women and members of minorities to the judiciary and to allow them to qualify for judicial office in greater numbers.

It should also be noted that the selection criteria are vague and that they are identical for all judicial positions. This uniformity is inappropriate; there is no question that the tasks of a judge hearing youth protection cases are vastly different from those of a judge hearing criminal or civil cases and that each position requires distinct qualifications.

A candidate's political allegiance is irrelevant to merit. However, it would go against democratic principles to disqualify candidates solely on the basis of their past political involvement or their allegiance to a particular political party.

The choice of persons whose task it is to select candidates on a merit basis is critical. One of the studies produced for the Commission highlights the fact that selection committees in Quebec, a geographically vast and highly diverse jurisdiction, are smaller than in any other

jurisdiction. The experts agree that the legitimacy of the process depends on increased participation by lay members of the public.

Political accountability for appointments

While the executive appointment model is not without flaws, it has several advantages, such as efficiency, flexibility and protection of the confidentiality of candidates. The system allows vacancies to be filled quickly. The confidentiality of the process encourages applications from persons who might otherwise hesitate to come forward. Finally, this model allows the executive to encourage applications from certain minority groups, which improves the participation from and representation of society as a whole.

Political accountability for the choice of members of the judiciary is therefore, in my view, an important ingredient in the judicial appointment process. Any transfer of this political task to members of a committee who are not accountable to the public for their decisions would be problematic. Furthermore, I see nothing questionable in having elected officials choose individuals who share their philosophy; this is not the same thing as cronyism or nepotism, the sole purpose of which is to reward candidates for services rendered.

Limits on executive discretion

The primary criticism directed against the executive appointment system is the absolute governmental discretion in appointing candidates. The absence of constraints on the Government with respect to the choice of judges raises doubts about the legitimacy of the appointments and the independence of the appointees, even while the conditions of security of tenure and financial security are respected. In this matter, the appearance of independence is just as important as actual independence.

Most authors and experts agree that one way to depoliticize judicial appointments is to reduce executive discretion by granting extensive powers to independent selection committees. However, even when the judicial appointment process includes a pre-selection by a committee, the absence of constraints on the executive at the end of the process undermines the objective of neutrality.

Under our judicial system, judges are invested with extensive powers. The choice of individuals for this office should not be subject to the absolute discretion of the executive. Placing limits on the ministerial discretionary power to appoint judges is fully compatible with the development of Canadian law on the exercise of discretionary power.

In my view, to prevent executive discretion from undermining public confidence in the quality and independence of the judiciary, the judicial appointment process must be made as transparent as possible, and the executive must provide reasons for its decision to appoint a particular individual. The system must be set up so as to attenuate the risk of illegitimate considerations' being taken into account. The legislation and regulations related to the judicial selection and appointment process must require those who exercise discretionary powers to develop mechanisms that promote citizen participation, public accountability and justification for decisions.

The limitation of executive discretion can only be achieved through the application of formal criteria to ministerial decisions. The existing criteria are obscure and may vary from one minister to another. Consultations are unregulated. Also, reasons for the decisions remain confidential. Guidelines are necessary; a mere presumption that the political decision-maker is acting ethically and with integrity is insufficient to satisfy the need for the appearance of independence.

Finally, I believe that executive discretion must be limited by a requirement to choose from among a short list of candidates. Once the choice has been made from a list, that list should

become obsolete, and any candidates considered apt should be required to submit a new application for any vacancy that might subsequently arise.

Transparency

Another significant criticism of the executive system for selecting and appointing judges is that it is opaque. Apart from the notice of positions to be filled, all subsequent steps in the process are kept secret. No information is provided about the identity of the selection committee members or the manner in which they are chosen. Ostensibly to protect the confidentiality of the candidates, it is practically impossible to find out how they are evaluated.

The transparency or opacity of the judicial selection and appointment process is directly tied to its legitimacy in the eyes of the public. The lack of transparency of the process could create the impression that decisions regarding the selection and appointment of judges are wilfully made behind closed doors in order to maximize the Government's discretion to choose its desired candidates. To counteract this perception, both the judicial selection procedure and the judicial appointment procedure must be as open and transparent as possible, while continuing to ensure the protection of any information that could identify the candidates.

Transparency requires greater public access to all stages of the judicial selection process, the work performed by the selection committees and the criteria used by the committee members to determine whether a candidate is apt. The names of the committee members, along with biographical information, should be made available to the public. The executive appointment process should also be transparent and should reassure the public that judicial appointments are based on merit. The executive appointment process must also be more open to public scrutiny. In my view, this means that detailed information about the selection and appointment process must be made available on the Internet.

A more diverse judiciary

One of the criticisms directed against the judiciary relates to the lack of diversity among the judges; the system of judicial appointment by the executive generally results in the formation of a judiciary primarily consisting of individuals from elite backgrounds.

This lack of diversity is partly due to the dominant role played by members of the legal profession within the selection committees; this often limits the influence of members with neither legal training nor legal experience.

The homogeneity of the judiciary is considered a serious failing, as judicial diversity is a factor that strengthens public confidence in the administration of justice.

The Ministers of Justice who testified before the Commission provided reassurances that this issue is taken into consideration. However, under the current state of affairs, the confidentiality surrounding every stage of the judicial selection and appointment process, including the lack of general statistics, does not allow us to evaluate the extent to which these general observations apply to the judiciary of Quebec.

One of the objectives of reforming the judicial appointment process will be to increase the pool of potential candidates from all backgrounds. A revised understanding of merit should take into account criteria that would maximize types of professional experience that would benefit the judiciary. The goal is to increase the pool of qualified candidates by adding criteria that reflect a diversity of personal and professional experience, since these are the qualities that should be possessed by the judiciary as a whole within a complex, pluralistic society.

4.2 Recommended improvements

In light of the principles and values that I identified in the preceding section, I believe it would be advisable to maintain the existing structure for judicial selection and appointment, distinguishing between the stages of judicial selection and judicial appointment. I will therefore offer separate recommendations for each of the two stages.

Regarding selection, I am of the view that the independent committee should be maintained, but that several aspects of it should be reformed.

I will begin by noting that among my recommendations, I propose the creation of two bodies, namely, a **secretariat** responsible for the selection and appointment of judges and a **standing selection committee** responsible for identifying individuals who may be recommended to fill vacancies on the Court of Québec and the municipal courts.

The principal tasks of the secretariat for the selection and appointment of judges will be to administer the work of the standing selection committee, to choose the members of the public who will sit on the standing selection committee and to report on the committee's proceedings to the National Assembly.

The standing selection committee will comprise a total of thirty members appointed for three-year terms. It will operate with seven-member panels. The procedure for selecting judges will be more fully described in the recommendations below.

Several changes are also proposed regarding the system of appointment by Cabinet, including the implementation of regulations setting out the procedure to be followed.

4.2.1 Process for selecting judges of the Court of Québec and municipal courts

For the reasons I have just outlined, the following recommendations presuppose a significant overhaul of the judicial selection and appointment process for the Court of Québec and the municipal courts. I consider these changes necessary to correct the flaws identified by almost all of the experts and institutional participants.

I believe that the changes to the judicial selection and appointment process that I am proposing will substantially eliminate the concerns raised during the Commission about undue influence in judicial appointments.

CREATION OF A SECRETARIAT FOR JUDICIAL SELECTION AND APPOINTMENT

Recommendation 1

I recommend that the Government ask the National Assembly to create legislatively a secretariat for judicial selection and appointment for the Court of Québec and the municipal courts, the duties of which will be to administer the selection and appointment process.

- This secretariat will include a judicial selection and appointments coordinator who does not answer to the Department of Justice.
- The coordinator will be supported by an assistant and by any administrative staff necessary to perform the duties of the secretariat.
- One of the duties of the secretariat will be to assign members from the public to each panel formed for the purpose of selecting judges. These members would be chosen from among the members of the standing selection committee.
- Another duty of the secretariat will be to submit an annual report to the National Assembly on the work of the standing selection committee. This report will also contain an analysis of appointments from a perspective of diversity and representativeness of

candidates, particularly with respect to the ratio of men to women and the presence of minorities. The report should describe any progress made in this area.

- The secretariat will have its own Web site, distinct from those of the Department of Justice and the Government of Québec.

CREATION OF A COMMITTEE TO APPOINT MEMBERS OF THE PUBLIC

Recommendation 2
I recommend that the National Assembly create a committee whose sole function will be to appoint members representing the public to sit on the standing selection committee.

- The committee must ensure that the populations of the various geographical regions are represented.
- The committee must also ensure a gender balance and, as far as possible, a fair representation of minorities.

CREATION OF A STANDING SELECTION COMMITTEE

Recommendation 3
I recommend that a committee be created to select persons who may be recommended for judicial appointment and that the committee be permanent.

Recommendation 4
I recommend that the status, composition and operation of the standing selection committee be fixed by statute rather than by regulation.

COMPOSITION OF STANDING SELECTION COMMITTEE

Recommendation 5
I am of the view that it is necessary to increase the size of the existing selection committee to improve its representativeness and enable the lay members to assume the greater role that is appropriate for them. Increasing the size of the selection committee will also promote debate amongst members representing a variety of backgrounds.

The creation of a permanent group of twelve public representatives, chosen by a committee of the National Assembly for their personal and professional qualifications, who will work together with twelve representatives of the judiciary and six representatives of the Barreau, constitutes in my opinion a major improvement. The members of the standing selection committee will be trained and provided with guidelines to assist them in performing the important task of selecting individuals who may be recommended for judicial appointments.

Accordingly, I recommend that the size of the existing selection committee be increased to twelve representatives of the public, plus six members from the Barreau du Québec, as well as six judges of the Court of Québec for vacancies on that court and six municipal court judges for vacancies on those courts.

I have opted to increase the number of representatives of the judiciary and the Barreau du Québec in order to take into account the fact that it is not the same practitioners who work in the municipal courts and at the Court of Québec, the latter of which, furthermore, has three separate divisions. It is also necessary to ensure regional representation for these two categories of members, as well as to achieve a gender balance and social diversity.

The objective is not to create an excessively large committee, as each panel that will undertake the selection of candidates will comprise only seven members, but rather to ensure the effectiveness and, above all, the integrity of the process.

Membership in the standing selection committee will thus be constituted as follows:

- **twelve** public representatives chosen by a committee of the National Assembly on the basis of pre-established criteria related to experience and community involvement, including three jurists whose practice is not mainly before the courts (for example, a notary, a professor of law, or legal counsel for a company or union);
- **six** representatives of the Barreau du Québec selected by a committee of the Barreau that represents its membership as a whole;
- for vacancies on the Court of Québec, **three** representatives designated by the Chief Judge of the Court of Québec and **three** representatives designated by the Conférence des juges du Québec;
- for vacancies on the municipal courts, **three** representatives designated by the Associate Chief Judge of the Court of Québec responsible for municipal courts and **three** representatives designated by the Conférence des juges municipaux du Québec.

TERM OF MEMBERS OF STANDING SELECTION COMMITTEE

Recommendation 6
I recommend that the members of the standing selection committee be appointed for a term of three years and that, with the exception of the members chosen from among the judiciary, the members be remunerated.

Recommendation 7
I recommend that the three-year terms expire at different times in order to ensure continuity in the knowledge and experience acquired by the members of the standing selection committee.

COMPOSITION OF SELECTION PANELS

Recommendation 8
A panel of seven persons chosen from among the members of the standing selection committee will be constituted for each selection process. Each panel will be composed of the following members:

- four members, including one jurist, from among the twelve public representatives.
- one member from among the representatives of the Barreau du Québec;
- for vacancies on the Court of Québec, one member chosen from among the representatives designated by the Chief Judge of the Court of Québec and one member from among the representatives designated by the Conférence des juges du Québec;
- for vacancies on the municipal courts, one member chosen from among the representatives designated by the Associate Chief Judge responsible for municipal courts and one member chosen from among the representatives designated by the Conférence des juges municipaux du Québec;

TRAINING FOR MEMBERS OF STANDING SELECTION COMMITTEE

Recommendation 9
I recommend that the members of the standing selection committee receive training in interview techniques, criteria for evaluating applications, the qualities sought for the performance of judicial duties, the structure of the courts and the judicial function in general.

Recommendation 10
I recommend that the members of the standing selection committee be made aware of the importance of increasing the access of women and members of minorities to the judiciary.

APPLICATIONS BY CANDIDATES

Recommendation 11
I recommend that the candidates be required to provide their information in a uniform manner; for this purpose, candidates should be asked to submit a standardized curriculum vitae, including information about their community involvement.

Recommendation 12
I recommend that any information related to political involvement be revealed by the candidates. I make this recommendation on the basis of the public's concerns with respect to political involvement and financial contributions to political parties. Political involvement alone should neither qualify nor disqualify a candidate. It is difficult to define what types of political involvement should be disclosed. I believe that the Government should hold consultations and submit a broadly accepted definition for ratification by the National Assembly. I recommend that candidates not be required to disclose financial contributions to political parties, as they are not necessarily indicative of commitment to or affiliation with any given party, and, in any case, they are already public.

Recommendation 13
I recommend the repeal of section 25 of the *Regulation respecting the procedure for the selection of persons apt for appointment as judges*, which provides that a judge of one court is apt for appointment as judge of another court when the chief judges of each of those courts forward a notice to such effect to the Minister.

MECHANISM FOR PRE-SELECTION OF CANDIDATES

Recommendation 14
I recommend that the selection committee establish a pre-selection mechanism to reduce the number of candidates interviewed to a maximum of fifteen for each position to be filled. The pre-selection step could consist of a written examination, a consultation process for the purpose of obtaining recommendations or information, or both of these measures.

CRITERIA TO BE CONSIDERED BY SELECTION COMMITTEE

Recommendation 15
I recommend that the criteria for evaluating candidacies be defined in the standing selection committee's enabling statute.

- The criteria proposed by the Barreau du Québec, Professor Peter McCormick and Professor Roderick Macdonald may serve as a baseline reference;
- These criteria must be sufficiently flexible to meet the needs of the position to be filled. It should also be kept in mind that certain criteria cannot be measured completely objectively; hence the importance of a diverse and more representative committee, as well as external consultation and letters of recommendation.

Recommendation 16
I recommend that the selection committee be required to develop an assessment grid for the candidates. The evaluation of the qualities required to perform the duties of a judge should not favour one particular model of professional practice or involvement.

Recommendation 17
I recommend that the judiciary's institutional requirements of diversity and representativeness not be included among the selection criteria, as these factors are not related to merit; it falls to the executive to ensure that these requirements are met.

Recommendation 18
I recommend that nepotism, cronyism and political allegiance be expressly listed as factors not relevant to the selection of candidates.

SELECTION COMMITTEE'S REPORT

Recommendation 19
I recommend that the selection committee's report contain three names, unless, under exceptional circumstances, it is impossible for the selection committee to recommend three candidates.

Recommendation 20
I recommend that the selection committee provide individualized assessments of each of the three recommended candidates, without indicating an order of preference.

Recommendation 21
I recommend that the recommendation of a candidate be valid only for the selection process for which the application was submitted. In other words, I recommend the abolition of the rule in section 22 of the *Regulation respecting the procedure for the selection of persons apt for appointment as judges*, which provides for a period of validity for the declaration that a person is apt for appointment as judge.

Recommendation 22
Candidates who wish to be considered for any subsequently advertised position would have to resubmit their applications.

Recommendation 23
I recommend that the candidates be informed, following the announcement of the appointment, of whether or not they were recommended by the selection committee.

- Having the notice to the candidates follow the announcement of the appointment or the holding of a new selection process would eliminate the opportunity for those candidates considered apt to take steps to promote their candidacy. Furthermore, given that the selection committee panel would be composed of seven permanent members, the discomfort that could be felt by members of a very small committee who know the candidates in a given region would be reduced accordingly.

- It should also be noted that one of the effects of the recommended pre-selection mechanism would be that when a judge is appointed, some of the candidates who applied would already have been informed that they were not recommended. Finally, the existing procedure for TAQ members already includes provisions for informing each candidate of the committee's decision regarding his or her application, and the evidence before the Commission reveals that this does not cause any particular difficulties.

TRANSPARENCY OF STANDING SELECTION COMMITTEE'S PROCEEDINGS

Recommendation 24
I recommend that the proceedings of the standing selection committee be conducted as transparently as possible.

Recommendation 25
I recommend that the names of the members of the standing selection committee, the evaluation criteria, the subjects to be addressed during the interview, and, generally, any information regarding the selection processes be made available on the secretariat's Web site.

4.2.2 Process for appointing judges to the Court of Québec and municipal courts

MINISTERIAL DISCRETION: TWO POSSIBLE APPROACHES

First interpretation: On this interpretation, which gives precedence to the principle of confidentiality, the Minister of Justice may not consult the Premier or the other ministers. The advantage of this approach is that it shields the Premier and members of the Cabinet from potential allegations of political cronyism and from all forms of pressure.

Second interpretation: On this interpretation, which rests on the principle of ministerial accountability, the Premier must be kept informed or consulted. The advantage is the reinforcement of ministerial solidarity. If this approach is favoured, limitations must be placed on the role played by political staff, and there must not be any debate in Cabinet.

I consider this a choice to be made by the National Assembly, as both interpretations are legitimate.

APPOINTMENT PROCESS

Recommendation 26
I recommend that the appointment procedure to be carried out by Cabinet following the submission of the selection committee's report to the Minister of Justice be stipulated in a statute or regulation.

CHOICE OF APPOINTEE

Recommendation 27
I recommend that the Minister of Justice be required to recommend one of the three candidates whose names appear in the selection committee's report, or that a new selection process be undertaken.

Recommendation 28
I recommend that nepotism, cronyism and political allegiance be expressly listed as factors irrelevant to a judicial appointment.

PERMISSIBLE CONSULTATIONS

Recommendation 29
I recommend that the Minister of Justice be allowed to consult a variety of persons, including judges, lawyers, employers or other individuals in a position to provide information relevant to the appointment criteria. However, the consultation of persons in their capacity as fundraisers, employees or members of a political party should be prohibited.

REPRESENTATIONS TO THE MINISTER OF JUSTICE

Recommendation 30
I recommend that a rule of ethics be established prohibiting members of the Cabinet and members of the National Assembly from taking any steps to promote a candidate.

CANDIDATES' CODE OF CONDUCT

Recommendation 31
I recommend that the Barreau du Québec amend its Code of Ethics to prohibit lawyers from exercising undue influence, whether directly or indirectly, on their own behalf or on behalf of others with respect to an appointment as judge or member of an administrative tribunal.

REASONS FOR CHOICE OF APPOINTEE

Recommendation 32
I recommend that the Minister of Justice be required to provide reasons for his or her choice by providing Cabinet with the curriculum vitae of the chosen candidate, the list of persons consulted, the list of persons having made recommendations, the list of candidates declared apt, the criteria used and the reasons for the choice related to the situation in the judicial district.

Recommendation 33
I also recommend that the choice of candidate be announced publicly. This announcement should contain the reasons for the choice of candidate, including his or her qualifications, the criteria applied and the specific needs of the judicial district of the position to be filled.

TIME LIMITS FOR APPOINTMENT

Recommendation 34
I recommend that the time for making an appointment be no more than sixty days following receipt of the selection committee's report.

PROMOTION TO ADMINISTRATIVE POSITIONS

Recommendation 35
I recommend the creation of a process for appointing the Chief Judge. This could involve a consultation committee made up of judges from the Superior Court and the Court of Appeal, as well as the outgoing Chief Judge. The tasks of such a committee would be to solicit applications, hold interviews and recommend one or two candidates.

Recommendation 36
I recommend that associate chief judges and other judges performing administrative duties within the Court of Québec or the municipal courts be appointed by the Minister of Justice on the recommendation of the Chief Judge.

4.2.3 Process for selecting persons apt to be appointed as TAQ members

The Commission's mandate was to examine the process for selecting and appointing TAQ members. This does not include a re-evaluation of its status or the regime that governs it. However, the Commission has heard several interveners submit that the TAQ is an agency with a purely adjudicative function whose members are appointed during good behaviour,

and for this reason it should essentially be treated as a court of justice rather than a branch of the administration. If such were the case, one would have to ask whether the principles, considerations and recommendations applicable to the judicial selection and appointment processes were equally applicable, subject to any necessary adaptations, to the processes for selecting and appointing TAQ members. As I have already mentioned, while I believe that the Government should study this issue, I view it as outside the scope of my mandate. The following recommendations are therefore based on the existing regime, taking into account the evidence before me.

EVALUATION MECHANISMS WITHIN SELECTION PROCESS

Recommendation 37
I recommend that the Government of Québec identify in a regulation the evaluation mechanisms to be used in examinations and interviews, particularly the qualifications to be assessed at each stage of the selection process.

OBSERVATIONS CONCERNING CANDIDATES' CHARACTERISTICS AND QUALIFICATIONS

Recommendation 38
I recommend that the selection committee panels provide individualized assessments of each of the candidates declared apt, without indicating an order of preference.

CIRCULATION OF SELECTION COMMITTEE REPORT AND REGISTER OF DECLARATIONS OF APTITUDE

To maintain the confidentiality of the information related to the process for selecting and appointing TAQ members, which, it should be noted, are forwarded to the ministers responsible for the administration of statutes providing for a recourse before the TAQ pursuant to the *Regulation respecting the procedure for the recruitment and selection of persons apt for appointment as members of the Administrative Tribunal of Québec and for the renewal of their term of office*:

Recommendation 39
I recommend that regulatory amendments be enacted to ensure that the reports of the selection committee panels are forwarded only to the Associate Secretary General for Senior Positions and to the Minister of Justice.

Recommendation 40
I recommend that the register of declarations of aptitude be made available only to the Minister of Justice.

4.2.4. Process for appointing TAQ members and related issues

REGISTER OF DECLARATIONS OF APTITUDE AND MINISTERIAL DISCRETION

For the purpose of placing limits on the discretion of the Minister of Justice to make recommendations with respect to the appointment of TAQ members and of facilitating the exercise of this discretion,

Recommendation 41
I recommend that the register of declarations of aptitude contain only a reasonably limited number of candidates.

APPOINTMENT OF TAQ MEMBERS AND BUDGETARY CONSTRAINTS

Given that the TAQ's status as a tribunal whose sole function is to resolve disputes between the Government of Québec and those who reside there requires that it enjoy significant structural and administrative independence from the Government,

Recommendation 42
I recommend that the Government of Québec consider the effect of the TAQ's budgetary status, particularly with respect to the application of governmental staff cutbacks, on the appointment of TAQ members, with a view to enabling it to perform its mandate fully.

APPOINTMENT OF BILINGUAL MEMBERS

Given that all are entitled to use either the French language or the English language before the TAQ and that, accordingly, it should be possible to designate bilingual members at any time should the need arise in a particular case,

Recommendation 43
I recommend that the Government of Québec and the TAQ consider the issue of how many bilingual members the TAQ must have in order to perform its jurisdictional function while respecting the constitutional rights of those who live in Quebec.

APPOINTMENT OF PART-TIME MEMBERS

Given that the evidence has revealed a recurrent problem of refusals by certain part-time TAQ members to make themselves available to sit on demand, that part-time members are appointed during good behaviour, that the maximum number of such members is subject to a cap fixed by Order in Council, and that this situation limits the TAQ's flexibility in remedying this lack of availability,

Recommendation 44
I recommend that the Government of Québec and the TAQ consider the issue of the appointment of part-time TAQ members, with a view to ensuring that such members are available to perform their adjudicative duties.

TERM OF APPOINTMENTS

Given that TAQ members are appointed during good behaviour but that, unlike the case for judges, the Act respecting administrative justice does not set a mandatory age of retirement,

Recommendation 45
I recommend that the Government of Québec and the TAQ consider the issue of an age of retirement for TAQ members, taking into account, if necessary, the possibility of appointing supernumerary members or allowing members to sit beyond the age of retirement in certain specific cases and with authorization.

RENEWAL OF TERMS

Given that members of the TAQ are henceforth appointed to serve during good behaviour,

Recommendation 46
I recommend that Division IX of the *Regulation respecting the procedure for the recruitment and selection of persons apt for appointment as members of the Administrative Tribunal of Québec and for the renewal of their term of office*, respecting the renewal of the term of TAQ members, be repealed.

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