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Tuesday, April 24, 2007

Chair

Mr. Colin Mayes

Standing Committee on Aboriginal Affairs and Northern Development

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● (1105)

[*English*]

The Chair (Mr. Colin Mayes (Okanagan—Shuswap, CPC)): We'll open this meeting of the Standing Committee on Aboriginal Affairs and Northern Development on Tuesday, April 24, 2007.

Committee members, you have the orders of the day before you. We are still working on Bill C-44, An Act to amend the Canadian Human Rights Act.

Today we have witnesses from the Canadian Bar Association. We have Christopher Devlin, chair of the national aboriginal law section, and Tamra Thomson, director of legislation and law reform.

Welcome to the witnesses.

We'll have a presentation of around 10 minutes and then we'll be moving into questions.

Committee members, I would like to take a bit of time at the end of the meeting to talk about the two motions that have come forward from Madam Crowder and Madam Neville. I think we're going to deal with those on Thursday, but we'll talk about that.

Welcome. I'll allow you to begin now, please.

Ms. Tamra Thomson (Director, Legislation and Law Reform, Canadian Bar Association): Thank you, Mr. Chair, honourable members.

The Canadian Bar Association is very pleased to have the opportunity to appear before your committee today to address the very important issues reflected in Bill C-44.

The Canadian Bar Association is a national association. We represent over 37,000 lawyers across Canada. Our primary objectives include working toward improvement in the law and the administration of justice. It is in this optic that we developed the submission before you today.

I will ask Mr. Devlin to address the issues in the bill.

Mr. Christopher Devlin (Chair, National Aboriginal Law Section, Canadian Bar Association): We have three points to make today, for three reasons.

Our first point is that the Canadian Bar Association supports the repeal of section 67. There's no question that equality should be uniform across federal legislation as it applies to the Indian Act; however, we have two things to urge the committee to consider.

First, we would urge the committee to consider adding a non-derogation provision and an interpretive provision to the bill. The second thing we would urge the committee to do is extend the delay of the effect of the repeal from the current six months to the 18 to 30 months that we suggest in our submissions.

There are three reasons for these points. First, the Bar Association feels there should be sufficient time for consultation with first nations. Second, we feel there should be provision for the capacity of first nations to deal with the application of the Canadian Human Rights Act to their local governance and capacity for first nations members to take advantage of the rights that will be extended to them under the act. The third provision is the need to balance individual human rights with other first nations rights and interests, particularly the rights of the collectivities of these communities of first nations.

I would like to start with the third reason first, because it's there that I think our submissions add to what the committee has heard from other witnesses before the committee.

Our primary reason for urging the extension of time and the interpretive and non-derogation provisions is that the repeal of section 67 has the potential for the inadvertent repealing of the Indian Act itself and for significant reforms to the Indian Act itself, but in a piecemeal fashion. I would refer the committee to the comments of.... Let me explain this. Mr. Justice Muldoon, in the Federal Court, has described the Indian Act as a piece of racist legislation and has said that were the exemption under section 67 to be repealed, it would oblige the Canadian Human Rights Tribunal to tear it apart.

It's important to appreciate that the Indian Act is fundamentally a piece of 19th century legislation that is based on 19th century precepts of race and of ethnic and national origin that are very much at odds with our modern 20th century and 21st century views of individual human rights.

We have examples. We point to examples in our submissions, such as the blood-quantum provisions under the membership section, section 6, of the Indian Act; we point to the application of property tax bylaws under section 83 of the Indian Act; we point to the issues of inheritance of real property on reserve under several provisions of the Indian Act. All of these provisions illustrate the 19th century policies that are in place under the Indian Act.

That said, and notwithstanding that it's fundamentally a piece of legislation that I think we all view as being flawed from a modern perspective, it serves as the administrative and operational framework for over 600 local governments across Canada: most first nations continue to have their governance provisions regulated by the Indian Act; their entitlement to their reserves is predicated on the Indian Act; their communities are entirely governed by the Indian Act. It also safeguards certain treaty rights and entitlements under certain treaties between Canada and respective first nations.

The Canadian Bar Association is concerned that sections 15 and 16 of the Canadian Human Rights Act may not be sufficient to have a proper balancing between the individual human rights of first nations members, or of non-first nations people dealing with first nations, and the collective rights of first nations communities.

● (1110)

As you probably know, section 15 is the bona fide occupational requirement provision of the Human Rights Act, and section 16 is a special programs provision. I think there's some doubt that those provisions would be adequate to address the kinds of balancing that would be required to recognize the specific historical and constitutional place that first nations occupy within the Canadian legal framework.

In 1977 the bar association made submissions on section 67. We refer to those in our submissions here. At that time we urged that the government repeal section 67 but leave in an exemption for programs that protect the rights of Indian people as Indian people.

NWAC has made submissions, and so has the Human Rights Commission, to this committee about a non-derogation clause, and we support that non-derogation clause as well. Our view is that the next 18 to 30 months should be taken to develop and canvass the significant policy concerns related to the potential for piecemeal reform of the Indian Act by repealing section 67 so that a proper non-derogation clause and a proper interpretation provision can be drafted, so that as we move forward after section 67 is repealed, the collective rights of first nations aren't taken out from under them.

In an ideal world the Indian Act would be replaced on a proper modern footing, so that first nations would have the appropriate legal frameworks to move forward as local governments. However, what we don't want to see is the Human Rights Tribunal essentially striking down the Indian Act. Of course, it's not the appropriate body to replace the Indian Act with a legislative framework to help first nations move forward with their government.

That's the third reason why we say there should be the delay. From that, I think it's obvious that we need to have consultation with first nations to be able to discuss with them adequate interpretation and non-derogation provisions, and also that they need to have the capacity to engage in those discussions.

That's the opening statement that we have at this time.

● (1115)

The Chair: Thank you.

Mr. Bagnell.

Hon. Larry Bagnell (Yukon, Lib.): I have a lot of questions. I don't know how many I'll get through. Basically on your three points —the interpretative clause, non-derogation, and the time—I don't think we disagree. There are about six items already suggested by first nations leadership, and we've agreed, at least on this side, with all of them. Those are three of them, so those aren't at issue.

I'm curious. How many members did you say you had? Was it 37,000? How many of those are aboriginal?

Ms. Tamra Thomson: We don't track our membership statistics in that way.

Hon. Larry Bagnell: How many aboriginal lawyers had input into your submission?

Ms. Tamra Thomson: Again, we don't track the membership of the section, but there are aboriginal lawyers involved in the section.

Hon. Larry Bagnell: In which section?

Ms. Tamra Thomson: In the aboriginal law section, which is the section that was primarily responsible for the submission. The membership comprises lawyers across the country who specialize in this area of law.

Hon. Larry Bagnell: Could the chap who suggested that if this passed it would cause the Indian Act to be torn apart elaborate on why that would be the case?

Mr. Christopher Devlin: It was in a decision of Mr. Justice Muldoon from 1994, the Canada Human Rights Commission and Department of Indian Affairs and Northern Development Canada judgment of December 30, 1994. I can read you the quotation from that decision.

Hon. Larry Bagnell: I'm not worried about the quotation; I'm worried about some of the technical reasons, if you're aware of them —and whether you agree.

Mr. Christopher Devlin: The Indian Act is fundamentally predicated on the definition of what an Indian is, and all the entitlements flow from that. There are Indian reserves that are set aside for the use and benefit of bands of Indians. When you look at what a band of Indians is, it's a group of Indians. When you look at what an Indian is, an Indian is defined in section 6 fundamentally by blood quantum. There is the sort of historical perspective under section 6, and then as you move forward it's really a question of blood.

The fear here, or not the fear, but I think the law reform issue is that you have a statute that defines a group of people essentially by their race, according to their blood quantum, and that racial characteristic entitles them to their reserves and all of the benefits that flow from their reserves. So their ability to reside on these lands held in common by the group, their ability to have the tax exemption on their reserve, the exemption from seizure, their ability to inherit property on that reserve and pass that property down to their children, their ability to tax businesses that may start on their reserve for their own self-government, all of that, if you work it backwards, comes down to the definition of an Indian and the blood quantum.

Fundamentally, according to Justice Muldoon, that's predicated on a racist notion and a racist personal characteristic.

If that's attacked successfully and struck down, a whole series of dominos could fall. The potential implication is that communities that have lived on plots of land since the 19th century could suddenly find that they're no longer Indians. If they're no longer Indians, they no longer have a band and they no longer are entitled to possess the reserve set aside for that band by Canada. You suddenly have dispossessed whole communities of people from the remnants of their historic lands.

Again, if we appreciate sort of the nation-building exercise in Canada, these reserves, not in every situation but often, were the remnants of larger tracts of land that the first nations used, and the government ended up setting those reserves aside for the use and benefit of these communities.

If the statute is struck down, if the fundamental premise of the statute is struck down, these communities could be disentitled to their lands, to their remaining lands.

● (1120)

Hon. Larry Bagnell: So in spite of these drastic possible ramifications of this bill, Indians could lose their reserve lands across Canada and not be Indians, etc., but you're still supporting this bill?

Mr. Christopher Devlin: We support it with the caveats that I mentioned.

We believe there should be a non-derogation clause, and we support the non-derogation clause in the concept advanced by the Human Rights Commission and by NWAC, which is found on page 3 of our submission, in terms of a non-derogation clause.

We also support, in the report from the commission, that there also be included an interpretive clause that would help then guide the Human Rights Tribunal in applying the Canadian Human Rights Act to the specific historical and constitutional circumstances of aboriginal people, so that you don't get this wholesale disentitlement as a result of a Human Rights Tribunal decision.

Hon. Larry Bagnell: There is some suggestion of a separate institution. Quite often we have set up a number of first nations or aboriginal institutions in Canada to deal with some of these transitions. Some suggestions have been made to set up a separate institution to administer this, as opposed to the Canadian Human Rights Tribunal. What are your thoughts on that?

Mr. Christopher Devlin: We haven't commented on that specifically in our submissions. That's sort of in the hands of the committee, as far as our submissions are concerned.

The Chair: Thank you.

Mr. Lemay.

[*Translation*]

Mr. Marc Lemay (Abitibi—Témiscamingue, BQ): Thank you, Mr. Chairman.

Thank you, Mr. Devlin and Mr. Thompson. Mr. Thompson, we do not need an introduction since we've already met at the Justice committee. I know your experience and I respect the Canadian Bar Association. This is the first time I speak to a member of the Indigenous Bar. I know there is an Indigenous Bar in Québec.

Let us forget the government for a while. If clause 67 is repealed without any consultation, as you recommend, would we not risk doing indirectly what cannot be done directly, that is to say abolish the reserves through a limited and narrow interpretation of the Canadian Human Rights Act?

[*English*]

Mr. Christopher Devlin: Thank you.

As I explained, it's not that it would happen overnight; it wouldn't happen tomorrow. It would be the result of a particular challenge and the result of a decision by the Human Rights Tribunal.

So the law reform issue we're trying to address here is that there should be reform of the Indian Act. But this should be done in a legislative process, so that there's something to replace it, in order to enable first nations to continue governing themselves as we move forward.

The problem with the Human Rights Tribunal is that if it decided it was going to strike down, for example, the status provisions of the Indian Act, things would fall after that. So it would be after a decision.

[*Translation*]

Mr. Marc Lemay: I am pleased to hear you quote Judge Muldoon. It is at page 10 in French and at page 8 in English. This is what it says:

> Over time, if all the incorrect or illegal administration of the *Indian Act* were corrected by human rights tribunals, that Act would be so permeated by human rights precepts that it would be ultimately destroyed.

And, further:

> ...the guarantee in this Act of certain rights shall not be construed so as to abrogate or derogate from any Aboriginal, treaty or other right that pertains to Aboriginal peoples in Canada.

As you see, I am a lawyer and I wonder if one should conclude that, for you, everything that has to be interpreted after the implementation of the Canadian Human Rights Act will have to be interpreted by taking into account what you want to be included in the bill, which is:

> ...does not abrogate or derogate from any Aboriginal, treaty or other right that pertains to Aboriginal peoples in Canada.

I know I seem lawyerly, but you are following me?

● (1125)

[*English*]

Mr. Christopher Devlin: You've summarized our position well.

Some hon. members: Oh, oh!

[*Translation*]

Mr. Marc Lemay: I am not aspiring to be appointed to the Supreme Court bacause my chances are too slim.

If we are in favor of repealing section 67, we have to take that into account. This definitely has to be included in the Bill, otherwise it could lead to the repealing of immemorial rights of the first nations. Does this reflect your position?

[*English*]

Mr. Christopher Devlin: That's correct, and this conclusion is found in the first paragraph on the last page of our submission.

Our submission is that Bill C-44 should be amended to include the non-derogation and interpretive provisions that we think should be the result of the next 18 to 30 months' worth of consultations and deliberations.

[*Translation*]

Mr. Marc Lemay: You have a vast knowledge of Aboriginal law, like me, and I believe that we should set a delay of 30 months rather than 18 because it could take much more than 18 months.

[*English*]

Mr. Christopher Devlin: We say between 18 and 30 months. This is really in the purview of the committee to decide the adequacy of the length of time.

Certainly our point is that six months is inadequate, and it's the committee's decision from the submissions to determine the adequate length of time.

[*Translation*]

Mr. Marc Lemay: But you understand that it is important. We have asked you to appear before the committee as experts and you certainly know that proper consultations take time and money. We are dealing with matters affecting directly the first Nations. Better take more time than not enough. This is how I understand your testimony.

[*English*]

Mr. Christopher Devlin: Yes, I agree.

[*Translation*]

Mr. Marc Lemay: Thank you.

[*English*]

The Chair: Madam Crowder, please.

Ms. Jean Crowder (Nanaimo—Cowichan, NDP): Thank you, Mr. Chair, and I want to thank the witnesses for coming before us today.

I want to talk about consultation, and I'm glad to see that you raised it. When the minister came before the committee on March 22, in a response to a question I asked about consultation, he indicated that lots of consultation had gone on. He specifically quoted the human rights review that happened in 2000 with Justice La Forest. I went back to the actual recommendations from that report, and it's quite interesting that in this review it talks about the importance of consultation. I just want to quote a couple of things.

It says, under "Consultations and Submissions":

> Any effort to deal with the section 67 issue must ensure adequate input from Aboriginal people themselves.

Then later in the report there's a great deal of discussion, raising some of the points that you have raised. He goes on to talk about the complexities, and he says:

> These points raise huge questions about the social and economic structure of Aboriginal life and its legal underpinnings. Such matters deserve far more study than we have been able to give them.

So I take it, from the words of this report, entitled "The Report of the Canadian Human Rights Act Review Panel—Promoting Equality: A New Vision", that the panel itself determined that this was not adequate consultation for a repeal of a section of the Canadian Human Rights Act that would have far-reaching impacts, and I think you've outlined some of those.

In your view, if we were to develop something around a repeal of section 67, what would that consultation look like?

● (1130)

Mr. Christopher Devlin: I think we don't address the nature of that consultation in our submissions specifically. The reason for that is that fundamentally the nature of the consultations, in some respects, should be determined between the government and the first nations leadership, and this goes to the earlier question that was raised about who we are.

The aboriginal law section is a group of lawyers who practise aboriginal law. There are other organizations of aboriginal lawyers, the Indigenous Bar Association being one of them, and I understand that they may be witnesses to the committee as well. The interest of our section, as practitioners of aboriginal law, is to identify the law reform issues and bring them to the committee's attention.

In terms of the process of consultation, the courts have told us that consultation really is a two-way street between the Crown and the first nation, and while as practitioners we're involved in helping facilitate that two-way street on a daily basis, the lead very much has to be taken by the first nations in terms of the sorts of consultations they want. So we didn't feel it was appropriate to put in our brief what that consultation should look like.

But clearly, you've had submissions from the Assembly of First Nations, or you will have submissions from the Indigenous Bar Association.

The position of the Assembly of First Nations has been very clear that consultation needs to happen. There are other indigenous groups that have also put forward their views, and they are the ones that ought to be involved in sketching out the framework of what those consultations should be. And I agree that probably 18 months would be a bit tight. I think it's probably a bit longer process than that. We know that it's been 30 years that this exemption has been in there, and that's a long time for human rights to be suspended from reserves. We're not interested in seeing that continue indefinitely, and as early as 1977 the CBA was calling for at least a limited repeal of section 67.

We appreciate that a lot of time has passed, but whatever the consultations that happen, they should be done appropriately and not be rushed, so that the law reform issues that are raised and that are implicated by the repeal are adequately addressed by that consultation process. It's not just a question of setting up opportunities to chat for the sake of chatting. It should be meaningful discussion with first nations leadership to talk about the sorts of issues that would certainly include the issues we've raised today.

The Indian Act is a house built on clay, and you might not like the clay, but if you get rid of the clay foundation, you no longer have a house, right? We have to make sure that we don't remove the foundation and have the house fall down.

Ms. Jean Crowder: I think that is a valid comment.

I want to hearken back again to Bill C-31, which was intended to redress discrimination against women and has inadvertently created under subsection 6(2) a mechanism that is actually going to look at assimilation eventually, because people will lose their status under that section by continuing to marry out.

So I think your comment around the fact that section 67 and the Indian Act both can have far-reaching and complicated effects is very important, so that we responsibly look at those issues in a broader context.

Do I have any time left, Mr. Chair?

● (1135)

The Chair: Not really.

Ms. Jean Crowder: Okay, thanks.

The Chair: Mr. Bruinooge.

Mr. Rod Bruinooge (Winnipeg South, CPC): Thank you very much, and thank you for your presentation today.

I want to go back to some of the comments you made in relation to first nations peoples potentially losing their reserves due to a ruling of the Canadian Human Rights Commission.

I guess perhaps you could elaborate on that in relation to section 35 of the Constitution. Do you think that perhaps section 35 would create an environment in which in fact the Constitution would be held a little higher than is a ruling of the Canadian Human Rights Commission?

Mr. Christopher Devlin: That is a lovely complicated constitutional question.

We know that the Canadian Human Rights Act is afforded quasi-constitutional status. We know that section 35 protects aboriginal and treaty rights. But we also know that the Indian Act is enacted under Parliament's jurisdiction over Indians and lands reserved for Indians and is a statutory framework, an administrative framework, if you will, for that head of power under the Constitution Act of 1867.

It would be a very interesting case to see if section 35 would save the Indian Act as a whole if it were held by the Human Rights Tribunal that the Indian Act was fundamentally racist and contrary to the provisions of that quasi-constitutional document.

I suspect that it would be a rather complicated and messy affair. It certainly isn't a clear-cut case that section 35 would operate as a measure to save the Indian Act.

When we look at cases like Corbiere, in which section 15 of the charter was used to strike down certain provisions of the Indian Act, notwithstanding section 35, I suspect that if the Indian Act were held to be racist that section 35 wouldn't be a shield to protect it.

I am happy to elaborate further on the examples that I brought to your attention, to sort of work you through those if you so wish.

Mr. Rod Bruinooge: It just seems to me that the constitutionally enshrined rights of aboriginal people in Canada would not be cause for the removal of lands from people due to a section 67 exemption, especially in light of the fact that non-derogation, to some extent, is actually incorporated into all law that we have in Canada due to section 35. You can't derogate from that section, in my opinion.

So as we proceed with a repeal, I am fully confident that not only would the Canadian Human Rights Commission be able to actually implement human rights in a judicious manner, but this type of scenario you're envisioning is one that I see as not practical under the current constitutional law in Canada.

But perhaps we could move on from there.

Did you see the submission of the Canadian Human Rights Commission?

Mr. Christopher Devlin: Yes.

Mr. Rod Bruinooge: Okay. Within that there is the recommendation that after a repeal is put in place the commission have the opportunity to work with first nations groups to come up with language that is able to interpret the divide between communal rights and individual rights.

What are your thoughts on allowing for the Canadian Human Rights Commission to work with first nations groups to come up with that interpretation?

Mr. Christopher Devlin: First of all, as a minimum thing that ought to be done, we would support that, and we do support that the Canadian Human Rights Commission should work with first nations as part of a consultation process to assist in the development of the interpretive provisions and even in the non-derogation provision.

I think the larger issue is the timing of when that would happen. In our submissions, we suggested that should happen as Bill C-44 is passed, not after the passage of the act in a subsequent amendment to the Canadian Human Rights Act. In our view, that work should happen, and we support that work happening with the commission. That work should happen now over the next period of time, and then Bill C-44 should be amended so that the interpretive provision can be added to the Canadian Human Rights Act so that we can address these issues all at once and not have to do it in two or three steps.

● (1140)

Mr. Rod Bruinooge: But for the sake of timing and moving this process forward, the suggestion was made that the repeal occur and, subsequent to that, the discussions begin for the sake of, of course, moving this forward, as I think everyone agrees that 30 years is a long time to not have the laws of Canada be present in first nations communities.

The Chair: Mr. Bruinooge, you're just about out of time.

Mr. Rod Bruinooge: How much time do I have?

The Chair: About 30 seconds.

Mr. Rod Bruinooge: Okay. Perhaps in the next round of questioning, if I'm so lucky, I'll ask you to comment a bit on some of the interpretive clauses that we've had presented before us. I'll give you a bit of a lead time, something I don't have the luxury of getting while I'm in question period, but I'll leave that with you.

The Chair: Madam Karetak-Lindell.

Ms. Nancy Karetak-Lindell (Nunavut, Lib.): Thank you very much, Mr. Chair.

Thank you for your presentation. I have a couple of things, probably more observations than anything.

In your submission, am I understanding that you would like an interpretive clause put in Bill C-44? The Human Rights Commission had recommended that we pass the legislation and then work with first nations groups to insert the clause after.

Mr. Christopher Devlin: Yes. Our primary submission on that point is that the interpretive provision should be inserted in Bill C-44. Of course, if that's not what happens, then we support a longer delay in the effect of the repeal so that an interpretive provision can then be developed through a consultation process and enacted separately.

Ms. Nancy Karetak-Lindell: The reason I asked that question first is I'm convinced there has not been enough consultation, because if there had been, not every one of our submissions now would be asking for an interpretive clause and not every one of our submissions would be asking for a longer implementation period. Those are the two recurring points that we're hearing from every witness before us.

If there had been consultations, that's what would have been told to the government before the legislation was drafted.

The other point I want to make, more to put it on record, is going back to what you said about the section that determines who is an Indian. In my ten years here, almost ten years, on this committee, from 1997 to now, that has been one of the recurring things that we hear. Whatever subject, whatever piece of legislation we're dealing with, there's always someone complaining that it should not be the government who determines who is an Indian.

I'm very worried about the comments you just made, in that in the legislation I've seen with the matrimonial property and also with this legislation, I'm seeing under the layer a tone of undermining rights. I'm worried that there's a bigger goal than just what these bills are trying to do. As an aboriginal person, if there was someone determining if I was even an aboriginal person, and what rights I had as an aboriginal person, I would not be concentrating on other issues. It would be very difficult for me as an aboriginal person to pursue other things in life if I was being challenged as to whether I was even an aboriginal in the first place, and that I think is the tone in the country right now. People are being asked to deal with other issues to determine their very eligibility for services in this country and therefore can't even be running their bands and reserves in the way they should to serve their people. I'm very worried about that, with the legislation we're getting.

To go back to this legislation, you would support the need to have that interpretive clause right in the legislation. You feel that six months is definitely not enough, that we need to make sure that aboriginal rights are protected in this legislation before we pass it, and those amendments need to be inserted before it leaves this committee.

● (1145)

Mr. Christopher Devlin: I would agree with that except to say that really what we're talking about here is specifically the Indian Act, not necessarily aboriginal rights as we know them under section 35. I'd like to give an illustration of what I mean by that.

Many urban and semi-urban Indian bands now have on their reserves significant populations of non-Indian residents through leasing of land for housing developments, so much so that on some of these reserves the Indians of the band are outnumbered by the non-Indians who live on the reserve. Nevertheless, the Indian band still has the authority for zoning, for property taxation, for the delivery of water and sewage services, and these sorts of things.

One of the inherent conflicts, then, becomes the non-Indian residents who don't have a legal say in the governance. There can be advisory and consulting committees with the band council, but the point is, the residents, because they're not Indians, don't have a right to have a say in what happens. They can't vote for chief and council, that sort of thing.

It's not difficult to envision that group of people, those non-Indian residents, challenging and saying they're being discriminated against by the provisions of the Indian Act in the place where they live, and I don't think that is a far-fetched example.

In reading the parliamentary discussion and the blues so far, there's been a lot of discussion about, for example, trying to ameliorate the situation of Indian women and how Bill C-31 has somewhat backfired in terms of advancing the rights of Indian women on reserve. The CBA certainly supports the equality rights of discriminated groups like Indian women, but one of the possible applications of the Human Rights Tribunal by these non-Indian groups is to take a run at the Indian Act because they feel, and perhaps rightly so, that they're being discriminated against by the provisions of the Indian Act.

Then you have this conflict between the community structure, for better or for worse, as a 19th century construct, being attacked on legal grounds in the 21st century, and that inherent tension. That's the kind of issue that I think needs to be wrestled to the ground through a consultation process, so that we don't end up seeing Indian bands disenfranchised on their own lands and the benefits they get from having these non-Indian residents on their reserve. They get the property taxes, they get the leases, and that helps them with their self-government, but that's all predicated on the fact that they're Indians.

If someone takes a run, and a successful run, at the underlying predication or foundation for that, which is the “Indian-ness” of these people as defined by the Indian Act, not as aboriginal rights under section 35 but as statutorily defined Indians, then that whole opportunity for self-government and getting the benefit of their reserve lands could be removed from them. That's the caution we're bringing to the committee today.

● (1150)

Ms. Nancy Karetak-Lindell: Just on those comments, what I'm worried about is that's the ultimate goal of this legislation.

The Chair: You're over.

You covered a question I had. My question, though, is a little bit more on the amendment to C-44, which is amending section 67, which was the implications for the non-aboriginals on reserve land. Does that give them more opportunity to challenge the first nations governance as far as their rights to taxation with representation and those kinds of issues? Even so, the Indian Act is in place, but is the fact that they've been extended human rights going to have some implications on those rights for those people who are non-aboriginal on aboriginal reserves?

Mr. Christopher Devlin: Certainly. The Human Rights Commission has identified on page 6 of the English part of our submission the use of reserve lands, occupation of reserve lands, housing, and enactment of bylaws. So all those provisions of the Indian Act would then be subject to the Human Rights Act, and properly so.

The fear isn't that...I mean, we're not here to support the Indian Act. We're not here saying it should be maintained forever. What we're saying here is it should be reformed, but it should be replaced by something that's a coherent legislative replacement, not attacked in a piecemeal fashion, which is the only way the Human Rights Tribunal could actually deal with it, because they decide things on a case-by-case basis, according to the facts presented to them in the case in front of them.

The Chair: Next from the government side is Mr. Blaney.

[*Translation*]

Mr. Steven Blaney (Lévis—Bellechasse, CPC): Thank you, Mr. Chairman. Thank you to the Canadian Bar Association and to their Aboriginal representative who have produced a clear and concise document for the nonspecialists that we are.

I have a few questions for you. To your knowledge, since 1977 have any governments passed legislation to improve the rights of Aboriginal communities?

[*English*]

Mr. Christopher Devlin: Do you mean first nations governments or governments in general?

[*Translation*]

Mr. Steven Blaney: The federal government. To your knowledge, have there been...

[*English*]

Mr. Christopher Devlin: Yes. Now in Canada there are opportunities for first nations to voluntarily start to move out from under the Indian Act. One example is the First Nations Land Management Act, where a first nation can voluntarily opt in to assume jurisdiction of the lands and resources on their reserves. Then the Minister of Indian Affairs no longer has legal authority, responsibility, or liability for administering the reserves.

Similarly, under the First Nations Goods and Services Tax Act, first nations who wish to engage in GST taxation can enact a law and assume that taxation power. Canada then sort of shares the taxation room with them so they can get the benefits of being a taxing authority. But that's on a voluntary basis. If they choose not to take advantage of these opportunities, they remain under the Indian Act.

[*Translation*]

Mr. Steven Blaney: Mr. Devlin, on page 2 of your report you express some concern about the cost of possible legal challenges resulting from Bill C-44.

I have been told that there are some communities that already come under the Canadian Human Rights Act and that this has not necessarily led to enormous legal costs for them. Do you have any information about that, based on the experience of those communities? I am told that the costs relating to the implementation of the Bill would not necessarily be high.

[*English*]

Mr. Christopher Devlin: My understanding is that while there are some first nations that are currently under the Human Rights Act—Westbank comes to mind, for example—the vast majority aren't, in terms of the application of the Indian Act on their reserves. So decisions that are made outside the Indian Act are still subject to the Human Rights Act.

We certainly haven't quantified the cost and really can't speak to the dollars and cents. There would clearly be additional litigation costs for first nations governments. The other side of the equation is for first nations people to have access to justice so they can actually avail themselves of the protection that will be afforded to them by the repeal of section 67, and whether the repeal will give them meaningful access to justice.

● (1155)

[*Translation*]

Mr. Steven Blaney: We agree that the *Indian Act* is a yoke under which we have to live today. Attempts have been made in the past to modernize it, especially relating to governance, but there was a lot of resistance.

Trying to repeal the *Indian Act* would be a very ambitious project, considering the inherent difficulties. Do you think that the step-by-step approach underlying Bill C-44 is a good idea, since it would allow us to improve Aboriginal rights without attacking the *Indian Act*, which would call for a much more comprehensive approach? As a first step, should we try to eliminate the irritants of the *Indian Act* in order to move forward, slowly but surely?

[*English*]

Mr. Christopher Devlin: Our position is that we support the repeal of section 67, and have supported it since 1977. That's been the consistent position of the CBA. Our submissions also say we need to look at the underlying policy and legal implications for the administration of these 600 local governments across the country.

The repeal of section 67 potentially puts at risk the administrative structure, because it is predicated on a racist piece of 19th century colonial legislation. That's the conundrum that always faces everyone who has to encounter the Indian Act. How do we reconcile that with our modern values? It's a very difficult problem.

The Chair: Mr. Lemay.

[*Translation*]

Mr. Marc Lemay: I have listened to all the presentations and something stays in my mind.

Mr. Devlin, I would really like to have your opinion about this. At pages 6 and 7 of your brief, you refer to potentially serious problems and you say that in some Aboriginal communities, non-Aboriginals could claim the protection of their own rights if section 67 was repealed. I may have misunderstood but I would like you to tell us more about this issue which I find very interesting. I have not seen that raised anywhere else, this is the first time I hear about it. What do you mean exactly?

[*English*]

Mr. Christopher Devlin: The example I used earlier was of, say, an urban first nations community or a semi-urban first nations community that has leased out part of its reserve for housing projects, so that you have non-Indian people taking subleases, building houses, and living on the reserve. This happens very frequently in urban and semi-urban areas now.

The Indian band and the band council are still the responsible local government authority on reserve. They have the jurisdiction under the Indian Act. They are the ones who pass the taxation bylaws, pass the zoning bylaws.

Very often in the property taxation bylaws I've seen, there are exemptions for Indian residents on reserve but not for non-Indian residents on reserve. It has always been the common understanding in the legal community that this is an ameliorative provision, whereby the band isn't going to tax its members but will tax other people who decide to either live or set up their businesses on reserve.

It provides a taxation revenue stream for the benefit of the Indian band. Sometimes there are even per capita distributions from taxation revenue streams, part of the tax revenues being used for band programing and part actually given out in the form of distributions to band members.

If a non-Indian band member living on the reserve finds out that their tax dollars are being distributed to individual band members, or finds out that their tax dollars are being used for a first nations community centre where only first nations kids can go to school, or whatever to assist in keeping that community intact, they may say, "I'd like to have a say about that; I'd like to have a say in where my tax dollars are going."

The rest of us in Canada do have a say about that, in the municipalities in which we live and the cities. We can vote, there are referendums, there are municipal elections, and we're able to participate in the allocation of our tax dollars to a limited extent. There is no extent for that in the current regime.

I can see one of those residents saying, "I don't think that's fair. I think I'm being discriminated against because I'm not an Indian and don't have rights under the Indian Act. The Indian Act governs my reserve where I live, but I'm not an Indian and I have no say about what happens in the community in which I live. So I'm going to go to the Canadian Human Rights Commission and lodge a complaint."

That's the example I use to illustrate how the Human Rights Act could be used by a non-aboriginal person to attack some of the provisions of the Indian Act. Of course, once you lift the lid on the Indian Act and dig deeper into what gives the band council the right to be there, you get further back to this fundamental premise of who is an Indian. From that definition all the rights follow, including the right to possess the reserve.

● (1200)

The Chair: Mr. Albrecht.

Mr. Harold Albrecht (Kitchener—Conestoga, CPC): Thank you, Mr. Chair, and thank you to our witnesses for being here. Thank you for your commitment to improving the lives of all aboriginal Canadians. I know it's the government's intent, and it's certainly this committee's desire, to see that process move ahead.

Mr. Blaney touched on the matter of the number of complaints involving some of the first nations communities that are no longer under the Indian Act by a voluntary choice. Have we experienced a vast influx of human rights complaints from these communities, which are no longer under the Indian Act and therefore would have access to those kinds of complaints? Do we have any history? I know you said you don't have a dollar figure, but do you have a "number of complaints" figure?

Mr. Christopher Devlin: No. We don't track those sorts of statistics. We're not a public agency in that sense.

Mr. Harold Albrecht: But would it be fair to say there hasn't been a huge influx?

Mr. Christopher Devlin: I really don't know.

Mr. Harold Albrecht: Okay.

Another point that's made in the Assembly of First Nations submission in regard to the non-derogation clause is that they were concerned that customary laws and traditions, for example, be protected.

I would ask the CBA, what is your position in dealing with alleged discriminatory practices, for example to do with gender, that may be justified on the basis of customary traditions or laws? How would we deal with those conflicting perspectives?

Mr. Christopher Devlin: In our submissions we identify that problem, but we certainly don't proffer any solutions to it. The intersection between indigenous legal systems, which are recognized as a body of law in Canada that's justiciable in the courts, and modern individual human rights is one that we just have no real experience with in the courts to date.

So as to how that intersection would be reconciled, we can't say. But it is a problem that we flag.

Mr. Harold Albrecht: I would just follow up, then, with the point that where you are asking for, and I think many of the submissions we have received are asking for, an interpretive clause, my question is whether or not it is really possible to have one interpretive clause in this legislation that would adequately address the needs of 600 first nations communities. I envision, maybe wrongly, a myriad of interpretive clauses based on cultures and traditions of the various first nations communities that are out there, or, what I think would be worse, only two or three first nations groups having all the say. Then we go back to asking, what is adequate consultation? I think we'd just get ourselves deeper and deeper into that question.

Perhaps you could respond to that.

● (1205)

Mr. Christopher Devlin: I appreciate that challenge. That is a challenge that also has to be met. I appreciate, too, the sensitivity to the fact that one size often doesn't fit all in the first nations context. It's erroneous to refer to first nations as a homogeneous group. They're not a homogeneous group. There are many different indigenous legal systems.

That said, I think an interpretive provision could be developed that would enable the particular indigenous legal tradition of a first nation to be considered by the Canadian Human Rights Tribunal when reconciling the individual human rights of a complainant before it with the collective rights of that particular first nation community.

Mr. Harold Albrecht: So you don't feel that sections 15 and 25 of the charter or section 35 of the Constitution Act adequately balance the collective and individual rights? We need an additional interpretive clause for this particular situation?

Mr. Christopher Devlin: Yes. The reason is that the Indian Act is a piece of federal legislation, as is the Human Rights Act. Section 35 deals with the aboriginal and treaty rights, the constitutional rights. The Indian Act is a piece of federal legislation enacted under subsection 91(24), the head of power, under the Constitution Act, 1867. They're not talking about the same things. There is an intersection, sometimes, between the rights under the Indian Act and the section 35 rights, but they're not analogous. They're not the same. And however flawed the statutory rights and obligations are under the Indian Act, it's what we have and it's what these communities are predicated on in terms of their administration and operations.

Just the risk that we're identifying is that we don't want to throw out the baby with the bathwater, so to speak.

Mr. Harold Albrecht: Do I have more time, Mr. Chair?

The Chair: Actually, no.

I have a question. Do you think those types of questions can be answered by a clause in the act, an interpretation clause that would be specific enough to really present certainty, or could it be challenged by court? It's going to be interpreted through the courts anyway.

Mr. Christopher Devlin: There is going to be litigation no matter how these things go. The whole tribunal process is all predicated on litigation, all predicated on complaints coming forward. Regardless of whether they end with the tribunal or in Federal Court afterwards, you're going to get interpretations of the enabling statutes.

The Chair: So is the framework going to be based on a court decision anyway?

Mr. Christopher Devlin: No. I think the point we're trying to make is that if there's an interpretive provision, then it's not a question of the tribunal ignoring or.... What it comes down to is that the tribunal has, as its option, the ability to look at the collective communal rights of a first nation when assessing the individual human right and the degree of discrimination and whether it's justifiable, unjustifiable, or whatever the nomenclature that ends up being used is. So in the subsequent appeal to the Federal Court, the issue is whether the tribunal got that balancing act right, not whether the tribunal erred by considering communal collective rights. You see, that's the distinction.

The Chair: Thank you.

Madam Crowder.

Ms. Jean Crowder: Thanks, and I actually want to follow up on this. Again, I'm going to come back to this 2000 report. It's actually really interesting to me that we end up with this Bill C-44 without an interpretive clause provision, when it had been strongly recommended in a number of places, including this review back in 2000. They talk about the interpretive provision, and in it, in laying the groundwork for the reasons for an interpretive provision, they say:

> We think that an interpretative provision should be added to the Act that requires the taking into account of Aboriginal community needs and aspirations in interpreting and applying rights and defences....

It goes on further to say:

> This would supplement the *bona fide* justification argument, ensuring that it is properly adapted to the needs of Aboriginal government, without binding the Tribunal to any one interpretation. This is consistent with the *Draft Declaration on the Rights of Indigenous People* that requires that States take measures to assist Indigenous people to protect their cultures, languages and traditions.

Then they go on to make a very clear recommendation around the need for an interpretive clause. I think the challenge that many of us have is that most of us come from a Eurocentric background, where individual rights are paramount, and we keep bumping up against many indigenous people who have a very strong belief that collective rights are paramount, or at least need to be considered. I wonder if you've seen cases or examples, perhaps in other countries even, where that collective versus individual right has been balanced and taken into consideration. This seems to come to the core of what we're talking about.

● (1210)

Mr. Christopher Devlin: I can't say I have. I would be making it up if I said otherwise.

The Chair: You're a lawyer, aren't you?

Mr. Christopher Devlin: But the submissions are honest ones, I'll tell you that.

I think we also have to be clear in terms of the Bar Association's position here. We're not suggesting that the collective rights should somehow trump the individual rights. The Bar Association has taken a very clear stand on the equality rights, for example, between men and women. I think we're suggesting here that it be open, and the collective communal rights and the indigenous legal traditions of a particular community should be something that the tribunal considers when dealing with the individual human rights of that particular complainant. But I can't point you to international cases, and we didn't refer to it in our submissions.

Ms. Jean Crowder: In their presentation, the panel review did talk about a case—the Jacobs case, but I don't see the date on it—where the court did recognize that there was the individual and the collective. So there is some jurisprudence in Canada already that does talk about that balancing of individual and collective rights and the need to recognize it. So I think we already have some case history that does talk about it.

Mr. Christopher Devlin: To go back to some previous questions, while I distinguish between section 35 and the Indian Act, and I do see aboriginal rights and treaty rights as different from the statutory rights under the Indian Act, to a large extent, some of the section 35 jurisprudence could be helpful to us and to the tribunal in moving forward—for example, having, for the duty of consultation, the concept of reconciliation of crown sovereignty with the first nations interests as the goal of consultation. That kind of reconciliation concept could be very much considered by the tribunal when it comes to recognizing the individual human rights of a complainant and reconciling those human rights with the collective rights of the community. It doesn't mean that the community's collective rights would trump the individual's human rights. There would still have to be some kind of balancing process there so that the collective rights that are recognized in Canadian law for first nations aren't suddenly wiped out vis-à-vis the Indian Act—and we're talking about only the Indian Act—and the individual's human rights don't trump a whole community's collective rights. There has to be some kind of balancing there.

We see that in the section 1 jurisprudence under the charter. This is not a foreign concept to Canadian jurisprudence in different contexts.

The Chair: The chair just wants to clarify. I didn't mean to slight your profession; it was in jest. I have great respect for your profession.

To the government side, Mr. Bruinooge.

Mr. Rod Bruinooge: Thank you, Mr. Chair.

Just going back to my previous line of questioning, in relation to interpretive clauses, it seems that this committee has found the one element of discussion for this bill that seems to be the most difficult for us to move forward on—and I think that's for a good reason, because I think it's difficult to make this interpretation.

We've received one suggested interpretive provision, and this was from the Assembly of First Nations. Have you had a chance to read through it?

● (1215)

Mr. Christopher Devlin: I saw it in passing. The one I have is the one suggested in the commission's report. I don't have the AFN's in front of me, I'm afraid.

Mr. Rod Bruinooge: Again, these are similar questions to ones that I've asked other witnesses, but they would be in relation to part of the interpretive provision supplied by the AFN, where it talks about the entitlement that is granted to a first nations government to provide preferential treatment to its members in relation to allocation of resources, employment, and economic benefits, etc.

In part, my concern on this particular point would be in relation specifically to housing allocation. It seems one of the largest impetuses for us even to begin to take on this big challenge of wanting to extend human rights on first nations reserves is not, obviously, to destroy first nations communities, by any means. It's more to extend some things that we take for granted in the rest of Canada, such as when there is a marital breakup and the marital asset is distributed equally. Within Canada that's one thing that so many families take for granted. Of course, one would argue it's one of the biggest benefits that women throughout Canada have been able to retain through marital breakup. So one of the biggest reasons that I think we're doing what we're doing today is for this very purpose.

Do you envision our government being able to proceed with a matrimonial real property legislation without first repealing this section of the Canadian human rights code? Also, do you envision our being able, from a legal perspective, to have that legislation be considered lawful before the courts with an interpretive provision that allows for this preferential allocation to still be done?

Mr. Christopher Devlin: On what I understand of the matrimonial real property initiative on reserve, it's going to be a suggested amendment to the Indian Act itself or regulations under the Indian Act. Normally I don't give legal opinions off the cuff, but I'll make some assumptions here.

It strikes me that you wouldn't need to repeal section 67 of the Human Rights Act to amend the Indian Act to provide further clarity about the allocation of real property on reserve. That has already been done under the Indian Act. There's a whole statutory and regulatory regime about the allocation of property and resources on reserve. The repeal of section 67 isn't a necessary first step to putting in matrimonial real property provisions under the Indian Act.

I'm glad you raised that specific issue, because although we refer to inheritance law as one of our concerns in our submissions, it works equally well with matrimonial issues. On an Indian reserve, the best title you can have as an individual is a certificate of possession, which isn't equivalent to fee simple but it's getting close.

So people get a parcel of land under a CP and build a house. The marriage splits up. If they're both Indians, the matrimonial real property law would likely address the division of the marital assets, quite similar to how it's addressed provincially. However, if one of them isn't an Indian and is no longer entitled to live on the reserve, not only are they forced to leave the reserve, but under the Indian Act only an Indian, a member of that band, can actually be on the title for the CP. Then you get into questions of whether there is a resulting trust. I can see a situation where that non-Indian person, particularly if it's a woman with kids, says, “I don't want money. I want to live in the family house, and he should go. Just the fact that he's an Indian and I'm not shouldn't change that.” So the underlying property regime, for good or bad, under the Indian Act could fundamentally be attacked on exactly that kind of fact pattern.

The question for the Human Rights Tribunal is whether it would be entitled or permitted as part of its jurisdiction to look at the public policy on why property is held communally and the whole concept of communally held property in the form of a reserve when considering that woman's individual human right to have a share in the family home—and have that balancing.

So while we haven't endorsed the interpretive provision that the AFN has put forward—or for that matter the provision that was recommended in the Human Rights Commission report—we think that from a jurisdiction point of view, the tribunal should be able to look at those sorts of factors when coming to its decision, rather than just privileging the human rights, not looking at the communal rights, and effectively trumping the communal rights, or worse.

● (1220)

The Chair: Thank you.

Next on the Liberal side we have Madam Neville.

Hon. Anita Neville (Winnipeg South Centre, Lib.): Thank you very much.

Thank you very much for your presentation. You've certainly raised a number of issues that have not been raised before and some that many of us have been talking quietly about.

You keep referring to the Indian Act. I'm not a lawyer, but I've certainly looked at it in all its complexity, and it's not easy to make one's way through. You talk about the policy and legal implications of the repeal of section 67. How do we identify them, and how do we address them as a committee? Some of them are far-reaching and maybe very much counter to the traditional and historical culture of aboriginal peoples.

You've raised so many questions in your presentation today, I'm trying to get my head around how we address them.

Mr. Christopher Devlin: Fundamentally, I think we can't address all of them here. I think there are two things we can do, though. We can give the Human Rights Tribunal a framework in which they can consider these factors when they're making their case-by-case assessment, such that we don't create the capacity for indirect repeal of the Indian Act without replacing it with something else.

Ideally, Parliament would say the time has come, not after just 30 years but 130 years, to replace the Indian Act, and that it was going to move forward to do that. That's where all of these policy implications would properly be vetted and sorted through. We can appreciate the magnitude of that challenge.

I think the interpretive provision and the non-derogation provision would help to prevent that kind of process from happening in a particular case in front of the Human Rights Tribunal, so that the Human Rights Tribunal wouldn't be faced with saying, "You can't do this, no matter how egregiously this individual's human rights have been violated, because if you do this you strike down the Indian Act and potentially affect 600 communities."

That we don't want to put the tribunal in that position would be my submission. If the tribunal is enabled and given the jurisdiction to look at the collective communal rights of first nations, they can try to engage in the appropriate balancing for the case in front of them. They can limit the critiquing of the Indian Act as best they can to the case in front of them and to the specific community in front of them, so that they also don't end up using an egregious set of facts from one community to affect 600 other communities.

That's the hope behind the interpretive provision and the non-derogation provision; that we could limit, so that the sections of the Indian Act that are repugnant in a particular case could be somewhat limited to that particular case without the whole act falling down.

● (1225)

Hon. Anita Neville: I believe that can be done.

Mr. Christopher Devlin: I think it's worth trying, until such time as the Indian Act is replaced by a proper parliamentary debate and a proper structure to move forward in.

I agree that this is a first step in that process, but it shouldn't be a first step that in fact achieves the process in a piecemeal fashion. The Indian Act can't be replaced in a piecemeal fashion. It has to be replaced with deliberative thought and a new governance act to move forward.

Hon. Anita Neville: Do I have any more time?

The Chair: No, not really.

Hon. Anita Neville: Thank you.

The Chair: The chair has a question. Would there be a possibility to put a justification clause in the Canadian Human Rights Act that would be sufficient to defeat any host of claims that would come from non-first nations people? Basically, instead of amending section 67 as we are with Bill C-44, could there be something in the Human Rights Act rather than an interpretation clause in Bill C-44?

Mr. Christopher Devlin: I'm sorry, I don't mean to mislead the committee. We are saying that Bill C-44 should be amended so that it in turn puts the interpretive provision into the Human Rights Act.

The Chair: Okay.

Mr. Christopher Devlin: Once Bill C-44 is passed, section 67 is repealed, and no one is going to look at Bill C-44 ever again. Isn't that right?

Bill C-44 should be amended, in our primary submission, so that the interpretive provision is then put into the Human Rights Act.

The Chair: Okay.

Mr. Bruinooge.

Mr. Rod Bruinooge: I guess I'll just go back to where we were prior to the last question, when we were discussing how matrimonial property would be allocated. You talked about how, if the individuals were both first nations, though there aren't provisions throughout Canada, there are some communities—a very small number—that have band council matrimonial resolutions. In those communities what you talked about would exist.

My issue would be that if a first nation citizen is freely able to marry and welcome into the community a non-aboriginal person, this non-aboriginal person should be extended the right of being able to live in that home with their children or have the opportunity to have that asset split. That's really the crux of the issue. That's why I see it as so essential that an interpretive clause not be able to allow those preferential allocations specifically in relation to matrimonial property. I just see that individuals being freely welcomed into communities as I just said should have that right.

What's your opinion on that?

Mr. Christopher Devlin: My opinion is that it makes eminent sense until you run up against sections 20 and so on of the Indian Act, where it's very clear that only Indians can have an interest in the reserve, and that the reserve is for the use and benefit of a particular band of Indians. If someone is a member of the band, that's fine, but if they're not a member of the band and if they're non-Indian, then they can't inherit the land even if their parents were Indians.

Similarly, under the present property regime under the Indian Act, if you're non-Indian and you divorce an Indian, you can't have an interest in the land itself. You might get a resulting trust, or a constructive trust, where the person has to buy out your interest, but the CP can't be passed to a non-Indian.

Whether we like it or not, that's the Indian Act as it is, and the public policy issue there is to preserve the entitlement to the reserve for the benefit of that particular community as it's statutorily defined. If we start allowing non-Indians to have an interest in the land beyond a lease, for example, but an actual interest in the land equivalent to the—

● (1230)

Mr. Rod Bruinooge: I think we're talking more than that. I think we're talking more about the actual physical asset, not necessarily the actual property but the land imprint. I think that would be going further down the line that you're talking about, which calls into question the entire system. I'm talking more the marital asset itself.

Mr. Christopher Devlin: I'm not as up-to-date on the progress of the consultations about the matrimonial real property initiative that Wendy Grant has been conducting across the country, but I think the Indian Act probably can be amended to enable someone to continue to live in a house and give them statutory permission to do that, whether or not they're an Indian, without necessarily granting them the interest in the CP itself. I can see the Indian Act being amended quite readily to provide statutory rights to possess for a certain length of time without actually getting an entitlement to the underlying interest of the matrimonial home. I don't know what she's been doing on that, but I would imagine that's part of the discussion.

Mr. Rod Bruinooge: We've talked about how whatever we do here as a committee and as a government is very likely going to see its day in court. I would argue that's inevitable.

From your perspective as a learned legal historian—especially in this area you obviously have a great degree of knowledge—what's your opinion as to why the Supreme Court hasn't taken a run at the Indian Act?

Mr. Christopher Devlin: Well, they did in Corbiere.

Mr. Rod Bruinooge: But further, to actually repeal this exemption.

Mr. Christopher Devlin: Oh, to repeal the exemption. I'll have to think about that.

I don't think a case has gone all the way up to the Supreme Court. I know that the Federal Court has considered it and we have a few cases. Justice Muldoon's comments came from one of the cases in which they considered the section 67 exemption, but none of those courts thought of striking down section 67. Is that your question?

Mr. Rod Bruinooge: Yes, that was my question.

The Chair: To the other side here, are there more questions?

Madam Crowder.

Ms. Jean Crowder: I just want to correct a piece of information.

On the Jacobs case I quoted, it's actually Jacobs v. Mohawk Council. It was actually the Canadian Human Rights Tribunal and not a court case. I just want to correct that information.

The Chair: Thank you.

Mr. Bagnell.

Hon. Larry Bagnell: I have one question. The federal government is always in court. There are lots of people taking us to court for lots of things. We have a system of lawyers to deal with that in Justice, etc., and it costs a lot of money. As Mr. Bruinooge and others have said, this is obviously going to end up in court—probably cases for Indian band administrations. From what you've seen, have there been any provisions to train Indian bands as to what they'll have to do to comply with the Canadian Human Rights Commission? Secondly, is there any suggestion of giving them resources so they can deal with these cases they're going to have before them?

Mr. Christopher Devlin: That's what we referred to in our section on capacity of first nations governments. There needs to be some sort of capacity for training of first nations governments. I'm not just talking about band councils, but their administrators and band office staff, so that when decisions are made, the human rights filter goes over the glasses and they're able to make sure, as best they can, that they can make those decisions in compliance with the act. That's what we mean by needing the requirement for capacity. We try to minimize the amount of errors made by first nations governments.

● (1235)

The Chair: Thank you.

Mr. Albrecht.

Mr. Harold Albrecht: Thank you, Mr. Chair.

I would like to follow up on that point. This situation has been evolving for over 30 years now. I'm wondering, have any of the first nations representative groups or individual communities come to the CBA for advice as to how they might proactively begin to deal with some of the challenges that will obviously be facing them?

Mr. Christopher Devlin: The bar association tends not to act as a public legal service. For the most part we—

Mr. Harold Albrecht: We are talking a lot about consultation around this table. I was just wondering whether any of the groups have sought your advice.

Mr. Christopher Devlin: No. They would seek the advice of individual members of the CBA and their own solicitors. They haven't approached us formally for that.

Mr. Harold Albrecht: Thank you.

The Chair: If you recall the witnesses who came with AFN, their legal counsel was in attendance

Mr. Harold Albrecht: Right.

The Chair: I can't remember her name, but anyway....

Ms. Crowder.

Ms. Jean Crowder: Could I make a comment? I think it's a good reminder to committee members that it was fairly recent that first nations were actually prevented from seeking legal counsel by law.

The Chair: Right.

Madam Karetak-Lindell, do you have something you'd like to add?

Ms. Nancy Karetak-Lindell: I have a very quick question. Would you agree that it takes more than repealing section 67 for people to start exercising their rights?

I come from an area that's not restricted by section 67, but I find that people don't exercise their rights because they don't know them. Unless we do a huge educational component so that every person in this country can know their rights, they're not going to exercise them. I think we need to do more public education, to let people know what their rights are in the first place. As I said, I come from a part of the country where people don't know many of their rights as Canadians. It takes more than legislation to make people exercise their rights.

Mr. Christopher Devlin: I would agree with you.

Ms. Nancy Karetak-Lindell: Thank you.

The Chair: Good.

Thank you very much to the witnesses. You were very informative and very knowledgeable on the subject. We really do appreciate the insights to Bill C-44.

We'll suspend now for approximately two or three minutes.

● _____ (Pause) _____ ●

● (1240)

The Chair: We will continue.

Committee members, I just wanted to make you aware of, first of all, the issue around the Barreau du Québec. They will be available on May 8, and we have managed to.... If you look at your updated calender, and I hope you have that, the chair will try to give them an hour in that meeting. They'll be on the panel, so they'll be part of that panel, just so you're aware of that. We have rescheduled the Indigenous Bar Association, and that is on May 10 at the same time. There are two panels that we'll be dealing with at two different times. The first hour we'll have the Indigenous Bar Association with the other three groups.

I also have the issues around the two motions, one from Madame Crowder and one from Madame Neville.

Hon. Anita Neville: Mine on Thursday.

The Chair: We're going to do that on Thursday, and we'll set time aside for that.

Mr. Lemay.

[*Translation*]

Mr. Marc Lemay: Do we have those motions?

The Clerk of the Committee (Ms. Bonnie Charron): I will distribute them again but I had already done so.

Mr. Marc Lemay: Are they the ones we have received? Are we going to deal with them on Thursday?

The Clerk: Yes, on Thursday.

Mr. Marc Lemay: However, you will redistribute them.

[*English*]

The Chair: Correct.

The other thing is we're still working through it. I want to assure the members that as we get through our calendar there is still opportunity for May 17, on the Thursday, to have legal experts, and we can develop that list if we wish. If you want to have a subcommittee meeting to discuss that, we can do that. Right now we can probably work through the calendar as it's laid out now and have a meeting to discuss the additions if the committee so desires additions.

Madame Crowder.

Ms. Jean Crowder: I'm sorry, I don't have the updated calendar. I was out of commission last week.

Did the Westbank First Nation get invited? The reason I'm asking is that they've come up a number of times as an example of a first nation that has implemented its own code and whatnot. I wonder if it might not be worthwhile hearing from somebody who has implemented their own code.

The Chair: I'm looking for direction. We could refer that to the steering committee. Okay?

The other thing is there has been some discussion around the Pikangikum First Nation. There was a letter I sent to the minister in response, and I'm sure all the committee members are aware of the commitment of the Government of Canada to....

Mr. Bruinooge, is it $46 million?

● (1245)

Mr. Rod Bruinooge: It's about $40 million.

The Chair: About $40 million for electrification and other water services and so on within the community. So there has been some work done on that.

I'm not sure if all the committee members did get the minister's response. This was on Friday the 17th.

Would you like a copy of that letter to be sent to the committee?

[*Translation*]

Mr. Marc Lemay: Was it the minister's answer?

[*English*]

The Chair: It was sent out on Friday, just so you're aware of that.

Is there anything further?

Hon. Anita Neville: I have a question, Mr. Chair.

We talked last week about the potential of expanding the notice of these hearings going on. What in fact has happened?

The Chair: The chair hasn't any direction on expanding.

We put the ad out on the Canadian Press wire services, at $1,000, to make sure people are aware, so we'll be taking submissions there.

You want to extend....

Hon. Anita Neville: My question, and I raised it last time, was whether it went to the aboriginal media.

The Clerk: Yes.

The Chair: Thank you.

We'll leave the planning for the subcommittee a little further down the line as we progress through this study.

Hon. Anita Neville: That's fine. Thank you.

The Chair: Thank you.

The meeting is adjourned.

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