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● (1110)

[*English*]

The Chair (Ms. Nancy Karetak-Lindell (Nunavut, Lib.)): Let's get the meeting under way now since we're starting a little late.

Today is Tuesday, April 5, and pursuant to Standing Order 108(2) we're doing a study of on-reserve matrimonial real property. We have before us today the Department of Justice, represented by Margaret Buist. We also have Jim Aldridge for the second hour.

I'd like to get this started because this is one of the first meetings we've had where we can actually start with the witnesses before us.

Thank you very much for coming in this morning.

[*Translation*]

Ms. Margaret Buist (Counsel, Legislative Initiatives, Department of Justice): Thank you, Madam Chair.

My name is Margaret Buist and I am a lawyer at the Department of Justice. I advise the Department of Indian Affairs and Northern Development on legal matters related to matrimonial real property on reserve land. I'll continue in English.

[*English*]

I'm here to speak to you about matrimonial real property on reserve in the context of individual equality rights guaranteed in sections 15 and 28 of the charter and their potential for coexistence with aboriginal rights guaranteed in section 35 of the Constitution Act. I'm also going to talk to you a little bit about section 25 of the charter, which addresses the intersection of those equality rights and aboriginal rights within the charter itself.

The issue of matrimonial real property on reserve raises the question of how to balance individual equality interests with the collective interests of aboriginal people. By that I mean balancing the need of separating couples to have access to legal remedies that are comparable to those that exist off reserve, such as provincial family law remedies, with the aboriginal collective interests in both managing reserve lands and in governing family law issues.

Let me give you an example. An individual on reserve separates and states they want to access the same laws to get exclusive possession of the matrimonial home that are available to people who live off reserve. The band says they don't want those provincial laws to apply on reserve; they want to have their own laws on reserve. That's the type of issue where two disparate interests must be balanced.

I'm going to talk to you next about the Charter of Rights and Freedoms and individual rights to equality. Section 15 of the charter, as you know, guarantees equality to everyone in Canada based on several enumerated grounds, including race and sex and several analogous grounds that have been determined by courts, such as aboriginality residence, which was found in the Corbiere case by the Supreme Court of Canada.

Individuals who claim discrimination by the federal government must show a court they have been treated differently compared to others, based on one or more of those grounds. They must also prove the different treatment has, from a reasonable person's perspective, affected their human dignity. If the individual proves this to the court, then the federal government has to provide a reasonable justification for the different treatment of the individual.

So the plaintiffs in a court case have to prove discrimination. If they do, the onus then falls on the government to show that any discrimination was reasonably justified in a free and democratic society under section 1 of the charter.

Currently Canada is involved in two court cases where section 15 claims to equality have been made in the matrimonial real property context. The first case was filed by the Native Women's Association of Canada, and the second is a British Columbia family law case. It's a private case between two individuals, but Canada has been drawn in through a notice of constitutional question.

These claims are not fully specified yet because they're not very far along in the litigation, for example, into the discovery process. From what we know about these two cases, both are based on allegations of discrimination against aboriginal women or children who live on reserve and who can't access the same provincial laws on separation those who live off reserve can. Both claims are based only on sex discrimination at this point.

However, there could be other claims brought by aboriginal individuals on other grounds. For example, an aboriginal person might claim race discrimination: I'm being treated differently because I'm aboriginal and I live on a reserve, and those laws don't apply here. Another equality challenge that could occur is that individuals could claim they're being treated differently because of a jurisdictional or, to put it another way, a geographical issue: I live on reserve; a person who doesn't live on reserve gets access to all these laws. So a jurisdictional or geographical claim could be made.

These are the types of claims individuals could put forward to try to seek access to the same legal family law remedies to deal with their matrimonial real property that other Canadians do.

In the event a court finds that an absence of a matrimonial real property regime on reserve comparable to that off reserve is discriminatory, the government can then argue that this violation of section 15 is justified under section 1 of the charter.

● (1115)

In seeking to justify any violation of section 15, the government has to pass a legal test that has been set up by the Supreme Court. The government must establish that the distinction complained of supports a goal sufficiently important to warrant encroachment on the charter right. The government must also establish that the means adopted to achieve that goal infringes as little as is reasonably possible, and that's called the minimal impairment test.

Courts are also very mindful of the context in which the discrimination might occur. With regard to the issue of matrimonial real property, there are several issues of context that are important—the unique nature of land holding on reserve, a band's collective interest in managing their own land, and the challenges posed by customary practices concerning land holding in general and also family law practices within particular aboriginal communities. So a court would take all of those things into account when balancing section 1 and section 15.

Section 28 of the charter guarantees that rights and freedoms in the charter will apply equally to men and women. It's an important section and we shouldn't forget it either. In addition to making a claim using section 15 of the charter for sex equality, women can also use section 28 to bolster that claim, if you will.

In testimony from aboriginal women before various bodies, including the Standing Senate Committee on Human Rights—and you may very well hear some of that testimony yourselves—aboriginal women indicate that they and their children are very negatively affected by family breakdown and by their inability to fully access matrimonial real property laws on reserve. In many situations it forces the women and children to leave the reserve communities where they have resided for many years. Land is also often held in the name of the husband. The husband holds the certificate of possession in many cases. Women and children can't go to court to get an order even to stay in the home temporarily on a reserve. There is also a negative effect alleged by non-band member women, who can't hold land in their names at all. Non-band members are not entitled to have certificates of possession. Women and children who are non-band members are usually required to leave the reserve in those situations. So women can use section 28 to support a section 15 claim that they are being treated differently on the basis of sex.

I have set out for you how section 15 and section 1 work under the charter in terms of the individual equality rights claims that we see in this area of matrimonial real property on reserve.

I would like to turn now to aboriginal rights because the equality claims must be balanced with aboriginal rights. Section 35 of the Constitution recognizes and protects existing aboriginal and treaty rights. In the context of matrimonial real property, it has yet to be determined if there is an aboriginal or treaty right or any other right or freedom. No court has pronounced on this, and in fact we don't have any court cases right now before the courts where a first nation or band has alleged that such a right exists.

However, we do know that first nations have alleged such rights exist outside of courts in their testimony to various bodies. They allege that they have a general right to manage Indian lands. They also allege that they have a self-government right, a right that is recognized by Canada and, as a part of that self-government, first nations or bands allege they have the right to create their own laws with respect to family, with respect to separation on reserve lands or on their lands.

If a band does make such a claim in court, then following the test set out by the Supreme Court of Canada in cases like Van der Peet, the band is required to go through a series of steps. They have to show that the aboriginal right was an integral custom of the aboriginal collective in question and that there is continuity between the practice of that custom, which we call pre-contact, or before European settlers came to Canada, and the present day. There has to be continuity between the history of that practice and the current-day practice.

If they meet that test, they prove that an aboriginal right exists. It's important to remember that Canada does recognize an aboriginal right to self-govern. However, it's unclear how this right would apply with regard to the development and implementation of a matrimonial real property regime on reserve land. Again, recall we have no court cases and no court decisions on this issue.

● (1120)

When you're looking at aboriginal rights under section 35, it's crucial to remember subsection 35(4) of the Constitution. That section guarantees that any aboriginal or treaty rights apply equally to both men and women. If there is an aboriginal right relating to matrimonial real property on reserve, then subsection 35(4) requires that it apply to both men and women.

Let me talk to you now about the section that balances these. That's section 25 of the charter. It states that the charter's guarantee of rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal treaty or other rights and freedoms. Very little guidance has been provided by the courts to date on section 25. It has yet to be determined whether the courts will interpret section 25 as a shield against other charter rights or as a mechanism to balance other charter rights with aboriginal rights.

In several court cases that Canada has faced, aboriginal groups have argued that section 25 should be a shield so that when an aboriginal right is proven, a charter right cannot infringe on it. Canada has taken the position in the litigation so far that section 25 should be a balancing mechanism. A court should look at the aboriginal right and the charter right and attempt to balance the two as well as possible, so that neither infringes on the other.

However it's interpreted, section 25 will have a role to play in the intersection of individual equality and aboriginal rights. Section 25 addresses that intersection of aboriginal rights under section 35 and individual rights under section 15, for example. Any tension between the possible aboriginal rights concerning matrimonial real property on reserve and individual equality rights will have to be resolved both by Parliament and by the courts under section 25 of the charter. Achieving this resolution will be important for any proposed solutions that you might present.

Finally, I've talked to you about the charter and I've talked to you about the Constitution. Those are Canadian legal instruments, but it's important to remember that Canada also has international obligations when you're addressing the issue of matrimonial real property on reserve.

Merci beaucoup.

The Chair: Thank you very much.

We'll start our round of questioning with the Conservative Party, led by Mr. Lunn.

Mr. Gary Lunn (Saanich—Gulf Islands, CPC): Thank you, Madam Chair.

Again thank you for your testimony. This is something that often has been brought to my attention, both before I became a member of Parliament and after. There have been cases on reserve, particularly with women who, in an oppressive situation, don't feel any options of where they can go because of the reasons you've outlined here. They don't have access to a matrimonial home. So where do they turn for help? What do they do?

I'm absolutely convinced that this is a real problem. I sense you're probably in a similar situation as myself in that you don't know what the exact solution is. But clearly we have to all work together, from all political parties and outside political parties and Parliament, to try to find a solution to this growing and real problem that's there.

You've outlined the problem very nicely. It's very clear about going to the charter and how they affect each other. If you could look into the future, which is very difficult for you to do, in your opinion, where do you see the solution? Again the problem that we're facing is nicely laid out. Where do you see us going from here forward?

Obviously it's before the courts now. If you could sit down with the chief justice of the Supreme Court and be able to have the greatest amount of influence, what would you advise for the court as to where we should go with this and how we rectify this problem that's facing us now and growing?

Ms. Margaret Buist: I would say the same things to her that I've said to you today. I don't have the answer, but what is important is that the balancing occur, so that the individual equality rights that are being put forward right now in the litigation against Canada and in the submissions that have happened to the Senate committee, and will probably happen to this committee, are respected, and that the aboriginal rights that you will also hear about probably at this committee and that the Senate committee heard about are also respected, and how to achieve that balance.

I don't have the answer for you on how to achieve the balance. That's really what the Department of Indian and Northern Affairs is looking to this committee for assistance in doing—hopefully not necessarily to the courts, but to this committee and possibly to Parliament. So I would say the same things to her as I've said to you. You must achieve a balance. You must say we need to respect the individual equality rights and provide access to the same types of laws that exist in the provinces off reserve, and we must also respect that reserves are a different land from provincial land, and that first nations in a move toward self-government want to have more control over their lands and more control over what's occurring in their own collective.

● (1125)

Mr. Gary Lunn: And I equally struggle because to find that balance.... Obviously on first nations lands and in the aboriginal community, it's communal property held by a certificate of possession, and some would argue that it's much more of a patriarchal society than ours is, as you've pointed out. In many cases the certificate of possession is granted only in the name of the man in those relationships and not both.

I struggle with this as well—to respect their traditions but at the same time the rights of the individual and what is in the best interests of the family in a family breakdown. It's an incredibly difficult line to find, where you can respect the communal system of aboriginal lands and in the same breath, as you also pointed out in your paper, to ensure the genders are treated equally on and off reserve.

I'm not sure. Am I right? Do you sense as well that first nations are more patriarchal than our society? Is that a fair statement? I don't know. It's a question.

Ms. Margaret Buist: I wouldn't say that, no. I would say that every community is distinct and has its own collective rules. What we do know, though, is that there are a number of communities where men hold the certificates of possession. There are also communities where women do and there are also communities where they're held jointly.

But what we've heard about before, for example, at the standing Senate committee and in other international fora as well, is that there is a negative impact on women and children in particular, and in particular in situations of domestic violence, where they have to leave the community because there is no house for them on reserve and they can't get access to their own home if the certificate of possession is in the man's name. And that situation does not occur off reserve.

Mr. Gary Lunn: Exactly. Therein lies the problem.

I will refer to my colleague. Thank you, Madam Chair.

The Chair: Thank you very much.

Did you want to use the last two minutes, Mr. Harrison?

Mr. Jeremy Harrison (Desnethé—Missinippi—Churchill River, CPC): Yes. I understand from media reports that the government is seriously considering moving toward a system of property and home ownership on the reserves, which is something I've been talking about for a significant period of time, as has my party.

If this does come to pass, that the government actually gets around to introducing legislation to make this a reality, how in your opinion would that affect the current problems that we see on reserves with matrimonial property issues?

Ms. Margaret Buist: I don't know what that legislation would look like, but what I know is that any legislation that deals with the issue of matrimonial real property has to either incorporate existing provincial laws on the division of property on breakdown or something similar to that in order to address this issue of matrimonial real property. So the rights that are not currently available on reserve, such as exclusive possession of the matrimonial home, the ability to transfer title of home between spouses on separation, the registration of the home as a matrimonial home—those three issues—would have to be made available in order to address this issue of matrimonial real property to achieve on reserve the equality that exists off reserve.

● (1130)

The Chair: Thank you.

Mr. Cleary.

[*Translation*]

Mr. Bernard Cleary (Louis-Saint-Laurent, BQ): Thank you, Madam Chair.

Before asking a question I would like to provide my input on the subject given that, for 25 years, I dealt with matters relating to land claims negotiations and self-government. In these negotiations the Government of Canada attempted, and rightly so I believe, to make us accept Canada's Charter of Rights and Freedoms. The government was not forcing us to accept something negative, but rather something that could potentially solve some of the problems we faced.

Of course we also have aboriginal rights, but they mustn't enable abominable acts to be committed against the population or individuals. Collective and aboriginal rights are all well and good but individual rights must also exist. Where do these rights fit in? What are their limits? This is something that has never really been defined in our agreements.

The fact is that it is the powers that be who are providing a poor example. The Department of Indian Affairs and Northern Development is quite ambiguous when it comes to the Charter of Rights and Freedoms. Let me give you an example taken from my own experience; it may be the best one. I lived off reserve, with all the drawbacks that that entails, so I didn't own a house on reserve. Since then, I have bought myself one and I am now an Indian living on reserve. What has changed in my life as an Indian or with my certificate of Indian status? The fact that I bought a house on reserve? My rights as an Indian should have been just as important when I lived off reserve as they are now. I don't remember which minister said this, but one or two mandates ago, he said that the Department of Indian Affairs and Northern Development's rules were constantly in contradiction with the Charter of Rights and Freedoms. And the department should set the example.

We have trouble on reserve proposing clear solutions to issues that, for Indians living on reserve, are new ways of doing things. We don't deliberately seek to violate the Charter of Rights and Freedoms in claiming protection on certain matters. This happens because the houses that we live in are on land that belongs to Her Majesty. We are not demanding all these precautionary measures, it's Her Majesty the Queen of Canada who is asking us to protect this land for her and not for us. This land doesn't belong to me personally. Even if I wanted to give it to my children I couldn't because it belongs to Her Majesty the Queen of Canada.

As long as such important questions remain unanswered, it will be difficult to implement what should be implemented on these reserves in order to respect all these principles. I have been talking about this for 20 to 25 years—these questions are as old as the earth is—and we still haven't got any answers.

● (1135)

I listened to you very closely, and you don't have a solution. You know that you don't have one. And this is the case because there is so much ambiguity and so many unanswered questions. When these problems occur aboriginals react just like any other human being. When they are caught in a particular situation they come to their own defence before that of others. For aboriginals, marriage, a quarrel, and divorce is just like marriage, a quarrel, and divorce for other people. Dividing up property is always difficult, and all the more so when Her Majesty the Queen of Canada is involved or when a department abuses its power and doesn't respect others.

I won't find a solution. I am not closed-minded or do I have trouble understanding the issues, but I won't find a solution for the simple reason that we are not dealing with the real problems. The problems are being offloaded onto the people on reserves who have trouble dealing with them because of how complex and complicated the situation is. And I understand this. The trustee isn't providing a clear direction. And the trustee should occasionally do a good job and give us explanations and direction which may help us to find the right solution. This doesn't mean we'll find answers to everything, but one thing is certain: we absolutely have to do something.

[*English*]

The Chair: I am sorry, you've run out of time, so we'll have to move on to the next questioner.

[*Translation*]

Mr. Bernard Cleary: I'm sure you've understood my question is a general one. If you are able to answer it I would be grateful.

[*English*]

The Chair: Thank you, Mr. Cleary.

We are now on to the honourable Sue Barnes.

Hon. Sue Barnes (London West, Lib.): Thank you very much.

For the record, I would like you to acknowledge whether or not in customary allocation of land a certificate of possession and a knowledge of who owns the land even exists for anybody outside or internal to know about.

Ms. Margaret Buist: In the situation of customary possession of land, the Minister of Indian Affairs and Northern Development or the department doesn't know who necessarily owns it. We only have registration of certificates of possession of land.

Hon. Sue Barnes: There are reserves inside of Canada right now that have partial certificates of possession combined with customary or fully customary, so there is no knowledge at this point in time of who owns what land across Canada inside.

Ms. Margaret Buist: That's correct.

Hon. Sue Barnes: Thank you.

That does obviously complicate the issue too, because some suggestions are that it's land that we should be looking at and the registration of land, as opposed to whether it's federal, provincial, or territorial. This can enter into the mix.

Again for the record, it would be very nice to think that this is a problem that you get with one marriage breakdown, but in fact what occurs inside reserve as well as outside reserve is you could have a couple of marriage breakdowns. You could have a mixture of aboriginal and non-aboriginal marriages, and this further complicates the issue also.

Ms. Margaret Buist: Exactly. Some marriages are between both Indians and band members, and some marriages are between band members and non-band members.

As I mentioned earlier, the issue of non-band members is quite significant because they cannot hold a certificate of possession. You can't transfer the matrimonial home to them as part of a settlement.

Hon. Sue Barnes: As with off reserve, some are common law and some are legally created marriages also, going through marriage breakdown.

● (1140)

Ms. Margaret Buist: That's true as well, and that further complicates the issue, because if you were, for example, to simply import provincial laws in each province or each jurisdiction into the Indian Act, some provinces don't recognize matrimonial homes for cohabiting couples and some do. So you would be importing a patchwork of solutions across the country.

Hon. Sue Barnes: Again for the record, in your presentation you touched on international situations. Are Canada's international human rights obligations relevant in this issue at all, and if so, how?

Ms. Margaret Buist: They are relevant. Canada is signatory to both the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination Against Women and has human rights obligations because of being a signatory to those international agreements.

Those international agreements all contain equality provisions that relate to this issue and relate to dissolution of marriage. So we have to fulfil those international obligations in addressing this issue as well.

Hon. Sue Barnes: Okay. Just to follow up on that, has any individual or organization claimed at an international level Canada is violating its obligations in this regard at present?

Ms. Margaret Buist: Yes. The Native Women's Association of Canada, for example, has claimed, both in their litigation against Canada and also in various international fora, that Canada is breaching its obligations.

Hon. Sue Barnes: I just need you to go over how, under the Indian Act, there is an exemption under section 67 of the Canada human.... Can you go over that?

Ms. Margaret Buist: Sure. Under section 67 of the Canadian Human Rights Act, any decisions made, for example, by band councils under the Indian Act—for example, land allotment decisions on who gets this land or who gets this house—are exempt from the Canadian Human Rights Act, so you cannot claim discrimination in accommodations on the basis of gender against the band council using the Canadian Human Rights Act, whereas someone off reserve could do that.

Hon. Sue Barnes: All right. So theoretically, then, over time, if we took out that section in the Indian Act, that would give somebody the ability to go on a charter violation of inequality of sexes. Correct?

Ms. Margaret Buist: Yes.

Hon. Sue Barnes: And then, over time, as bands would have to deal with that situation if people brought that forward, it could self-correct, but it may take a substantial period of time?

Ms. Margaret Buist: Yes. If you removed section 67 of the Canadian Human Rights Act, you would open an important avenue for equality for individuals on reserve.

Hon. Sue Barnes: One of the biggest areas of concern—I think both from the federal government's perspective and from the first nations' perspective—would be that because you've got aboriginal rights protected under section 35 of the Constitution, if we passed federal legislation on the issue of on-reserve matrimonial real property, some people would very much feel this was an infringement of those rights.

If that's the case, is there any way such an infringement would be either justifiable or necessary? How would you go about this? This is a huge concern, I think primarily from the perspective of sensitivity of government, but also, most importantly, from the first nations' perspective. Can you just canvass that area for me?

● (1145)

Ms. Margaret Buist: I would suggest the committee look at the self-government agreements and at the First Nations Land Management Act. I think both those areas provide some guidance as to how to balance the rights.

In self-government agreements, various approaches have been taken between the government and the first nations on how to deal with this issue. In the First Nations Land Management Act, the bands that join up to that regime create their own matrimonial and real property codes.

So there are two examples of how a balancing has occurred between the individual equality rights and a recognition of the need for a matrimonial and real property regime, but balancing with the first nations' desire to have some control over the process occurring on their own land.

Hon. Sue Barnes: Let's just take one of those, the First Nations Land Management Act. My understanding of that act, as we put it through, was that those first nations that subscribe would have up to 12 months after they get into the system to set up their matrimonial real property regime.

But I also understand that currently there are no teeth in the legislation to enforce that, and in terms of capacity we are probably capable of putting 30 or so new bands per year onto that regime. Is that correct?

Ms. Margaret Buist: Yes, that is correct. They are required to have a matrimonial real property code, but I believe only five have enacted codes right now, out of the number of bands that have joined up to the FNLMA, so there is a problem in terms of lacking teeth.

In anything that occurs, this committee would want to take a look at making sure there was some requirement, or some fallback position. Let's say the committee provides an option to deal with on-reserve matrimonial real property nationally if first nations can't do this within a certain timeframe on their own. That would be one possibility.

The Chair: Thank you very much.

We are out of time, but I would like to ask you for a clarification .

You were saying section 67 of the Canadian Human Rights Act does not apply to all custom allotments, but the researcher tells me that's only for allotments under the Indian Act—that it wouldn't be applicable to custom allotments.

Ms. Margaret Buist: What I said is that section 67 of the Canadian Human Rights Act is a bar to challenging any decisions made under the Indian Act. So if a band makes decisions with respect to land allotment on reserve, those are decisions made under section 20 of the Indian Act, and you cannot make a human rights complaint against those.

The Chair: But we're clear that it doesn't apply to some of the custom allotments of land.

Ms. Margaret Buist: The way custom allotments are made is not governed by the Indian Act. The Indian Act only covers certificates of possession. I referred to land allotment, which may have been the source of confusion. I wasn't talking about custom allotment, I was talking about land allotment under section 20, with certificates of possession.

The Chair: I just want to make sure people realize that custom allotments are then subject to the human rights charter.

Ms. Margaret Buist: No, they're not.

The Chair: I'm getting confused here now.

Ms. Margaret Buist: Custom allotments are made outside the land regime of the Indian Act; they are not something the Indian Act recognizes, let's put it that way. However, in the same way they're not recognized by the Indian Act, they're most likely not recognized by the Canadian Human Rights Act either.

The Chair: Okay.

We'll go on to Mr. Harrison.

Mr. Jeremy Harrison: Thank you, Madam Chair.

I understand that this is a very complicated legal issue. My background academically is in aboriginal law, and I know this is an incredibly complex set of issues, not just the single one. The bureaucracy has obviously put together options. What options have been put together for dealing with this?

Ms. Margaret Buist: The Department of Indian and Northern Affairs has discussed options, but I'm not sure what you mean by “put together”. Lots of options have been discussed and looked at within the department.

Mr. Jeremy Harrison: Well, what are some of those options that have been discussed?

Ms. Margaret Buist: You would have to ask the Department of Indian and Northern Affairs. I'm their lawyer, and I can't talk about those things; they're covered by solicitor-client privilege.

Mr. Jeremy Harrison: Okay.

One question I have as well is with regard to how the issue of matrimonial property is dealt with in jurisdictions outside Canada. There's obviously a very different legal underpinning in those countries. As an example, with a country that does have reserves, the United States, how does the American system deal with the issue of matrimonial property?

Ms. Margaret Buist: I don't know, I'm sorry.

Mr. Jeremy Harrison: Okay. That's good.

The Chair: Thank you.

We're going to Mr. Valley for the government side. We're now going to alternate back and forth.

Mr. Roger Valley (Kenora, Lib.): Thank you.

I have several short questions. We all know it's been going on for quite a while over a number of governments. Can you tell me roughly how many years we've been working on this issue?

● (1150)

Ms. Margaret Buist: The Supreme Court of Canada decisions relating to this, Derrickson and Paul, were in 1986. So that's when it first came to Canada's attention that there was an issue with respect to provincial family law not applying on reserve.

Mr. Roger Valley: Since 1986, has any legislation come forward that has failed or died on the order paper, any documents like that?

Ms. Margaret Buist: There's been no legislation proposed to deal with this issue.

Mr. Roger Valley: Okay.

We get advice from a host of groups around the country, organizations that represent first nations at all levels. Have we received documents giving us advice on this issue from some of the first nations?

Ms. Margaret Buist: As far as I understand, submissions have been made to the standing Senate committee. A number of reports were presented to them from various witnesses who were called before them. So those documents exist.

Mr. Roger Valley: So it falls to us to do a proper study with the proper time, which we've been trying to do, and come up with some suggestions for legislation with the information we have from the Senate and what we can gather. Is that my understanding of where we're heading here?

Ms. Margaret Buist: That's what I understand the Minister of Indian and Northern Affairs has asked this committee to do.

Mr. Roger Valley: So we need a full, in-depth study, one that's given the proper time, I would suggest.

That's all, Madam Chair.

The Chair: Thank you.

We now have Mr. Bellavance.

[*Translation*]

Mr. André Bellavance (Richmond—Arthabaska, BQ): Thank you, Madam Chair.

Ms. Buist, we're dealing with a legal grey area, from what I understand. There are a number of laws that contradict each other: the 1982 Constitution Act, the Indian Act and Canada's Charter of Rights and Freedoms. Does one of these acts trump the others? Could that help us find a solution?

[*English*]

Ms. Margaret Buist: I'm not sure one should take precedence, but I do know a balancing act should occur. A close examination of the equality rights that are affected in this issue and a close examination of what aboriginal rights there are and may be affected should occur, and it would be very helpful if this committee took part in that balancing act and put forward any proposals. It's what is required in law.

[*Translation*]

Mr. André Bellavance: The Senate committee has done that. Demands have been made since 1974. I have in front of me the text from testimony on the 22nd of September 2003 of the president of the Association des femmes autochtones du Québec, Ms. Michèle Audette. In her testimony, Ms. Audette explains that for many years studies and reports from committees and organizations have shown that discrimination exists. As members of the committee we will do the work, but what should we do exactly to ensure that justice is done in this matter?

[*English*]

Ms. Margaret Buist: I know the standing Senate committee did find that there was a breach of the charter, and I know various organizations that spoke to them talked about the equality rights of women. I'm sure you will hear that as well, but what you will also hear is first nations and bands say, that's fine, we respect the equality rights, but we don't want whatever solutions you propose to interfere with our rights to self-government and to manage our own land. So we would like you to balance those equality rights with those aboriginal rights.

[*Translation*]

Mr. André Bellavance: A little earlier, we talked about international conventions that guarantee equality between men and women and which prohibit discrimination. Canada is a signatory to these conventions and yet we disregard them. What can be done in this regard? We are told from time to time that discrimination does occur here. Does that mean that discrimination can continue with impunity?

[*English*]

Ms. Margaret Buist: The same debate we're talking about here on the domestic level in Canada is also taking place on the international level. Canada is a signatory to those conventions that call for the prevention of discrimination, but Canada is also in discussions—it hasn't signed a convention yet—with international aboriginal groups in the international forum on how to protect customary rights. So that same requirement for balancing between aboriginal rights and individual equality rights is going on in the international fora as well.

● (1155)

[*Translation*]

Mr. André Bellavance: Thank you. Should I have any time left, I'd be pleased to give it to my colleague.

[*English*]

The Chair: One minute and 20 seconds.

[*Translation*]

Mr. Bernard Cleary: I would like to continue along the same lines as my friend André.

Somehow, somewhere, someone will have to make decisions. We can't continue to allow people to act in a haphazard, ad hoc fashion without providing clear direction on these issues. And I think that is the responsibility of the Government of Canada. There needs to be direction. I can understand that we don't want to take matters into our own hands, but something has to be done sometime and must involve all parties. Even aboriginal leaders are going to have to take a stand. We'll never be able to find a solution because nobody wants to impose any solutions. So that is my first point.

My second point relates to the status of these lands which changes following negotiations. Under certain conventions, the land no longer belongs to Her Majesty the Queen of Canada, but rather to the band. The band needs to have its own rules and not hide behind the fact that the land can't be sold to white people. We won't always be able to hide behind that.

I know that this is how it works, but we aren't experts in every field. We need experts who will help us to better understand the issues and make the best decisions. You are one of these experts. So you have to help us and not let us get caught up in never-ending debates which offer no solutions.

[*English*]

The Chair: Thank you very much.

We will now go to Mr. St. Amand.

Mr. Lloyd St. Amand (Brant, Lib.): How much time do I have, Madam Chair?

The Chair: You have five minutes in this round. This will be the last questioner, and we will go on to the next round.

Mr. Lloyd St. Amand: I would like to commend you, as did Mr. Lunn, for your cogent presentation of an admittedly difficult issue.

I have a couple of questions with respect to the charter. As I understand it, a section 15 right is basically inviolate unless section 1 comes into play and basically saves the right being violated. Is that fair to say?

Ms. Margaret Buist: I would probably say it a little differently. You have to show with regard to a section 15 right that compared to someone else you've been treated differently and that affects your human dignity.

Mr. Lloyd St. Amand: The violation of such a right, or the denial of such a right, can be validated pursuant to section 1.

Ms. Margaret Buist: That is correct.

Mr. Lloyd St. Amand: But as I read the charter, section 25 is not permissive, it's mandatory. The language has “shall” rather than “may”. Is the denial of a section 25 right addressed in any other paragraph of the charter?

Ms. Margaret Buist: Section 25 is a little different from section 15. You don't apply section 1 to section 25. Section 25 is simply there as a guarantee, like section 28. Section 28 is a guarantee of gender equality, section 25 is a guarantee that any other equality rights, for example, those under section 15, will not abrogate or derogate from any aboriginal rights. So it's a guarantee. You don't apply the section 1 test to it.

Mr. Lloyd St. Amand: So the bands who claim that section 25 stands on its own and cannot be challenged are not able to use section 1, because section 1 and 25 do not interact.

● (1200)

Ms. Margaret Buist: Yes. The bands wouldn't use section 1. Only the government uses section 1, or, I should say, if an aboriginal government is being challenged under the charter, then it would use section 1.

Mr. Lloyd St. Amand: Okay.

You mentioned in your presentation Canada's current involvement in two cases of claims being made or initiated under section 15 on the basis of a right being violated. What remedy is being sought by the plaintiffs in those cases?

Ms. Margaret Buist: In the NWAC case the remedy being sought is to have the court require Canada to pass legislation. That's never been ordered by the Supreme Court of Canada before, but it is the remedy being sought at this time. Remember, it's early days in that litigation, but that's what is planned.

Mr. Lloyd St. Amand: Yes, I appreciate it's early days, but the prayer for relief has been made known for some time. So the plaintiffs are requesting not an injunction but a court order mandating legislation to be passed by the federal government giving the plaintiffs and others of their class, so to speak, the same rights as off-reserve aboriginals. Is that the nub of it?

Ms. Margaret Buist: That's correct.

Mr. Lloyd St. Amand: Okay.

I appreciate that Mr. Bellavance has touched on this, but what would our international obligations actually compel us to do? I may be asking the same question, and perhaps you answered it. I know you talked about balancing, but the fairest interpretation of our international obligations says they compel us to do what?

Ms. Margaret Buist: To observe and respect equality, in particular equality in marriage dissolution for women and children, so to follow section 15.

Mr. Lloyd St. Amand: Are you wanting to proffer your opinion as to whether or not our current laws abide by that obligation?

Ms. Margaret Buist: I can't give you my opinion on that. I can only give opinions to the Department of Indian and Northern Affairs.

Mr. Lloyd St. Amand: I understand.

Thank you, Madam Chair.

The Chair: Thank you very much, and I thank our witness this morning for a very thorough presentation and question and answer session.

We will suspend for about a minute to get ready for the next witness, Mr. Aldridge.

● (1203)

(Pause)

● (1206)

Mr. Jim Aldridge (General Counsel, Nisga'a Lisims Government): Thank you very much, Madam Chair.

Thank you to the committee for inviting me here today. I bring you the greetings of Nisga'a Lisims Government. President Nelson Leeson and the other officers all asked me to pass on their greetings to both those members of the committee they know and those they have not yet had a chance to meet.

As the committee knows, and as has been obvious through your deliberations—including the last hour—one of the most difficult challenges confronting first nations and their citizens has concerned the question of the division of matrimonial real property located on reserve. More specifically, the challenge has been how to ensure that first nations individuals who undergo marital or conjugal breakup have the same or similar rights as non-aboriginal Canadians under provincial family law regimes, as was described, if I may say so, very well by the previous witness.

It's important to keep in mind that a number of slightly different issues can arise in this context depending on whether both spouses belong to the same band, whether one is a member of a different band, or whether one is a non-Indian and not covered by the Indian Act at all.

The problem of course is multi-faceted. It arises from the complex interplay of Canadian constitutional relationships between federal and provincial law, as well as from the provisions of the Indian Act that, as we know, were overtly designed originally to bring about assimilation of first nations people into the broader Canadian society while at the same time denying those nations the outright ownership of their lands. It arises as well from the tension between individual rights and collective entitlements, and it arises from the historical discrimination against first nations women that was reflected in the Indian Act for so long and that regrettably lingers on in certain areas despite the legal and social reforms of the last two decades.

The problems have been well-documented and articulated for many years, yet solutions seem to be slow in coming. Some people, some commentators, blame this slow progress primarily on what they allege to be sexist attitudes on the part of the federal government and first nations leaders. While there may be some basis for this view, in my opinion such explanations are too simplistic and fail to take into account the true complexity of the problems associated with property rights of first nations and their people.

As the chair mentioned, the Nisga'a treaty came into force on May 11, 2000, almost exactly five years ago. In the succeeding five years, the Nisga'a Nation has faced inevitable challenges on a number of fronts. Nisga'a Lisims Government, which is the name of the government of the entire Nisga'a Nation, and the four Nisga'a village governments have had to establish new modes of doing things now that the Indian Act no longer applies to their lands, to their governments, nor—except for the narrow purpose of determining who is an "Indian"—to their people.

In those five years, the Nisga'a Nation has had to enact a great number of laws—laws in respect of the operation of Nisga'a government; laws in respect of the confirming of Nisga'a citizenship; the conduct of elections; the management, stewardship, and allocation of their fish and wildlife resources; the review of their government's administrative decisions; the proper management of their forests; and many other matters fundamental to the operation of any contemporary government within Canada. Indeed, one of the most important and most complex areas has been the establishment of the land ownership regime, which is of course a broad subject matter that intersects with the division of matrimonial assets.

In my comments today I will endeavour to describe to the committee the general approach being taken by the Nisga'a Nation to the broad question of Nisga'a citizens' rights to real property in the context of the Nisga'a treaty, as well as the evolutionary approach under which the Nisga'a have chosen to move forward. While I will certainly do this in the context of the question of division of matrimonial property, I will also endeavour to show the committee that this question—namely the one concerning matrimonial property—can only be properly understood in the broader context of dealing with land ownership.

I have some necessary background information—and much of this the previous witness covered. When I put together my speaking notes, I didn't know you'd be receiving such a comprehensive presentation just before mine. Perhaps I'll present some of the same information in a slightly different way, a little more truncated.

It's important that you appreciate that the Nisga'a treaty, like all other land claims agreements and modern treaties and self-government agreements, was negotiated in the historical context of the provisions both of the Indian Act and of the Constitution Acts, 1867 and 1982. At the risk of oversimplifying and repeating matters with which the committee I know is already familiar, the following points would appear to me to be the most important to keep in mind as they apply to the Nisga'a and as they continue to apply to most first nations in Canada today.

● (1210)

First, as we know, Canada has exclusive jurisdiction over both Indians and lands reserved for the Indians. The question of ownership and possession of lands on Indian reserves is therefore unquestionably a matter over which provincial governments have no jurisdiction whatsoever. Accordingly, provincial laws dealing with the division of land, including land title legislation, estate law, and provisions pertaining to the division of family assets simply do not apply on reserves.

Second, while Canada has legislated in respect of ownership of land and estates on reserve, it has not legislated in respect of division of property on reserve following marital breakdown, and I recall the answer given to your question by the previous witness.

Third, first nations do not own the land on their reserves. Under the Indian Act, land on reserves is owned by the Crown in right of Canada "for the use and benefit of the band". The band has only a right of use and benefit.

Fourth, the greatest right to property on a reserve that can be attained by an individual Indian or member is the right to possess land, the title to which is vested in the Crown. This right of possession, which can be allotted by a band council with the approval of the minister or customarily, is sometimes but not always evidenced by a document called a certificate of possession.

Fifth, the Supreme Court of Canada has categorically determined in the Derrickson and Paul cases, which were alluded to, that by virtue of subsection 91(24) of the Constitution Act, 1867, the right to possess land on a reserve is not subject to provincial family relations legislation.

Finally, the result has been that first nations spouses who reside on a reserve do not have the same ability as other residents of their province to obtain a court order in respect of the ownership and possession of their home in the event of a marital breakdown.

To summarize, the current situation is primarily the result of these two features, both the fact that Indian bands and their members are forbidden by federal law from owning the lands on reserves and the fact that provincial family relations legislation cannot apply even to the limited right of possession that Canada has been willing to allow individual first nations persons to have.

However, beyond these legal points, there lies another much deeper issue, to which the most serious regard must be given. The challenges surrounding the division of matrimonial property on reserve are only one manifestation of the larger question of the extent to which land that is the collective property of an aboriginal nation can or should be exposed to acquisition by others who are not members of that nation.

No one disputes the special relationship that exists between aboriginal nations and their land. Their traditional territories have sustained them since time immemorial. Much of the modern struggle of aboriginal peoples has been to keep or regain land that has been taken away from them or lost as a result of various government initiatives over the past centuries. Indeed, despite the many objectionable features of the Indian Act, one of its few virtues has been the fact that it has managed, for the most part, to sustain at least the limited interest in reserve land that it accords to Indian bands, but the Indian Act's protection of reserve land has come with an inevitable price.

An interest in land that cannot be sold freely has a reduced monetary value. If there is a restricted market, there's a restricted value. If the right to possession of land can only be held by a member of the band, it cannot be mortgaged to a bank or other financial institution. If the right to possession of land can only be held by a member of the band, it cannot be bequeathed by will or descend by intestacy to a non-member, despite the wishes of the deceased or the interests of the heirs. And if the right to possession of land can only be held by a member of the band, it cannot be transferred to a non-member in the event of a marital breakdown. These are all elements of the same phenomenon.

On the other hand, if a first nation was able and prepared to permit individuals to sell parcels of the first nations land to outsiders or to allow individuals to grant mortgages over parcels of the first nations land to financial institutions, to enable individuals to bequeath parcels of the first nations land to any beneficiary, or to give spouses who are not members the right to own or possess parcels of the first nations land, that first nation might risk losing its connection to its land.

Thus the special ties of a first nation to its land could be severed, not through conquest or surrender, but by operation of law and by subordinating the interests of the group to the capacities of the individual.

These are not easy questions, and they're not easy questions that can be solved by the glib embrace of either individual values or collective values to the exclusion of the other. They are also not questions, in my respectful view, to be finally determined by non-aboriginal politicians, judges, or lawyers.

● (1215)

They are not questions that should be debated by accusing those who desire a real proprietary interest in their homes of being opposed to their community. Nor are they to be debated, in my respectful view, by accusing those who feel responsible for protecting their nation's attachment to their land of being self-interested or sexist.

So it was in this context, Madam Chair and members of the committee, that the Nisga'a treaty was negotiated and settled. The treaty represents a fundamental change in many of the basic elements of the legal regime I've just described. Under the Nisga'a treaty, the Crown ceased to own the land for the use and benefit of the Nisga'a. On the effective date, the Nisga'a Nation owned all of Nisga'a lands—the 2,000 square kilometres including but not restricted to the former reserves—and the Nisga'a Nation then granted to the Nisga'a villages, the four villages, most of the property interests in the lands that had previously been the Indian Act reserves on which the villages are located. So it was a transfer of ownership from the nation to the villages of what was formerly the reserve.

Moreover, the treaty expressly provides, so that there can be no question about this, in the general provisions chapter, paragraph 10:

> There are no "lands reserved for the Indians" within the meaning of the Constitution Act, 1867 for the Nisga'a Nation, and there are no "reserves" as defined in the Indian Act for the use and benefit of a Nisga'a Village...and for greater certainty, Nisga'a Lands and Nisga'a Fee Simple Lands outside Nisga'a Lands are not "lands reserved for the Indians" within the meaning of the Constitution Act, 1867, and are not "reserves"....

That is sort of hitting it twice, but there can be no question that the treaty provides that these are not section 91.24 lands, which you will recall was the fundamental basis of the Supreme Court of Canada's decision in Derrickson and Paul, saying that the Family Relations Act of the province could not apply. These are not section 91.24 lands.

In case there is any further question about the application of federal and provincial law, the treaty goes on to say in paragraph 13 that:

> Federal and provincial laws apply to the Nisga'a Nation, Nisga'a Villages, Nisga'a Institutions, Nisga'a Corporations, Nisga'a citizens, Nisga'a Lands and Nisga'a Fee Simple Lands, but:
>
> > in the event of an inconsistency or conflict between this Agreement and the provisions of any federal or provincial law, this Agreement will prevail to the extent of the inconsistency or conflict.

Accordingly, it is clear that the constitutional impediments arising from section 91.24 of the Constitution Act, 1867, simply no longer exist in respect of the Nisga'a nation and their lands.

But it is also clear that the application of federal and provincial law will need to take into account Nisga'a laws validly enacted under the treaty as well as the provisions of the treaty that govern the relationship of Nisga'a laws to federal and provincial laws. As the owner of the entire fee simple estate in Nisga'a lands, the Nisga'a Nation has the right, under paragraph 4 of their lands chapter, in accordance with the treaty, in accordance with their own constitution, and in accordance with Nisga'a law, to dispose of the whole of its estate in fee simple and any parts of Nisga'a lands to any person or to create or dispose of any lesser estate or interest to any person.

Finally, under paragraph 44 of the Nisga'a government chapter, Nisga'a laws governing the nature and transferability of interests created by Nisga'a Lisims Government prevail over any inconsistent federal or provincial laws to the extent of the inconsistency.

I should say parenthetically, Madam Chair, the treaty does not give, nor did the Nisga'a seek, legislative jurisdiction in respect of the division of matrimonial property. Rather, through the technique I've just described of declaring this not to be section 91.24 land and through the technique of ensuring that the Nisga'a Nation has power to make laws about the disposition of assets generally, it was then content to simply allow provincial law, in particular provincial family relations law, to apply on Nisga'a lands, and it does.

That said, the Nisga'a Nation agreed in paragraphs 33 and following in the lands chapter to undertake to grant to Nisga'a citizens who had a right to possession of land on the former Indian Act reserves an interest under which those Nisga'a citizens would have "substantially the same right to possess the described parcel of Nisga'a Lands as the person would have had as the holder of a certificate of possession under the Indian Act immediately before the effective date, modified to reflect Nisga'a government jurisdiction over and Nisga'a Nation ownership of Nisga'a Lands."

● (1220)

In other words, this was at the behest of the federal government. The federal government said to the Nisga'a negotiators, if you are going to own the land collectively in a single mass on the effective date, at the magic moment when we flash over to the new regime, 100% of the land will be vested in the Nisga'a Nation.

Canada proposed, and the Nisga'a obviously accepted, that in order to protect people who had a right of possession in the previously existing reserves, those people would be given an interest —again, substantially the same right to possess the parcel of land as they had under certificates of possession—which of course would then vanish because the Indian Act doesn't apply.

Some people in Nisga'a villages had certificates of possession; many did not. But everyone who was identified as having a right of possession by way of certificate of possession, or by way of band council resolution or otherwise, was given a treaty guarantee that they would receive an interest on the effective date with substantially the same right to possess as was given by the certificate of possession. This was the first step in a transitional process, which is still under way.

This treaty obligation was accomplished under statute of Nisga's Lisims Government, duly enacted.

[*Translation*]

Mr. André Bellavance: We haven't had interpretation for a couple of seconds.

[*English*]

The Chair: I'm not getting the translation from you either.

[*Translation*]

Mr. Jim Aldridge: Unfortunately, I can't make my presentation in French because I don't speak the language well enough. My apologies.

[*English*]

The Chair: I'm hearing English now.

Can we try the French again, please, to have confirmation that Mr. Bellavance is hearing?

[*Translation*]

Mr. André Bellavance: Okay it's working now.

[*English*]

The Chair: Okay.

Go ahead, Mr. Aldridge.

Mr. Jim Aldridge: Thank you.

I'll try to pick that up and not go around again. The point I wanted to emphasize, though, is that the Nisga'a complied with the treaty obligation by enacting a law called the Nisga'a Village Entitlement Act. As of the effective date, Nisga'a citizens were therefore granted interests, the nature of which under Nisga'a law was substantially the same as the right of possession under the Indian Act.

These interests, known as Nisga'a village entitlements, were all registered in the Nisga'a land title office in accordance with the Nisga'a Land Titles Act. So there can be no question of not knowing who has what. The Nisga'a established a land titles act. They established a land titles office. The village entitlements were all registered there immediately following the effective date.

Therefore, while these Nisga'a village entitlements were granted by Nisga's Lisims Government to Nisga'a citizens under the treaty, they retained the limitations on transferability similar to those of Indian Act certificates of possession. More specifically, a Nisga'a village entitlement can only be transferred to an individual if that individual was on the band list of the relevant band that existed under the Indian Act prior to the effective date. A Nisga'a village entitlement cannot be transferred, mortgaged, or bequeathed to any individual who's not an eligible recipient, namely a member of the band as it existed before the effective date.

So, for instance, a Nisga'a village entitlement in the village of Gitwinksihlkw cannot be transferred to a person who is on the Gitlakdamix band list prior to the effective date. It has this limitation on transferability, which it inherited from the Indian Act as the first step in the transitional process.

This obviously limits the economic value of Nisga'a village entitlements, as well as the ability of non-eligible transferees, mortgagees, heirs, and spouses to acquire a legal interest in the subject property. Of course, an eligible heir or spouse could obtain a court order in respect of the transfer of ownership of a Nisga'a village entitlement in accordance with provincial estate or matrimonial property law. Such a transfer could be registered under the Nisga'a Land Titles Act.

If I can pause, in both Derrickson and Paul, committee members will recall that the two spouses were both members of the same band, that either of them were entitled to hold the certificate of possession under the rules governing certificates of possession. It was simply that the court had no jurisdiction to order it by virtue of section 91.24.. Having removed the section 91.24 impediment, the court now has jurisdiction to make orders as between two eligible recipients under Nisga'a village entitlement. We didn't have to enact any laws to bring that about. That happened automatically by virtue of the terms that we negotiated and agreed to in the treaty.

But the Nisga'a have decided that the interests of individuals in land should evolve over time and should proceed in accordance with the wishes of their people. Accordingly, Nisga'aLisims Government has enacted another statute, the Nisga'a Nation Entitlement Act, to provide the next stage of individual land holding. Nisga'a Nation entitlements can beheld by any Nisga'a citizen regardless of their former band membership, or indeed whether they had a former band membership.

Nisga'a Nation entitlements, therefore, have a higher economic value and are transferable to a larger class of eligible recipients, both voluntarily by individuals or pursuant to court order. A person who holds a Nisga'a Nation entitlement faces fewer restrictions than a person who holds a Nisga'a village entitlement. However, it is still not possible to transfer or mortgage Nisga'a Nation entitlements to spouses, beneficiaries, or lending institutions that are not Nisga'a citizens.

The question now facing the Nisga'a Nation, and which is in the process of being addressed by Nisga'a people and their governments as we speak, is whether and on what basis to advance further the regime of individual Nisga'a property interests.

One possibility that could be considered and made provision for would be the granting of a full fee simple estate to Nisga'a individuals without any restriction on transferability and the registration of that title in the provincial land titles system, so that Nisga'a individuals would relate to their properties in exactly the same way as most provincial residents.

Such a step would undoubtedly maximize the potential individual economic value of the residential properties in Nisga'a communities, but it would also maximize the ability of non-Nisga'a spouses, beneficiaries, and lenders to acquire title in those lands and the risk that increasingly over time properties in the Nisga'a communities would be owned by outsiders.

This is a profoundly serious question, and one that will most certainly require a careful balancing of interests. Indeed, in debates on the question, individual Nisga'a citizens who speak to the question are often obviously torn between their personal interests of maximizing the value of their land and their dedication to the broader interests of their nation.

Having struggled so long to achieve Nisga'a ownership of land, it's difficult to embrace a system under which this hard-fought-for land base might fall out of Nisga'a hands simply by operation of law.

● (1225)

There is, of course, a spectrum of possibilities that could be considered, short of the granting of unrestricted fee simple estates described above. There could be long-term leases granted. There could be other kinds of temporary interests granted. These are the options Nisga'a government is considering at the present time. But as the Nisga'a continue to confront this challenge and these questions, there are a few points that are beyond debate and are worth stressing.

First, whatever solution is achieved, it must not discriminate between Nisga'a women and men. The Nisga'a Nation was one of the strong supporters of the inclusion of subsection 35(4) in the Constitution Act, 1982, under which aboriginal and treaty rights are guaranteed equally to men and to women. The Nisga'a always agreed that the Charter of Rights and Freedoms should apply to Nisga'a government and Nisga'a laws, and they so provided, not only in their treaty but in their own Nisga'a constitution as well.

On something that came up with the previous speaker, there's no question the Canadian Human Rights Act applies. The only reason it wouldn't apply is under the provision of the Indian Act. The Indian Act doesn't apply any more, so the Canadian Human Rights Act does apply to the Nisga'a Nation, and that's as they want it.

On section 25 and the comments that were made by the previous witness, if any members want to ask me about that I can describe the Nisga'a view on that as well.

Moreover, there's an important protection set out in paragraph 5 of the lands chapter that ensures that a parcel of Nisga'a lands does not cease to be Nisga'a lands as a result of any change in ownership of an estate or interest in that parcel. In other words, Nisga'a government jurisdiction will continue over all of Nisga'a lands, regardless of any future changes in ownership.

Finally, it is surely beyond debate that there is no body or government more qualified or appropriate to determine these fundamental questions for the Nisga'a than indeed the Nisga'a women and men who elect and are elected to Nisga'a government. The solutions that lie ahead for the Nisga'a Nation may be difficult to find, but they will ultimately be Nisga'a solutions. That is far preferable to the imposition of a regime by other governments that consider they know better.

Those are my prepared comments, Madam Chair. I'll be happy to try to answer any questions committee members might have.

● (1230)

The Chair: Thank you.

We'll get right to it, to make the most of the time left.

Mr. Harrison will lead off for the Conservatives.

Mr. Jeremy Harrison: Thank you, Madam Chair.

I'd very much like to thank you, Mr. Aldridge, for that presentation. That was really one of the best presentations I've heard in my time as an MP. It was outstanding. It felt like I was back in Norm Zlotkin's class at the University of Saskatchewan law school. It was very interesting.

I guess the first very general question I have is on the matrimonial property regime on the Nisga'a lands. How has that worked for the Nisga'a?

Mr. Jim Aldridge: Remarkably, and somewhat to the surprise of many of us, there haven't been any problems or issues that have come to our attention in terms of matters proceeding to litigation or otherwise. People know that provincial law now applies. The limitations are the result of the proprietary rights. Thus far, we haven't run into the kinds of complexities we think will come up with the breakdown of a marriage or a contested will, because you have exactly the same phenomenon underlying both. But so far, so good, touch wood.

Mr. Jeremy Harrison: Do you see the Nisga'a agreement, as it pertains to matrimonial property, as something that could be used as a template in future self-government agreements with first nations right across Canada? Do you see foresee any potential problems with that type of regime being used as a template?

Mr. Jim Aldridge: Thank you for that. The Nisga'a have never presumed to suggest that the solutions they negotiated that were right for them would necessarily be appropriate for other first nations or aboriginal nations across the country. So they would never presume to suggest that there should be a template there.

That said, there are only so many ways of approaching a problem. The one that the Nisga'a chose of simply allowing provincial law to come in and govern family relations has certain things to recommend it. They don't have to try to design a matrimonial law regime themselves, such as bands under the First Nations Land Management Act are obliged to do. There will be a smoother interface between their people and the rest of the province, without getting into difficult conflicts of laws issues. Recall that the reason why the First Nations Land Management Act needs the bands to do those codes is because that land is still under section 91.24, so provincial law can't reach it.

So I would say that. Others might take a look at the land holdings regime and realize that if you get that right, you can let ordinary laws of general application do their work for matrimonial property.

● (1235)

Mr. Jeremy Harrison: Right.

Well, that's one of the options, to have the provincial matrimonial property legislation apply.

I asked this question to our previous witness, and she couldn't really answer, for a number of reasons, but what options would you, as a professor of law, recommend that this committee look at that could be used for the matrimonial property process we're going through right now?

Mr. Jim Aldridge: In my respectful view, the committee should regard this as being a subset of the broader question of aboriginal nations' ownership of their own lands. It's not something that can simply, in my respectful view, be attacked in an ad hoc manner without addressing the fundamental question of the existence of nations, the recognition of nations, the ownership of their land, and ultimately, in a self-government context, so that the nations can make those decisions themselves, albeit, again in my respectful view, within the context of basic charter and human rights guarantees.

Mr. Jeremy Harrison: Right.

One of the things I found very interesting in your prepared remarks was with regard to the Nisga'a government, some of the discussions that were ongoing regarding ownership of land. I appreciate your previous comments having to do with the Nisga'a discussing fee simple land ownership.

That's something I honestly find quite surprising, that it's even under discussion. I'm wondering if you could maybe expand on that a bit.

Mr. Jim Aldridge: Sure.

It's nothing new. Nisga'a individuals, like individuals in many other areas of the country who have had to live with this third-rate property interest that is all the Government of Canada would allow them to have under the Indian Act, have long chafed under the restrictions of being unable to use their property as a means to getting a start through mortgaging, through being able to obtain financing. Ways and means have been found around the edges of that, but many people have longed for the ability to consider their property their own and do with it as anyone else would.

But precisely the same individuals are conflicted; they have conflicting desires. Because they also recognize that if that's allowed, people do, and inevitably some people will, for example, default on their mortgage payments, and you could have foreclosure and land moving out of the community.

One of the things I heard people say when I was speaking with my clients in preparation for appearing here today is how much people like the fact that they now have a piece of paper that's registered in their own land titles office, that's surveyed out. They know they have that; it has their name on it. They are very content with that.

But in the long term, it's finding that balance between the economic advantages of fee simple ownership and the national advantages of restricted transferability.

Mr. Jeremy Harrison: That's good.

Thank you, Madam Chair.

The Chair: Thank you, Mr. Harrison.

Right now, we're going on to Mr. Bernard Cleary for the Bloc.

[*Translation*]

Mr. Bernard Cleary: First, I'd like to congratulate you on your presentation. It points us in the right direction. I thought it was a good presentation partly because it was in line with some of my own ideas. One of the major points in your presentation was about aboriginal groups recovering their land so that such land becomes Indian land, Nisga'a land, Innu land, and so on. And so that we can develop acceptable systems for the people, which could, initially, be similar to paragraph 91(24) of the Constitution although I hope to forget about that as soon as possible. So we could move in this particular direction. This is what you have explained to us and I can see a number of potential solutions.

However, this isn't supposed to be a template—because the person who developed it doesn't want to be singled out and those who didn't would have liked to have created the template themselves—but the fact remains: it is definitely a fantastic testing ground, because we must talk about land in the context of the future.

As you stated very frankly, this isn't a silver bullet or a solution to everything and there are deficiencies. You have to improve the system and you'll probably be able to develop real solutions following these tests, bearing in mind that this is all recent and still being developed. It's wonderful because it will provide food for thought in other negotiations. I have been a negotiator for some time. And I know that one always tries to go a bit further than one's predecessor. What has already been achieved has been achieved, so you don't have to fight as hard as your predecessor to achieve it. Any progress is good progress for everybody.

Whether it be on the issue we're studying today or in relation to getting mortgages for properties on reserve, solutions need to be found even if it isn't clear how to come up with them right now. This is the only way to move ahead on these issues.

So congratulations on all that. In proposing this visionary model, did you get the feeling that the public is getting more and more open-minded on this issue or that it would prefer that things stay along the lines of the paragraph 91(24) template? Can you see any solutions for the future and what might the solutions be? As negotiator, have you proposed solutions that have been rejected but may be accepted at a future date? And in the same vein, what measures might be acceptable in the short term?

● (1240)

[*English*]

Mr. Jim Aldridge: Thank you very much.

The Chair: I want to thank Mr. Cleary for his question. I'm very pleased to hear a question coming from Mr. Cleary. We shall anxiously wait for your answer.

Mr. Jim Aldridge: Thank you very much for the comments and question.

It's very difficult, of course, to stare into a crystal ball and anticipate how things might play out in different parts of the country. For the Nisga'a, whom I'm privileged to work for and know the best, I believe their future will continue more or less along the lines I described, moving toward more and more extensive individual property rights, with the appropriate limitations to try to balance the needs of the community,

But you're quite right to point out that not all aboriginal nations will see the solution lying in the same way. Many, I know, would resist very strongly any suggestions that their lands not be 91.24 lands. They will prefer to keep section 91.24 applying to their lands.

In that case, I would then say, and hopefully without presuming too much, that the best solution for the federal government to take is to move swiftly toward recognition of nations and true self-government agreements, which will enable first nations to tackle these issues within a broad area of jurisdiction and land ownership, and not with an ad hoc or, as you said, band-aid approach.

So I think that will happen. I think the demands are there from individual aboriginal people. It's just which set of tools are chosen, whether they be under federal jurisdiction under section 91.24 or whether it will be by taking a somewhat different approach and removing lands from section 91.24 at the same time as empowering a nation with true self-government, such as has occurred with the Nisga'a.

The Chair: You have one minute.

[*Translation*]

Mr. Bernard Cleary: That will be it for me, otherwise I'll exceed the speaking time that is being given to me and you'll give me cross looks.

[*English*]

The Chair: All right. Thank you.

Some hon. members: Oh, oh!

The Chair: Well, we can't have that, right?

We'll now go on to the Honourable Sue Barnes from the government side.

● (1245)

Hon. Sue Barnes: Thank you.

Mr. Aldridge, please convey my best wishes to the Nisga'a Lisims Government. I track them and look at their successes. I'm very, very pleased on a personal level, as is our chair, and all of us.

One of the things I know about your own personal record is that you were co-chair of the joint ministerial advisory committee on proposed amendments to the Indian Act, in the last Parliament, I believe. Inside of that, can you just touch very briefly on whether matrimonial real property was an issue that was discussed?

Mr. Jim Aldridge: It was not.

Hon. Sue Barnes: Okay, and why not?

Mr. Jim Aldridge: It was not within the mandate of the committee. It was specifically excluded.

Hon. Sue Barnes: Okay.

Another role you are currently involved in, I believe, is with modern treaties, an umbrella organization. Could you just very briefly touch on that?

Mr. Jim Aldridge: Yes, I'd be glad to do that.

About a year and a half ago, all of the groups in Canada with modern land claims agreements, dating from the James Bay and Northern Quebec Agreement, or both the grand council of the Cree and Makivik, all the way through to the Nisga'a with their agreement, gathered together in a conference on the question of implementation of land claims agreements. All of the groups had a common experience that led them to the conclusion that Canada really needs to adopt a new, comprehensive implementation policy for modern treaties.

An ad hoc coalition of these groups was formed, including, as I say, every single group with a final agreement in law. There may be a few new members coming soon. Those groups are working together as a coalition to try to bring about very much needed changes in the implementation policy.

I know this takes us too far afield, but if I may say, it's very much in parallel with the recommendations made by the Auditor General in the other part of her famous 2004 report, where she wrote an extensive chapter on problems with implementation. So the coalition is working on that at the present time.

Hon. Sue Barnes: There's obviously a legislative gap regarding on-reserve matrimonial real property; it's acknowledged by governments and it's certainly acknowledged by first nations. I think in an ideal world, what everyone, first nations and the federal government, would like is to see everybody with their own self-government agreement. Unfortunately, there's a time lag that is negatively affecting women and children—and sometimes men, but mainly women and children—on reserve in marital breakdown situations, which is aggravated by potential violent situations on reserve too.

How best can this committee look at...? You said in your opening comments that, ideally, it shouldn't be politicians telling first nations via the whole concept of consultation. We all know the problem out there. Maybe it takes a couple of meetings for everybody's head to realize the complications within the problem, but the larger problem is self-government and having self-government. As a federal government, we now ensure that this is part of every self-government agreement.

But what do you do, faced with what you know are violations of human rights, dignity, and equality, for those who aren't going to get there in the short term? What, in your opinion, should we be looking at?

Mr. Jim Aldridge:

As you mentioned, I spent a fair bit of time working with others on the concept of first nations government legislation that could act as a transitional set of rules to apply to deal with some of the most egregious and immediate problems, matrimonial property not being one that we were assigned. The same question arises in respect of a whole lot of things, with respect. Some kind of transitional enabling legislation that clearly allows nations to address these questions I think is essential.

Part of the problem—and I'm sorry if I don't have the magic bullet as to what should be done. All I would stress is this. It cannot be done away from the context of the limited property interests that band members have. These certificates of possession confer the right of possession only, which is only transferable to another member of the same band.

So even if this committee were to recommend to Parliament that it try to tackle the question, it's going to run into some problems right off the bat. Does that mean family relations types of provisions that would enable transfer outside of the band? This is going to be a really fundamental question, one that is obviously profound in its consequences. Or you maintain, as the Nisga'a did coming right out of the gate, the restrictions on alien ability outside of the band, as it would be in this case. The Nisga'a don't have bands any more, but in this case it would be bands. You maintain those restrictions, but you empower courts within that context to make orders on the division of real property assets, which is essentially what the previous witness talked about. Incorporate provincial laws by reference.

● (1250)

Hon. Sue Barnes: It's interesting that you set up the equivalent of a land titles office inside Nisga'a. With your entitlement certificates, and even with the certificates of possession that do exist for some first nations under the Indian Act, a lot of people put the title only in the male partner's name. Isn't there the ability to use joint tenancy, for instance? Is Nisga'a using joint tenancy as a common situation?

I used to practise real estate law and teach real estate law. Most people were counselled to go with both husband and wife when they came in. That's how it's done. Yet when I look at the registry that now exists, it's mainly male names. There's no requirement under any act to do it under male names. There's no reason why some of those certificates of possession on reserve couldn't be done on the equivalent of a joint tenancy right now.

Mr. Jim Aldridge: It's lingering sexist attitudes.

With the Nisga'a, many were given as joint tenancies. Not all of them were. Some were given just in the names of, yes, frequently men; some were given in the names of women. It's hard to say. Different villages put together their lists. It also depended on who was resident there first and who moved in thereafter, and all of these different things that would give rise to different family histories.

It's less of a concern with our entitlements because, as I say, if the spouse is or was a member of the same band, then by operation of the Family Relations Act, he or she is going to have a joint interest upon marital breakup anyway.

Could you legislatively require all certificates of possession to be issued as joint tenancies? I think that would be very difficult. It's a timing question. The logistics of that would be very difficult. In many cases it would amount to an expropriation of a half interest of one spouse and a granting of it to the other—quite a way to get the marriage off on the right foot.

Hon. Sue Barnes: Except it works for most people.

Mr. Jim Aldridge: Well, they do it voluntarily when they sign up. The question arises if you have somebody who already has a full interest in a certificate of possession—perhaps I misunderstood the idea—and you say to this person, okay, you brought your new spouse home, man or woman, so by operation of federal law that person now becomes a joint tenant.

Hon. Sue Barnes: Or not even by operation of law, but just by raising it as a potential option. It doesn't seem to be raised with anybody right now.

Mr. Jim Aldridge: Oh, I see. Yes, I think that would be helpful.

I think most people do it. More and more, the Nisga'a have just insisted on it being that way.

A voice: Give them pre-nups.

Hon. Sue Barnes: Pre-nups, okay.

The Chair: Sue, you're now well past your time.

Hon. Sue Barnes: Okay. I have a zillion questions for you. It's too bad.

The Chair: Just for clarification, though, so most of us know that we all understand it the same way, what do you mean by joint tenancy? Is it where both spouses have their names on the certificate and have equal rights to the property?

Mr. Jim Aldridge: Yes, exactly so. They have an undivided interest and both own the whole thing.

The Chair: All right. Thank you.

I don't think I have anyone from the Conservatives wanting to ask a question, so we'll move right on to Mr. St. Amand.

Mr. Lloyd St. Amand: The Nisga'a, as I understand it, are moving forward, potentially towards individual ownership of land. In the meantime you referred to certificates of possession. I'm presuming, then, that an interim order for exclusive possession—because no doubt the same is available under B.C.'s provincial law—is now available to a Nisga'a spouse.

Mr. Jim Aldridge: If they're an eligible recipient, that is, if both spouses were members of that band prior to the effective date, then, in my view, yes, which is the opposite of the outcomes in Derrickson and Paul. If the spouse, however, is a resident of another Nisga'a village or a non-Nisga'a, then the answer would be no.

● (1255)

Mr. Lloyd St. Amand: You also talked about profound implications of individual ownership of land and mused as to whether or not the consequences could be limited, so to speak, by restrictions on alienability. Would such restrictions, though, be challenged under the charter? If so, would the challenge likely be successful?

Mr. Jim Aldridge: Any such restrictions would most certainly have to be consistent with the charter. So it could not be a distinction based on the enumerated grounds of section 15. It couldn't be a restriction based on analogous grounds, I suppose, as the previous witness said, unless the Nisga'a were able to justify it under section 1. I can tell you, as their counsel, that I know they would do everything in their power not to pass a law that was contrary to the charter. So the restrictions on transferability would have to be non-discriminatory.

Mr. Lloyd St. Amand: Right, but with respect, if the purpose of the restrictions was to maintain the community, maintain the culture, the restrictions in and of themselves would most likely be discriminatory under the charter.

Mr. Jim Aldridge: With the greatest of respect, not at all. If it was restricted to the set of people who participate in the collective ownership of the property, that's a discrimination based on who owns the asset. It wouldn't be a racial discrimination. Another first nations person who is not a member of that collective and has no proprietary interest in the property couldn't claim, “I should have the same right to that property that I don't own as that person has to the property they do”. So the restrictions on transferability that I have in mind would refer to the people who participate in that collective, if you will.

Mr. Lloyd St. Amand: So there'd be something of a unique concept of individual ownership. You would be an individual owner, but at the same time an owner collectively of the entire parcel.

Mr. Jim Aldridge: The way it's established, the entire original estate in fee simple, not the kind of watered-down estate in fee simple you or I get, the original fee simple, is vested in the Nisga'a Nation. So the nation retains a residual interest in any event. Interests that they grant will no doubt reserve, accept, and provide for the same kind of holdbacks as the Crown does when it gives a grant in fee simple. There will continue to be this national interest share in the underlying title. So in my view, it would not be contrary to the charter at all to say only those who have a property interest can own it. I'm not saying that's necessarily the best way, but that's one of the ways they've considered it.

Mr. Lloyd St. Amand: I understand.

There would be a concern, I presume, about foreclosures. How would that concern be obviated?

Mr. Jim Aldridge: You can't obviate it. If there's a fee simple title or some other title that is capable of acting as security on a loan, there is the risk of losing that property if the security has to be foreclosed upon. One way of mitigating it, though, is one that I alluded to very quickly. Even if the entire fee were disposed of or lost to a lender, the land would remain Nisga'a land for jurisdictional purposes. The second thing is that in maintaining a residual interest, without restrictions on transferability, the lender could not get at that residual.

Mr. Lloyd St. Amand: So the—

The Chair: Sorry, but you're now out of time.

We really have run out of time for the committee. I'm afraid we don't have time for another question, Mr. Cleary, because I think it's fair to the committee that we try to adjourn on time for this session.

I do have a couple of announcements.

Mr. Aldridge's presentation will be translated. It will be distributed to all the members by the clerk as soon as that is done.

We also have a request from the Hon. Margaret Wilson, Speaker of the New Zealand House of Representatives. She and her delegation from New Zealand would like to meet officially with the members of this committee. I note that she specifically asked to meet our committee.

In light of all the other commitments she has while in Canada, she's asking for Tuesday, April 19, between 9 a.m. and 10 a.m. Arrangements will be made by her representatives. For those members who wish to attend, I'm encouraging that you meet with her. This is totally voluntary. The clerk will be sending information to the offices of all the members this afternoon.

Again, thank you to the witnesses this morning, and to the committee members.

The meeting is adjourned.

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