House of Commons
CANADA

Standing Committee on Aboriginal Affairs and Northern Development

AANO • NUMBER 053 • 1st SESSION • 39th PARLIAMENT

EVIDENCE

Thursday, May 17, 2007

Chair

Mr. Colin Mayes

Standing Committee on Aboriginal Affairs and Northern Development

Thursday, May 17, 2007

● (1115)

[*English*]

The Chair (Mr. Colin Mayes (Okanagan—Shuswap, CPC)): I open this Standing Committee on Aboriginal Affairs and Northern Development of Thursday, May 17, 2007.

Committee members, you have the orders of the day before you. We're continuing our study on Bill C-44, an act to amend the Canadian Human Rights Act.

Appearing today, from Cornet Consulting and Mediation Inc., we have Wendy Cornet. Welcome. And from the University of Winnipeg we have Larry Chartrand, director, aboriginal governance program. Welcome.

We'll be asking the witnesses to make submissions of ten minutes, or roughly that amount of time, and then we'll move into questions.

Madame Cornet, would you like to speak first?

Ms. Wendy Cornet (Cornet Consulting and Mediation Inc.): Sure.

Good morning, and thank you for inviting me to be with you here today.

I am a principal in the firm Cornet Consulting and Mediation Inc. I'll give you a bit of background about myself. I've worked in the area of aboriginal affairs policy since 1976, since before going to law school. I worked with the research branch of the Library of Parliament for a period of time, and since leaving the branch I've worked as a consultant, working with both the federal government and various aboriginal organizations at the national, regional, and community levels.

The first issue I was going to address was the challenge of consultation. In this regard, it's important to consider the respective roles of the executive on the one hand and Parliament on the other in ensuring compliance with section 35 of the Constitution Act.

The executive branch is responsible for directing consultation activities, although it is also possible that legislation could be passed to provide direction on this subject. It is the legislative branch that ultimately has the power to affect the enjoyment of aboriginal and treaty rights, and therefore has the responsibility to consider them in adopting legislation. Where the legislative branch does not meet this obligation, the judicial branch may provide a remedy to uphold the rule of law and the supremacy of the Constitution.

While we understand the executive and legislative branches have distinct roles, there is a relationship between them. As Peter Hogg has noted in his book *Constitutional Law of Canada*, even a minority government is able to exercise substantial control over the legislative process. An example would be the government's discretion to table and withdraw a government bill, for example.

Section 35 of the Constitution Act is the supreme law of the land in the same way the Charter of Rights and Freedoms is, meaning that the final product of the legislative process, a bill adopted into law, must comply with the requirements of section 35. Where legal duty to consult does exist, properly fulfilling this duty can be part of determining whether there has been an unjustifiable infringement of aboriginal and treaty rights.

The executive has the primary responsibility for identifying any legal duty to consult and ensuring it is met. The legislative branch is therefore dependent on the executive for carrying out this duty adequately but in the end holds the decision-making power about whether to pass a given piece of legislation. Compliance with section 35 necessarily requires a capacity on the part of the crown to answer several legal questions correctly prior to the adoption of a bill into law where there is a legal duty to consult and to make a reasonable effort to accommodate the perspectives of aboriginal peoples.

The government must first accurately answer the question of whether there is an aboriginal or treaty right that could be at risk, or a potential aboriginal treaty right that could be at risk of infringement, and thereby give rise to a duty to consult. Where the government answers that question correctly and proceeds to carry out a consultation exercise, that consultation, in its scope and content, must also be sufficient to meet the requirements of section 35. This again requires legal analysis, one that is dependent on getting the first question correct about the existing scope and content of aboriginal treaty rights. This is because the scope and content of an aboriginal right can affect the scope and content of the duty to consult. Likewise, the strength of a claim to a potential aboriginal and treaty right can also affect the scope and content of the duty to consult.

Where the government does carry out consultation, it then must come to the correct answer on whether the legislation being contemplated requires any adjustment or modification as a result of anything the crown has learned during a consultation process. The penultimate challenge for the crown is to answer all of these legal questions correctly and to carry out any legal duty to consult adequately prior to the adoption of a bill.

However, by its nature, a bill can be changed at various points in its consideration by Parliament prior to its adoption, and so too may its impact on aboriginal and treaty rights. This suggests that the obligation to ensure that a bill does not result in an infringement—and specifically an unjustifiable infringement—of aboriginal and treaty rights ultimately rests with Parliament as a whole. Parliament, of course, may rely on the advice of parliamentary committees and what it hears in debate.

In addition, Parliament could perhaps rely on some form of certification respecting section 35 analysis provided by the Department of Justice respecting a bill tabled by government. Such a process currently exists with respect to the Charter of Rights and Freedoms but does not exist.... I'm just outlining a possibility that could take place but doesn't at the moment, as far as I know.

Concerning consultation carried out prior to a bill's tabling, a question arises about how the potential for infringement can be discussed among aboriginal peoples in Canada in a consultation process where the details of the government's proposal to legislate are not revealed to the aboriginal peoples concerned until a bill is tabled. This may raise the question whether in a particular case there has been adequate consultation, sufficient for aboriginal peoples to assess the potential for infringement with representatives of the crown and to engage with the crown in a process aimed at reconciliation of aboriginal treaty rights with crown sovereignty.

To conduct an adequate assessment of the potential existence of an aboriginal treaty right and the potential risk of infringement, if any, there are two vital areas of information. The first area involves the details of the proposed legislative activity. While the executive cannot trench on the legislative process, it does have the power, through a decision of cabinet, to share details of the bill with the aboriginal peoples concerned prior to its introduction to Parliament.

The other vital area of information is one where the government and aboriginal peoples may both have some information or knowledge on the existence or potential existence of an aboriginal treaty right. In this regard it helps to remember that the Supreme Court of Canada has said the perspectives of aboriginal peoples are to be taken into account in making an assessment on these questions. All this points out how vitally important it is that consultation processes involve a thorough two-way sharing of information and perspectives to ensure an accurate and informed assessment of the risk of infringement.

I was going to say a few words about consultation process design and conflict management and point out that Indian Act reform has historically displayed the dynamics and characteristics of what has sometimes been called intractable conflicts, meaning the underlying issues to conflict are deep-rooted, multi-generational, and involve issues of power inequality, identity, and high stakes distribution.

Interactions between first nations and federal and provincial governments have been characterized by power imbalance, mistrust, and repeated negative patterns. And while there's a fair amount of literature studying the outcomes of litigation, there is a surprisingly small amount of literature studying negotiation processes involving first nations and governments from a conflict management perspective. There is a small amount of literature looking at the experiences of BCTC or the Indian Claims Commission, but relatively little of this literature has been applied to discussions at the national level, particularly involving the development of legislation at the national level.

Finally, I'll address the issue of section 35 and the interpretive clause. While the Canadian Human Rights Act is a quasi-constitutional statute, section 35 of the Constitution Act of 1982 has explicit constitutional status as the supreme law of the land. It seems inevitable that issues relating to section 35 will arise in connection with some complaints arising from first nation communities. This has already occurred in cases where the section 65 exemption has been found not to apply.

In the case of Ermineskin Cree Nation and Canada in 2001—and I believe ongoing peaceful litigation is an example of this—it appears as a result of section 50(2) of the Canadian Human Rights Act and various case law that the Canadian Human Rights Tribunal has jurisdiction to consider constitutional questions related to its jurisdiction to hear a complaint before it, including issues relating to the charter and section 35 questions. However, section 96 courts have concurrent jurisdiction to hear such matters. In Ermineskin Cree Nation, the issue before the court was whether the Human Rights Tribunal has jurisdiction to determine a constitutional question relating to section 35 rights, and if so, whether the court had concurrent jurisdiction and should exercise its discretion in the case before it to decide the question.

The court in that case determined that the Human Rights Tribunal did have jurisdiction, but because of its lack of expertise in dealing with section 35 rights, the court decided the matter should be decided by a superior court.

● (1120)

This decision is evidence that section 35 issues in relation to the Canadian Human Rights Act may arise and be decided regardless of whether there is an interpretive clause referencing collective rights. For example, issues will likely arise on whether and which statutory collective rights under the Indian Act have constitutional status as aboriginal rights, such as the retention of the collective property interest in reserve lands to the exclusion of those who are not band members.

In this regard the Guerin case suggests that most if not all first nations have an interest in their reserve lands equivalent to or indistinguishable from an aboriginal title interest. Further, the interest of a first nation in their reserve lands is inextricably tied to the critical matter of membership. The exclusion of non-members from reserve lands would likely attract constitutional protection as a result of section 35 of the Constitution Act, and take precedence over any conflicting direction arising from the protections of the Canadian Human Rights Act.

However, the manner in which the Indian Act or first nation membership codes variously establish membership criteria may be less secure on charter grounds or CHRA grounds of discrimination where these rely on arbitrary requirements with a weak connection to the notion of peoples, and rely instead on elements of gender discrimination or strict blood-quantum requirements, to the exclusion of other criteria.

There are procedural and structural issues to consider in considering repeal of section 67. The Ermineskin Cree Nation case suggests that a complainant may have to wait for a superior court to determine a constitutional issue, and if that question is resolved in favour of tribunal jurisdiction, only then would the tribunal have an opportunity to determine the substance of a complaint. This raises the prospect of a lengthy process for some cases arising from first nations communities, regardless of how the issues relating to an interpretive clause or non-derogation clause are resolved.

One way to possibly streamline the processing of complaints that may involve section 35 issues would be to provide the commission with authority to establish panels with expertise in aboriginal rights and human rights to hear matters arising from first nation communities. Appointments could be made in consultation with first nations and aboriginal peoples.

One way of resolving the issue of the interpretive clause would be to add a “for greater certainty” provision as a subsection to follow subsection 50(2). I've proposed the following wording:

> For greater certainty, the interpretation and application of this Act shall be in a manner consistent with the constitutionally protected rights of the Aboriginal peoples of Canada.

This wording should be sufficient to ensure a consideration of constitutionally protected collective rights and their relationship to individual rights, and constitute a direction to balance individual and collective rights in a manner consistent with the Constitution Act, 1982.

Thank you.

● (1125)

The Chair: Thank you very much.

Mr. Chartrand.

Mr. Larry Chartrand (Director, Aboriginal Governance Program, University of Winnipeg): Thank you for the invitation to appear before you today to talk a bit about the implications of repealing section 67 of the Canadian Human Rights Act.

I have to apologize, as I have a bit of a cold I got from my five-year-old son. And flying last night didn't help much.

There are maybe three things I really want to touch on in addressing a repeal of section 67 of the act. I just want to note, first of all, that I did some work for the Congress of Aboriginal Peoples in 2003 and a couple of reports—which I am not sure this committee is aware of—on the implications of repealing section 67.

What I did in that two-part report was to look at what would happen if section 67 were repealed. I also did a second report called “Past and Future Impacts of Repealing Section 67 of the Canadian Human Rights Act”. These look into the future, but also look at the past in terms of whether people can bring past actions once the amendment is made.

I didn't have the chance to find out from CAP what the copyright is on those reports, but I am sure they'd be happy to share them with you. If not, I'll send them along, if the committee is interested in seeing a little bit more of a detailed analysis of what the impact might be.

For the purposes of today, though, I want to concentrate on three issues primarily. One is the impact of the amendment in terms of what it would mean in the aboriginal community, in terms of people not getting access to justice.

I think it was around 2002 or 2003—I am not sure precisely—that I obtained some statistics from the Canadian Human Rights Commission on the number of individuals who have been denied access to redress of their discriminatory complaints, because of the existence of section 67. They estimated that about 100 individuals per year—and this is a conservative estimate—are turned away at the doors of the Human Rights Commission because of the existence of section 67.

We all know, however, that the tribunal, the commission, and the courts have interpreted 67 very narrowly. Yet the exception of people getting access to justice is probably larger than the impact of section 67. In the majority of cases, individuals somehow find a way to actually pursue their complaint through the commission, right?

Some hon. members: Oh, oh!

Mr. Larry Chartrand: In the majority of cases, they actually find they can do that; so they have really limited the impact of section 67.

But there is still a significant minority of cases where section 67 continues to deny justice. If you multiply the 100 people by the 30 years of this supposed temporary provision of the code, over 3,000 people have actually not received human rights justice since its existence—and that's a very conservative estimate.

It is really important, I think, that this repeal go forward, just to let people have basic redress for discriminatory actions.

That tells you a little bit about the reality of what might happen if the repeal went through. It's not going to have an overwhelming impact, as some of the literature seems to suggest. It's not going to have an insignificant impact, but it's going to have a moderate impact. There will be a number of people who can get access to justice who weren't able to do so before.

This does mean that the commission is going to have to obtain resources to assist with these additional cases. First nations are going to have to have resources to develop the capacity to address and defend their actions. But this is not going to be enormous; at the end of the day, it's not going to have a major impact.

In fact, what's likely to be more significant, of course.... And I am just going to take the liberty here to mention a couple of things about human rights generally.

● (1130)

It's poverty, lack of housing, lack of economic opportunity, mostly in relation to isolated reserve communities, that really creates the environment that allows discriminatory actions to exist. Social science studies have shown the connection between that type of lifestyle and human rights violations.You don't have to be a rocket scientist to realize there is a significant connection there.

If you really want to address human rights in this country, the Kelowna Accord would have made a bit of an impact. That's where you have to get at human rights issues, in aboriginal communities. You have to raise the communities up to the economic sustainability that they deserve as founding nations in this country. So we can't allow the conditions to continue to exist, the third world conditions.

We have international agencies, like the child international agency, going to do investigations in Canada, the first time ever an international agency goes into Canada to investigate conditions that are like those in third world countries.

I teach students in the University of Manitoba in my aboriginal politics in Manitoba class. They come from some of those isolated reserves and they do community profiles. They show the pictures and everything. Some of the conditions are deplorable. They live in broken-down motels because there's no housing there.

Those are the real human rights that are stake, and we need to address that issue significantly.

The other thing is the Declaration on the Rights of Indigenous Peoples. That is simply an embarrassment to any country that has any idea of upholding human rights, to not uphold that Declaration on the Rights of Indigenous Peoples. That's outright shocking and disgusting.

Anyway, I will not dwell any more on that. I only took the liberty to add those two small points.

The other point I want to address is the bona fide justification issue. There's some concern in some of the debates earlier and also in some of the reports about the lack of an interpretive provision in the existing amendment. There's some suggestion that that may not be all that much of a big deal, because of the already existing bona fide justification provision in the human rights code. So band governments, for cultural, linguistic, or other reasons related to the aboriginal culture, may want to discriminate against individuals based on various grounds in order to protect themselves from the mainstream influences of colonization and the assimilative processes of colonization.

I want to make an aside here. We all know that aboriginal communities have a very fundamentally different value system from the western democratic liberal system, where individual rights are paramount versus an aboriginal community where collective...well, not so much collective rights. That's really something that pits aboriginal governments against Canadian governments. It is really more of a value of relationships to the animate and inanimate world. The fundamental value system is based on relationship, based on respect implicating relations.

If you were to imagine a charter of rights or a human rights code that came from an aboriginal tradition, it would look a lot different from the Canadian human rights code, where the emphasis is on individual rights, and the Charter of Rights, which puts the emphasis on individual rights.

You have to keep that in mind. It is really important for aboriginal communities to be able, under the assimilated process, to have a mechanism to maintain their fundamental value system that differs from the Canadian liberal value system.

If we don't have an interpretive clause in there, the bona fide justification clause needs to be that mechanism for aboriginal communities to protect their collective cultural interests.

There are already cases that have used the bona fide justification clause to support that type of initiative. For example, MacNutt v. Shubenacadie, a 1997 decision in the Federal Court trial division, upheld a band's discriminatory actions. And they were justified, based on the bona fide justification provision in the code, because they were protecting a very fundamental collective interest. So they were allowed to do that; it was justified under that.

● (1135)

If the courts and the tribunal continue to use that provision, then it's not that big a deal if there's not an interpretive clause in the amendment. However, that's a big “but”. In fact, an interpretive clause may even water down the bona fide justification clause, because the clause is an absolute defence. That's the second point I want to make.

The third point is the whole issue of consultation. It's 2007, and a lot has changed since 1977, when this amendment was first enacted. Also, a lot has changed in recognition of the aboriginal governments' roles and responsibilities to govern, and their relationship with the Canadian federal government. In that light, and because of the way the Constitution and protection of section 35 rights have been interpreted by the courts, there is a legal requirement, a constitutional obligation, to consult with aboriginal peoples on any matter that affects their interests.

I would like to extend that. It's time now that when the federal government initiates policy or proposes the idea of legislation, it understands that at a minimum, it has to engage jointly in policy analysis and drafting legislation that impacts aboriginal peoples.

A good example of a system in which aboriginal peoples have a say in the legislative drafting process is in Finland in the Sami parliament, which is a separate parliament for aboriginal peoples. Maybe this is a model that Canada needs to think about more seriously, because of the implications of the consultation requirement now under section 35 analysis.

So this legislation should not have gone ahead as it is right now. There should have been joint drafting with the AFN and other aboriginal peoples' representative bodies, and then this amendment should have gone ahead.

Right now, in trying to push this amendment through, even though the aboriginal groups are generally in favour of it because of human rights protections and implications, primarily for aboriginal women, it's still not consistent with the true relationship that existed in Canada between aboriginal peoples and Canada, the true relationship reflected in the Two Row Wampum treaty: nation to nation partnership, and that's how decision-making should be done now.

● (1140)

The Chair: If you could, please wrap it up.

Mr. Larry Chartrand: I'm going to close on that point. I know I'm getting a bit far afield from the actual item of discussion, but it's an important point to keep in mind.

Thank you very much for listening.

The Chair: Thank you.

The chair has to leave at 12:50. So if we're not finished the business of the committee, I ask Madam Karetak-Lindell to take the chair.

Also, would the committee members like copies of the 2003 reports that were mentioned by Mr. Chartrand?

A voice: Yes, we're interested in those.

The Chair: Okay, I'm going to ask the clerk to provide them to committee members.

Where would we like to start?

Madam Karetak-Lindell.

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

Thank you very much for your interventions, both of you.

You touched on a couple of sections that I have been very worried about throughout these deliberations on Bill C-44. You talked about the duty to consult; Wendy, you also talked about negotiations on conflict management, and Larry, you talked about jointly drafting legislation. Those are very critical bases, I think, of what defines a relationship between aboriginal people and the federal government, because, as I have repeatedly said, we can no longer do things as we used to in the 1960s. I refer to that because that was the time when everybody just made decisions on our behalf without any of our input whatsoever.

I would like to think, as you do, that in 2007 that's behind us, but it's very difficult from where I sit to tolerate how Bill C-44 came about, because we're had numerous witnesses before us who really feel the same way of doing things has come back—that someone in an office in Ottawa decides what policies and legislation are good for us without our input.

I'll come back to specific questions. Negotiation on conflict management is one of the areas I'm really worried about; I'm worried that we're not going to be prepared in those aboriginal communities to deal with the way of resolving conflict. In my culture, for example, as I was mentioning to Wendy, we like to look at win-win situations. We're very uncomfortable with the current court system, which results in a winner and a loser. Because our communities are small, we can't have winner and loser situations all the time, because it divides communities. What we want to be able to see is a win-win situation and a compromise; maybe that's why we have our consensus style of governing.

What I'm worried about with this legislation is that if there isn't enough proper consultation and not enough capacity-building at the communities, we're going to be dividing communities with win-lose situations, whereas we have an opportunity to do win-win if we go about bringing this legislation the right way. Could both of you please comment on that?

● (1145)

Ms. Wendy Cornet: I think conflict management and resolution issues arise at both the national level and the community level, as you're suggesting in your question.

At the national level there are relatively few examples. One exception is the recently concluded process involving Wendy Grant-John on matrimonial real property. That was a relatively short-term experiment. I am sure there are lessons that can be drawn and built upon from that experience, but you don't see it very often.

Usually at a national level policy discussions and discussions about legislation involve people showing up and having at each other. None of the parties involved generally bring conflict resolution strategies. A lot of energy is devoted to communication strategies, communication lines, but despite a rather large body of literature and expertise on conflict resolution out in the world generally and in Canada in particular, we don't really apply it to this subject matter very often. I don't really know why that is.

I believe the Canadian Human Rights Commission did refer to the need for conflict management capacity at the community level when it appeared before this committee. Your concerns, Ms. Karetak-Lindell, I think are valid ones, particularly given the social context in which disputes over human rights may occur in aboriginal communities, communities being small.

In a community like Ottawa or Halifax, Vancouver or Regina, if a human rights complaint or a legal matter arises it's usually dealt with by strangers, people you don't know. One expert, I think it was Russell Barsh, drew the analogy to say that in the south in our large democracy we're strangers governed by other strangers, whereas in indigenous communities people certainly know one another and many are related to one another. So after a matter that's litigated is finished, those people have to continue to look at each other day after day.

So there probably is—I think the commission is probably right and you're right—a need for something other than the black letter of the law to ensure that you are promoting social cohesion, and not litigation only and have, as you're suggesting, winners and losers at the end of the day and not much social cohesion.

Mr. Larry Chartrand: Yes, I would like to echo those words. There is a fair bit of infighting with aboriginal communities, between families and clans and that sort of thing, already in existence, and it becomes quite adversarial. But because the Canadian legal system has been imposed on them, the traditional mechanisms for resolving disputes in a more harmonious, consensus-based mediation approach has been devalued, to the point where individuals in those communities would prefer to go to the Canadian system rather than their own traditional system, and further that adversarial kind of milieu.

The amendment here allowing individuals to pursue claims against their band council, for example, will probably exacerbate that a bit, even though the Canadian Human Rights Act offers mediation alternatives and tries to resolve things in a less adversarial format. So there will be an increase, I am sure, but probably not an overwhelming piece beyond what already exists, because a good number of the cases that actually went to the Human Rights Commission actually did get resolved because of the way the tribunal and the courts limited the impact.

The Chair: We have to move on to the next question. I have time limits. I don't want to be rude, but I have to watch the clock. The members watch me.

Mr. Lemay.

[*Translation*]

Mr. Marc Lemay (Abitibi—Témiscamingue, BQ): Thank you for being here. I really appreciated what I have heard and I would like to tell you about it. I will not go over everything that you have said. I believe that you are really knowledgeable about these communities. My question will be simple and direct. As my university teacher used to say, it is a question that is short but that deserves a long and developed answer.

Do you believe that as we speak, today, on May 17, that the native communities are prepared and ready to face the repeal of section 67 of the act? In other words, are the communities addressed by Bill C-44 ready to deal with this bill today? If the answer is yes, why? And if not, why not?

I want to give you as much time as possible to answer.

● (1150)

[*English*]

The Chair: We'll start with Mr. Chartrand.

Mr. Larry Chartrand: I'd say yes and no. Yes, because—

[*Translation*]

Mr. Marc Lemay: That is not good.

[*English*]

Mr. Larry Chartrand: There are some aboriginal communities that have the capacity, strong government. Some even get awards for good governance. These communities have strong capacity, in terms of both their personnel and the legal advice and services they get. They probably could handle it without any significant problem. They may need additional resources because of the increase in the cases. But there is also a good number of aboriginal communities that probably would have difficulty responding in a fair way, even if they have valid justification for discriminatory action. They may just not have the resources, the legal counsel. I'm talking about some of the more remote communities, where access to that kind of personnel and skill and knowledge is at a premium. Their efforts are often mostly directed to just survival, let alone human rights abuses based on discrimination.

So it's going to be a wide range. Some communities are going to be quite well prepared, and others are not going to be prepared at all. You can even extend the deadline for five years and they still won't be prepared. So it's going to be a wide range.

Ms. Wendy Cornet: I would agree with Larry's comments, but I think it's less a question of whether the communities are ready for the repeal of section 67 than what communities feel they need by way of human rights protection. Obviously, allegations and complaints relating to various forms of discrimination arise in aboriginal communities, as they do in non-aboriginal communities, so it would seem rather obvious that you need some kind of mechanism.

The current situation I think is unacceptable, in that the section 67 exemption does operate in a very arbitrary and anomalous way. A study I did for Status of Women made that argument, that whatever merit it had in 1976, prior to the adoption of the Constitution in 1982, the way it operates now in terms of what falls in the exemption and what falls out really doesn't make any rational sense. So I think clearly something needs to be done.

The question of whether applying the Canadian Human Rights Act is the best means of human rights protections in first nations communities I think is an interesting question. My colleague here had noted in a paper he did on the Canadian Human Rights Act section 67 exemption issue that the current federal self-government policy doesn't address one way or the other whether or not first nations people have inherent jurisdiction or should be recognized as having jurisdiction over human rights matters, enabling them to pass their own human rights codes. It's rather odd, because the federal self-government policy has three lists of issues that can be negotiated: those the federal government won't negotiate, those that it is willing to negotiate, and other matters, depending on the circumstances, that it may negotiate. And human rights doesn't appear on any of those three lists, although there is a policy with respect to the Canadian Human Rights Act application.

I agree with Larry's answer to your question, "Are they ready?": I think it depends on the community. But I think the more relevant question is, what is actually needed for human rights protection? I'm sure that first nations people have lots to teach us about what a human rights charter might look like.

● (1155)

The Chair: Monsieur Lemay, you have about a minute and a half, or less than that, actually—a minute.

[*Translation*]

Mr. Marc Lemay: I will go one step further by asking you a very simple question. If I understand what you are saying, it is not only a matter of governance for first nations. There is also the matter that first nations must be ready and must accept that we repeal section 67, that we abolish it. Do I understand correctly?

[*English*]

Ms. Wendy Cornet: I guess my own opinion—to the extent that this is relevant to anyone, as I think the opinion of first nations is far more important—is that there's a need to fill. The complaints do come. We may learn now about how to balance collective and individual rights by opening up the application of the Canadian Human Rights Act.

That leaves open the question, in the end, is this the best way to serve human rights needs in first nations communities, through the Canadian Human Rights Act? It's better than nothing. It's better than the rather anomalous way in which section 67 currently operates. But whether we could do better is probably a good question.

The Chair: Madam Crowder, please.

Ms. Jean Crowder (Nanaimo—Cowichan, NDP): Thanks, Mr. Chair.

I want to thank you both for coming before the committee today.

This bill has been touted as being very simple, and we should just get on with it. Speaking for myself, certainly I support the repeal of section 67 of the Canadian Human Rights Act. Most of the witnesses who have come before the committee also support it. The problem is the process.

Ms. Cornet, we already know from your paper—Mr. Chartrand touched on this as well—that there already are a number of other ways in which people raise human rights issues; you mentioned 2001. Currently, for example, the Assembly of First Nations has filed a human rights complaint based on underfunding for child protection. There have been other human rights complaints filed around denial of education services, which is one of the cases mentioned in this paper.

You also stated in your paper, Ms. Cornet, that a simple repeal of section 67 does not address the other equality issues—the inequality issues—that are already entrenched in the Indian Act. It seems there's much more we need to do around protecting human rights rather than section 67.

I wonder if you could comment, both of you, on the broader human rights violations that exist and that we need to address in a more coherent, comprehensive fashion.

Mr. Larry Chartrand: That's a good question relating to the broader human rights issues.

It stems from taking seriously, I think, the need to understand the relationship between aboriginal peoples and the Canadian government. It's a relationship of equality.

At the level of peoples...and we are talking about the level of peoples as opposed to individuals. Equality between individuals is a western, Canadian, liberal, and democratic fundamental principle, but so is the equality between peoples, the right of peoples to govern themselves based on the principle of self-determination. That is an equally fundamental human right. It's a human right enjoyed by a collectivity, and oftentimes they're pitted against one another.

In Canada the collective human right of aboriginal peoples has been ignored for the last couple of centuries. The means to try to recognize it has started to develop. Section 35 is an important aspect of that long-term development. But we have a long ways to go until we get to that stage where first nations peoples are treated as equal in their governance capacity, recognizing their sovereignty and the fact that their treaties are international treaties, not domestic contractual things.

If we want to recognize human rights for aboriginal peoples, then we have to recognize that those treaties are international treaties in the true sense of the word, and that aboriginal peoples have sovereignty, with treaties negotiated based on that notion. Anything else is a violation of human rights in the fundamental relationship.

● (1200)

Ms. Wendy Cornet: In response, as I had written in that paper, there are some outstanding human rights issues, some of which are being pursued in the courts as we speak, such as the legal rules used under the Indian Act to determine Indian status and band membership where first nations have not assumed that responsibility. There are also human rights issues with respect, probably, to some of the first nations codes on membership.

Bringing charter litigation to try to resolve those issues is a pretty expensive exercise, and some of the cases have been sitting there for quite some period of time. So connecting to some of my comments about the need for conflict management and conflict resolution strategies, I think there is a need to start thinking about that to take on some of these hard policy issues, be they how to develop a consultation policy and protocols or how to finally come to grips with the issues relating to Indian status—and there are some pretty serious issues there. I don't think our constitutional understandings of the word “Indian” and “aboriginal peoples” in the constitutional provisions present human rights difficulties, and I've written articles about that issue as well.

I think there are some problems with the way the Indian Act defines the word “Indian”. There are still some remnants of racialized thinking in the Indian Act in the way that it defines “Indians”. That doesn't mean that it's impossible to come up with a legal definition that references indigenous peoples in Canada in a respectful way and that doesn't racialize them. I just don't think the Indian Act achieves that. Our constitution, I think, does. There may be people who disagree with me. I think we don't have that problem in our constitution. We do have a problem in the Indian Act.

The Chair: You have less than a minute.

Ms. Jean Crowder: Thanks, Mr. Chair.

I actually just wanted to close by quoting Mr. Chartrand. It's a summary submitted in terms of the Indian Act exemptions, options for reforming the Canadian Human Rights Act. I just think this statement in your summary summarizes where we need to go. It says:

> The decision of whether the CHRA should apply should be one left to the negotiating parties. From the Aboriginal nation's perspective, only it knows how and to what degree the imposition of “western” norms of individual human rights protection will adversely affect their collectivist cultural traditions and values.

I think that's a powerful statement, and I think it would be incumbent on the committee to pay attention to that.

The Chair: On the government side, who would like to speak?

Mr. Bruinooge.

Mr. Rod Bruinooge (Winnipeg South, CPC): Thank you, Mr. Chair.

I appreciate the testimony that you've given today.

Perhaps I'll just go back to some of the comments that you brought forward, Mr. Chartrand. You are, of course, an individual who comes from my home city. I believe you teach at the University of Winnipeg as well as the University of Manitoba. Is that correct?

Mr. Larry Chartrand: Just the University of Winnipeg right now, and a little bit for Athabasca University.

Mr. Rod Bruinooge: Okay, right.

You were speaking in relation to the bona fide justification clause that the Canadian Human Rights Act currently employs on occasion. You said that an interpretive clause may water down this bona fide justification clause. I assume that's in relation to section 35 rights being an overarching principle, but perhaps you could clarify that for me.

● (1205)

Mr. Larry Chartrand: Often they're interpreted as a way of taking a substantive principle where there's a conflict with another principle, so you get a collective interest in maintaining the culture, for example, pitted against a claim of discrimination based on sex. An interpretive clause may try to come up with a balance between those two competing rights, that can generate harmony to the extent that's possible, because the interpretative clause is giving importance to the idea of the collective interests they have in the community.

The bona fide justification test is actually a substantive principle that if the community meets the criteria of what is a bona fide justification, it can continue with its discriminatory action because the tribunal or the court has been satisfied that the priority ought to be given to the collective interest of the community. Whether it's manifest in some cultural, spiritual, or linguistic activity, they have that right to have that prevail over a breach of an individual's right under the human rights. That's what the bona fide justification can do, if it's allowed to do that, and the courts and tribunals have already done that in the past.

On the interpretive clause, the reason I say it might water it down is that it might try to compromise rather than give the full effect of that defence—that's all.

Mr. Rod Bruinooge: Do you believe a repeal of section 67 then requires an interpretive clause in light of what you've said, how the Canadian Human Rights Commission likely would continue to use their bona fide exemption in reference to section 35?

Mr. Larry Chartrand: Even though I say the bona fide justification might be an alternative, I do think we need to think carefully about an interpretive clause. I know the proposed wording of past interpretive clauses has not been very satisfactory. There have been a lot of complaints and criticism about the overly broad nature of it, or the uncertainty of it, or who it's going to apply to. That's something that really would benefit from fairly significant consultation at the aboriginal community level and with aboriginal political organizations as to how that wording ought to be drafted.

When the Charlottetown Accord was proposed, there was interpretive clause wording that was actually pretty detailed and pretty significant. That's maybe a place to start looking, but the communities will need their input on that, because there are things that are important to aboriginal communities other than just culture, language, and spiritual things. A lot of communities want alcohol to be prohibited on reserves because of the past experience with alcohol and the effects of colonialism, residential schools, and how alcohol became a way of addressing those pains. So a lot of communities want to ban alcohol from reserves. They can't justify that necessarily on cultural, language, or spiritual grounds, so there's a real need to take seriously an interpretive clause and think about it very carefully as to what it should encompass, and that will require extensive consultation.

The Chair: You have a minute and a half.

Mr. Rod Bruinooge: Continuing with that line of thinking, wouldn't section 35 rights, though, come into consideration if the Canadian Human Rights Commission were making a ruling?

Perhaps I'll direct this to Ms. Cornet. Would they not influence the commission, and wouldn't those be considered? I think, based on what we've seen from the commission before, there's no reason to believe that collectivism wouldn't be incorporated into any rulings. Do you agree with that thought?

● (1210)

Ms. Wendy Cornet: I think that's true. The issue has been raised about the expertise of the commission in section 35 rights. I think that's an interesting question in terms of how to address it. Proposals have been made to consider striking panels with specific expertise, not only in human rights but also in section 35 questions.

I think section 35 issues will inevitably come up, as I said in my presentation. Apparently tribunals have jurisdiction to consider them, but their jurisdiction can also be challenged, and the matter can be referred to a superior court. That doesn't sound like a very streamlined, efficient way of dealing with a human rights complaint. If we can anticipate some discussion on the relationship between collective rights and human rights protected by the Canadian Human Rights Act, perhaps it would be wise to turn our attention to the kind of expertise that's going to be needed by Canadian Human Rights Act tribunals to deal with those issues.

The Chair: Thank you.

We're moving into the five-minute round.

Mr. Russell.

Mr. Todd Russell (Labrador, Lib.): Thank you, Mr. Chair.

Good morning, Wendy and Larry. It's good to see you again. Thank you for your very clear and concise testimony. I think it brings a new perspective and raises some questions that the committee hasn't been delving into for some time.

I want to go back to the issue of consultation. The government has asked virtually every single aboriginal witness representative group before us what they consider to be consultation. How much time should it take, and what should the process look like? I'm not sure the obligation rests on the aboriginal people to determine that. I believe the court has been very clear that the legal obligation to consult rests with the crown—in this case the federal government.

Do you think the legal duty to consult applies prior to a bill like this coming forward? We had no consultation prior to this bill coming forward. There's no anticipated consultation after this bill has been tabled. This is it. From the committee it moves on to the House. Then we pass it or we don't pass it.

In this scenario, has the government already breached the law, so to speak—the legal duty to consult?

Ms. Wendy Cornet: There can always be different opinions on that question. So one question might be whether the government has done a section 35 analysis prior to proposing the bill. I don't know.

That's one of the reasons why the issue was raised in my presentation that although there is a very formal process to assure parliamentarians that prior to consideration of a bill there has been consideration by the Department of Justice and a certification that each bill passed muster and the Department of Justice is satisfied there's not a charter issue problem with a bill before it's presented, if there is such a process, it isn't public. I don't know, maybe there is such an exercise, but there hasn't been a public statement of commitment to say that's what we do every single time. So we don't actually know, number one, whether that analysis has been undertaken in any given case that I'm aware of with a particular bill, and number two, if it has been done, then what need the government saw, perhaps, to engage with aboriginal peoples on their opinion.

I do empathize with the government, because the whole managing of the consultation obligation is a highly complex one and involves, as I outlined in my presentation, a whole series of legal steps to hopefully get to the right answer. Part of getting to the right answer involves listening to aboriginal perspectives.

I just followed through the logic of that in my presentation. If the Supreme Court is directing reconciliation as a means of implementing section 35, and explaining that reconciliation means consultation and accommodation where there is an existing aboriginal and treaty right, then in order to understand whether there is an existing or potential aboriginal and treaty right, you probably need a conversation with the aboriginal peoples concerned. Right?

In order to finally come to an informed decision, is there the likelihood of any potential infringement with my anticipated legislative activity, and if there is, do I need to do something about that?

So it's part of the larger process of working out the direction received so far from the Supreme Court of Canada and what parts the executive has to do and get done before matters come before people like you in Parliament, and what your role is in checking that work.

Again, in my presentation, just based on sheer logic—not case law or anything else—I'm saying to myself that even if the federal government has done a fantabulous job in analyzing the consultation issue before presenting a bill to Parliament, Parliament then of course is free to change it. Well, what then? Don't you need to continue tracking that section 35 issue, if it's there, throughout the whole process? And what assistance do you need to get that job done? How can you engage in a conversation with first nations people or other aboriginal peoples about that?

● (1215)

Mr. Todd Russell: I would just say that the complexity doesn't give one an out for not upholding the law or fulfilling the duty to consult.

Ms. Wendy Cornet: Absolutely. The one option that's not available to the crown is to say “I don't know”. You need to have an opinion; you need to come to a conclusion based on good information, good legal analysis, and then—whatever—defend it, explain it, communicate it. But you can't say “It's too complicated. I can't figure it out.”

Mr. Todd Russell: Thank you.

The Chair: Thank you.

I'll go on to the government side. Mr. Bruinooge.

Mr. Rod Bruinooge: Mr. Chair, I will be splitting my time with Mr. Blaney.

I'm just going to continue with Mr. Russell's logic here for a moment. He posed the question of whether the government has broken the law. Of course I have an opinion on that.

I perhaps would like you, Ms. Cornet, to pursue, theoretically, what would happen if the government has broken the law. In this case, on Bill C-44, what would the process be for dealing with the fact that the government had broken the law? What would it look like? If Bill C-44 were passed, what would happen after that?

Ms. Wendy Cornet: Whether or not there has been consultation and adequate consultation goes to an analysis of whether or not there's a justifiable infringement, which assumes an infringement, which assumes an aboriginal right. Unfortunately, this is what you end up with. Everything is interdependent with everything else, and perhaps the logic of that is the earlier you begin to engage on those issues, probably the better off you are toward the end of the legislation process.

So if there is a problem—and I don't know, because I'm not aware of the facts of what happened or didn't happen before this bill was introduced—then there's a potential remedy in terms of the legislative process itself to identify whether there are existing aboriginal treaty rights at play, whether they are at risk of infringement, and whether that infringement can be minimized or completely avoided.

Mr. Rod Bruinooge: Would the repeal be undone, in your opinion, in that theoretical scenario?

Ms. Wendy Cornet: Would the repeal be undone?

Mr. Rod Bruinooge: I mean the repeal of section 67.

Ms. Wendy Cornet: Well, I don't.... That's a good question. I hadn't considered it.

Mr. Rod Bruinooge: What would it look like? Could you consider it?

Ms. Wendy Cornet: If it were to be undone, then you'd be back to the status quo. As with any other provision that was deemed unconstitutional, you'd be back to the drawing board to get it right.

Mr. Rod Bruinooge: In theory, though, there would be a period of time in which the Canadian Human Rights Act would apply to first nations people, and then if the repeal were undone, it would be removed from first nations people. Would that be the scenario that you envision?

Ms. Wendy Cornet: I'm not aware of a situation in which repeal of a provision has been struck down, but I suppose that's theoretically possible. It would take quite a few years, presumably, to establish that, because someone would have to come forward to show the existing or potential aboriginal treaty right that is at risk of serious infringement by repeal of the Canadian Human Rights Act and somehow argue that before a superior court and get that judgment. That could take some time.

● (1220)

Mr. Rod Bruinooge: Do you see that as logical, though—that a judge would take away the Canadian Human Rights Act provisions from first nations people?

Ms. Wendy Cornet: I think it would depend on the arguments placed before them. We're talking about a completely hypothetical case, but this goes back to why the consultation process and the two-way flow of information is so important, because now you're placed in a position of only contemplating theoretical situations. If you have an opportunity to discuss these things long before actual drafting begins, it gives some time for people to assert specific aboriginal rights and describe them. The courts have been clear that you can't just assert a right in the abstract; it's got to be rather specific.

I don't know what the chances are of someone asserting an existing aboriginal treaty right that is actually implicated by repeal of section 67. I have no idea.

In answer to your question, I suppose it's theoretically possible that the repeal could be struck down.

Mr. Rod Bruinooge: To provide more perspective of the government side, I'll mention the Taku and Haida court cases, which are basically the benchmark for an analysis in consultation with first nations communities. It is specifically in relation to resources. That is part of the problem that is being seen, especially in discussion of this topic: the resource element is not in place in this discussion. That's not to say that consultation shouldn't occur, but the legally mandated consultation from Taku and Haida is not seen to be in relation to this particular legislation.

The Chair: Time has expired, so I'm not going to let you answer that, unfortunately.

Ms. Wendy Cornet: Sorry.

The Chair: I guess we're moving on to the Bloc. Go ahead, Mr. Lévesque, please.

[*Translation*]

Mr. Yvon Lévesque (Abitibi—Baie-James—Nunavik—Eeyou, BQ): Thank you, Mr. Chair.

What I find exasperating in this matter is that we are having a discussion on rights that are not only constitutional but must also be social rights for some nations. We are talking about a government that has refused to recognize some nations before the United Nations. I am referring to a pointed remark made by Larry a moment ago when he talked about Kelowna and I believe his remark is quite relevant to this debate.

I will ask all my questions and then I will let you answer.

If we had implemented the Kelowna accord at the very beginning and if we had talked about repealing section 67 thereafter, we would have brought first nations to an acceptable level, albeit a level that would not have been quite the equal of the whole of Canada, for the application of the Canadian Human Rights Act.

My next question is directed mostly to Ms. Cornet. Section 25 of the Canadian Charter is often considered as a protection clause. Indeed, it says that the guarantee in this charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms. Section 35 of the Constitutional Act, 1982, for its part, recognizes and affirms the existing aboriginal and treaty rights of the Aboriginal peoples of Canada.

Ms. Cornet, could you comment on the various roles that are played by each of these provisions? My colleague is a criminal lawyer. Personally, my area of expertise is as a sociologist in work relations. Hence, there is a gap between our respective opinions and we would like you to fill that gap. Eventually, could you tell us how the courts have interpreted section 25 up to now?

I invite you to comment.

[*English*]

Ms. Wendy Cornet: Section 25 speaks to a requirement not to abrogate or derogate aboriginal and treaty rights. But we don't actually know the scope of potential conflict.

A starting point of analysis, I've suggested in the past, would be to adopt an analysis more consistent with international human rights theory, which doesn't start with the premise that collective and individual rights are necessarily in conflict, in that the same international human rights covenants that protect individual rights with respect to economic, cultural, and social development, and from racial discrimination, and so forth, also recognize the right of peoples to self-determination. A primary tenet of international human rights theory is there's no hierarchy of rights; they're interdependent. So part of having full enjoyment of individual human rights in respect to culture and social development implies the right to self-determination of peoples, and vice versa; you can't fully enjoy your right to self-determination of peoples if you're experiencing racial discrimination.

So we might have less fear, and have an ability to work through these issues, if we started with that understanding from international human rights theory, that these rights are interdependent and are meant to work together. There may be instances when you come across an irresolvable conflict, and they'll have to be reconciled. But I think the courts—as the Canadian Rights Commission has tried to do in the past, too—make every effort to reconcile those rights in a way that respects both.

I think that's the overall direction of the Constitution, in that we're all supposed to make every effort to respect both, and to reconcile them, as opposed to picking one over the other. Now, there may be instances when that is required, and the existing constitutional provisions will provide guidance to courts on what to do when faced with those difficult situations.

● (1225)

The Chair: You're down to less than 20 seconds, Mr. Lévesque. Are you done?

[*Translation*]

Mr. Yvon Lévesque: I would simply like to allow Larry to give me a brief answer. First of all, would it not have been more acceptable for the first nations peoples to start by settling the Kelowna accord issue and then talk about repealing section 67?

[*English*]

Mr. Larry Chartrand: I think the communities would have an opportunity to develop some of the infrastructure that doesn't yet exist, and address some of the poverty issues, some of educational issues. That, of course, would create an awareness level in the community that's going to promote more positive relationships. When you're dealing with substandard housing and crowded conditions, and then of course the impact of alcohol and substance abuse in dealing with those negative situations, that leads to human rights abuses on various levels, not just with the band government.

So when you address the poverty issue, you address human rights issues. Unfortunately, this government has not seen fit to do that.

The Chair: We're going to the government side now.

Mr. Blaney.

[*Translation*]

Mr. Steven Blaney (Lévis—Bellechasse, CPC): Good morning.

I will speak in French. My first question is directed to Mr. Chartrand. First of all, I want to thank you for sharing with us your views as an expert having a good knowledge and understanding of the issues.

Ms. Cornet, during the questions and answers period this morning, you said that the present situation was unacceptable, that we had to do something, that we had to act.

We have heard several groups, as you know, including the Assembly of First Nations, the Assemblée des Premières nations Québec-Labrador, representatives from the communities, law experts from the Barreau du Québec, various experts in the area as well as women groups. Also, mention was made of the consultations as well as the points raised by Mr. Chartrand regarding the clauses for protection of collective rights and the rights of first nations.

My question this morning is quite simple. Of course, we are aware that the parliamentary process is not necessarily perfect and that we desire to move toward a new form of relationships. However, within the framework of the present structure, we have had the opportunity to make a small step forward, even though it does not solve the enormous problems that you have referred to, such as housing, education, issues that we also want to examine.

I would like to ask you whether it is a good start, wether we are on the right track. The next step is the clause by clause study. How do you see the follow up regarding the existing bill?

Mr. Chartrand, perhaps you could start.

● (1230)

[*English*]

Mr. Larry Chartrand: Thank you very much. You raised a couple of good points.

I think this is an important step simply because of the overall historical impact of colonization and assimilation and the nature of aboriginal communities today. I see it as an interim step in the greater process of aboriginal communities becoming self-governing and being able to exercise their own human rights processes and principles.

In the meantime, until aboriginal communities acquire their own jurisdiction with respect to human rights, this is an important step. As Wendy mentioned, there are self-government agreements out there that are starting to now include reference to human rights. This involves negotiations. Some of the communities agreed it should apply, but some may want to develop their own, and that's part of the negotiation process in the treaty development.

That's why I say it's an important first step for those who have engaged in that self-government exercise. Some communities may very well be comfortable with an individual human rights model. Others may want more of a marriage between traditional and western ideals.

Mr. Steven Blaney: You mentioned that there were about 100 people per year who would have applied to launch a complaint, which means about 3,000 persons overall during the last 30 years. Would you think that if this bill were to pass, whether amended or not, there would be an opportunity for them to have their fundamental rights recognized, or at least to have a chance to challenge the court to have them recognized?

Mr. Larry Chartrand: Oh, yes, absolutely. And that's a fairly conservative estimate; it doesn't even include the chilling effect of having that provision exist for 30 years, so it's very conservative.

There's nothing more frustrating than going to a place where you're supposed to get justice and being told you're denied.

Mr. Steven Blaney: Some witnesses have recommended that there be adaptation period for the bill to come into effect. Would you see some transitional period as a positive, constructive amendment? Would you see it as useful, or not necessarily?

Mr. Larry Chartrand: I think it would be very useful. It would give aboriginal communities an opportunity and time to reflect on what this means for their governments and their communities.

Mr. Steven Blaney: Have you given any thought to what length it could be?

Mr. Larry Chartrand: It's really hard, because some communities are probably ready now. Others are going to take a long time.

I think the recommendations of the Human Rights Commission before on that.... I think they were looking at 16 months or something; I'm not sure exactly. It could be a little more than a year, but certainly more than six months.

Mr. Steven Blaney: Madam Cornet, would you like to have some comment on the transition?

The Chair: You've run out of time.

Madam Crowder.

Ms. Jean Crowder: I want to come back to a presentation the Canadian Bar Association made. In it they talked about the effect of Bill C-44 on the Indian Act and presented a case that has been cited by Justice Muldoon of the Federal Court of Canada, that without any kind of coherent approach, the repeal of section 67 without looking at broader impacts could actually result in the piecemeal destruction of the Indian Act.

I wonder whether you've thought about that at all and whether you have any comments on it.

Ms. Wendy Cornet: Yes, I have thought about it. I think it would have certainly been true prior to 1982, which is why the exemption was placed in the act in the first place.

Since then, I think it's less vulnerable to being taken apart piecemeal, particularly with respect to the protection of reserve lands for members. But it's an interesting question what might happen if there were issues litigated around the Indian status provisions, which are pretty central to the Indian Act, and around band membership provisions where those are determined by the Indian Act.

That may not be a bad thing, because in my own view those issues need to be discussed, in large part because the way in which Justice Muldoon expressed himself in that case to me reflected the misconception that the point of protections for Indians, also more commonly known today as first nations people, is not to protect "Indians" as the racial labels that have been imposed upon them, but to protect their rights as peoples.

His remarks in that case, in my own view and with all due respect, seem to reflect some confusion about the distinction between peoples and their rights and an archaic, 19th-century piece of legislation such as the Indian Act, which still carries within it some of those old ideas about race.

If you think back to what happened in the early interactions with aboriginal peoples, including Inuit and Métis as well as first nations, they didn't present themselves as races. They presented themselves as peoples.

I'm sure you've heard that in many of the indigenous languages, the word for themselves in fact means "people". The whole way in which collective rights have been asserted by aboriginal peoples is not on the basis of their race but on the basis of their distinct status as peoples who were here prior to other peoples and who have the right of self-determination. It is not on the fact that they look different from other people; I've never heard anyone say, I have a right to something because of my physical appearance. That's not the basis of those rights.

So I think to the extent that it is vulnerable on questions relating to race, we may actually get some clarification that would be helpful to the general public and others in understanding that aboriginal rights relate to rights of peoples, not—

● (1235)

Ms. Jean Crowder: If I understand it, the fear, rather than being of a planned, comprehensive approach—this was my understanding while the bar association was presenting it—was more around the notion that what you would end up with is sections struck down outside the context of an appropriate consultation that would probably see the revocation of the Indian Act.

What we're hearing from many people is that the Indian Act needs to be completely done away with or rewritten, but the fear was that it could be done in a way that didn't look at the whole piece of legislation.

Ms. Wendy Cornet: That's true now, with charter challenges to the Indian Act.

Ms. Jean Crowder: Right.

Ms. Wendy Cornet: Corbiere struck down a provision of the Indian Act relating to election provisions. The Indian status provisions are under challenge under charter grounds now. Presumably that's a policy consideration for the federal government: that certain aspects of the Indian Act—currently, now—are under attack on charter grounds and that those things need to be thought through.

Ms. Jean Crowder: And of course that's getting much more difficult since the court challenges program was eliminated. People need to have access to resources in order to be able to take some of this on, and there has been a door closed for people who don't have the resources, with the elimination of the court challenges program.

Do I have any time left?

The Chair: Not really; I've decided you've had enough time.

Some hon. members: Oh, oh!

The Chair: We'll move on to the government side.

Mr. Storseth.

Mr. Brian Storseth (Westlock—St. Paul, CPC): Thank you, Mr. Chair.

Ms. Cornet, I'd be interested in hearing not necessarily about this piece of legislation and the process, but about the actual idea of repealing section 67 of the Canadian Human Rights Act. Are you in favour of it?

Ms. Wendy Cornet: I am. That's my own personal opinion. As I said, I think more relevant is what first nations people who are affected by it think. That's far more relevant.

I think it's a good idea in part because there are cases that come before the tribunal. Section 67 is not a complete blanket exemption for all the acts and decisions of Indian Act band councils. There are many acts and decisions that Indian Act band councils take that fall outside the authority of the Indian Act.

Where that happens, challenges are brought before tribunals. If you read those cases, I think it is clear that there are some pretty serious issues. Just as in the larger society, there are issues of sexual harassment and of discrimination on any ground you can think of that's under the Canadian Human Rights Act.

When you look at the cases to see, as I said earlier, which issues fall outside the exemption and which fall in, I just don't see any rational reason for the distinction. If the Canadian Human Rights Act has fulfilled a useful function to the extent that it applies now, which I think it has, I don't see why we have that exemption for these other cases.

● (1240)

Mr. Brian Storseth: So you do agree in essence with a little bit of what my colleague Ms. Crowder is saying, that it's more about the process than about whether or not this is a good thing to do.

I'm not sure if it was you or Mr. Chartrand who was mentioning sitting down with first nations, bodies such as the AFN, and drafting some of these things. Something interesting came up at the last committee meeting. I'd be interested if you agree with some of my Liberal colleagues who feel that we should go community by community and allow them to pick out which aspects of human rights that they want to be able to apply within their individual communities. Do you agree with that?

Ms. Wendy Cornet: I think the benefit of speaking with first nations communities is that you'll have a better idea perhaps of what structural and program changes need to accompany this repeal, and I think the commission referred to some of those issues.

For example, the review panel initially looked at the entire Canadian Human Rights Act, including this exemption. It made quite a number of recommendations about the operation of the Canadian Human Rights Commission and the tribunal. I don't believe the government, or any government of any stripe, has ever replied to that report in its whole. So there are other issues about the operation of the commission and how best to deliver human rights protection to all Canadians.

There may be specific issues in the first nations community of which we should be aware. That would be the advantage of speaking to people about the application of the act.

Mr. Brian Storseth: Do you agree with my colleague opposite that the individual community should be able to pick out which human rights they feel should apply to their community and which ones shouldn't?

To me, it then seems like a hodgepodge of human rights all across the country, if you go to that degree.

Ms. Wendy Cornet: I think the issue would be that just as each provincial government has jurisdiction to enact human rights statutes in its sphere of jurisdiction that aren't federal, conceivably first nations could do a bang-up job on enacting their own human rights codes.

Mr. Brian Storseth: I don't mean to interrupt here, I just want to have a little back and forth with you.

Ms. Wendy Cornet: I think that would be more a straightforward way if—

Mr. Brian Storseth: But the local municipality operates underneath the governance act of the provincial government.

Ms. Wendy Cornet: That's right.

Mr. Brian Storseth: So I'm just trying to get from you your impression of whether we should go right to the individual community level, as my colleague across has suggested, or if we should go with a broader approach. Should that be at the AFN level? I'm just asking your opinion on this.

Ms. Wendy Cornet: I'm not too sure that those are the only choices. I guess that's why I'm struggling with your question.

I would think that if there were an issue that the Canadian Human Rights Act in its entirety is somehow problematic for whatever reasons from a first nations community viewpoint, then rather than piecemeal picking of an act that they didn't draft in the first place, a more sensible resolution might be recognizing their jurisdiction to enact something that works that is also consistent with international human rights law.

You do see references to international human rights law in self-government agreements. For example, if a first nation government enacts a law that creates an issue internationally in terms of compliance with international human rights law, the more recent self-government agreements provide for processes for Canada to discuss that with the first nation or aboriginal community concerned to resolve it, so that Canada collectively is in compliance with international human rights norms.

Mr. Brian Storseth: I'm not trying to pigeonhole you into one or the other. I'm just trying to get some solutions.

The Chair: But you're out of time.

Committee members, we have finished two complete rounds. Do you want to continue?

Hon. Anita Neville (Winnipeg South Centre, Lib.): I had some questions, but I'm prepared to....

Mr. James Bezan (Selkirk—Interlake, CPC): We're prepared to end early if that's the choice of the committee.

The Chair: I don't want it just for the convenience of the chair. You can carry on if you have other questions.

● (1245)

Mr. James Bezan: I'll defer to the opposition members.

The Chair: Over to the opposition.

Hon. Anita Neville: I'd just like to make a statement. I think the member opposite is misrepresenting the views of someone who is not here—

The Chair: Okay, I don't know if I can allow that point.

Hon. Anita Neville: Okay.

The Chair: We're asking questions. Just don't get started.

Hon. Anita Neville: I have a question.

The Chair: I'm not going to let this carry on. I am going to adjourn.

Thank you very much to our guests for your participation. It was very informative.

We're adjourned.

Published under the authority of the Speaker of the House of Commons

Publié en conformité de l'autorité du Président de la Chambre des communes

Also available on the Parliament of Canada Web Site at the following address:
Aussi disponible sur le site Web du Parlement du Canada à l'adresse suivante :
http://www.parl.gc.ca
