House of Commons
CANADA

Standing Committee on Aboriginal Affairs and Northern Development

AANO • NUMBER 056 • 1st SESSION • 39th PARLIAMENT

EVIDENCE

Tuesday, June 5, 2007

Chair

Mr. Colin Mayes

Standing Committee on Aboriginal Affairs and Northern Development

Tuesday, June 5, 2007

● (1115)

[*English*]

The Chair (Mr. Colin Mayes (Okanagan—Shuswap, CPC)): I open the Standing Committee on Aboriginal Affairs and Northern Development of Tuesday, June 5, 2007.

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

As witnesses today, we have Jerome Slavik, a lawyer from Ackroyd, Piasta, Roth & Day; Louise Mandell from Mandell Pinder, barristers and solicitors; and Professor William Black from the University of British Columbia's law faculty.

Welcome to our witnesses.

We'll hopefully proceed with a 10-minute presentation from the witnesses, and then we'll move into a question period from the members of the committee.

I'd like to begin with Mr. William Black, please.

Professor William Black (Faculty of Law, University of British Columbia): Thank you very much.

I'd like to thank the members of the committee for inviting me to appear today.

I know that some of my colleagues are going to talk about the consultation issue. While I believe that's very important, I will focus on other matters, because I know that at least there's going to be some discussion of that by others.

I was a member of the La Forest committee, the Canadian Human Rights Act review panel. My main purpose today will be to talk to you about the thinking of the panel and how we reached the recommendations we did.

I'd like to start by talking about the goals that we thought should be achieved. In other words, what are we trying to accomplish here before we move on to "how do we accomplish it"? I think in the view of the panel there were five goals.

The most obvious one is to provide a remedy to those who experience discrimination related to the Indian Act, which of course is now precluded by section 67.

The second one, however, which is equally important, is to do so in a way that balances the individual rights in the Canadian Human Rights Act with the collective rights of aboriginal peoples.

The third, in our view, was to ensure that the Canadian Human Rights Act doesn't become a tool for non-aboriginal people to challenge programs and activities designed to benefit aboriginal people and to deal with historical inequalities.

The fourth, which is related to the third, is to ensure that the Canadian Human Rights Act doesn't become a way of piecemeal dismantling the Indian Act. While the Indian Act certainly is far from perfect, we think if it's going to be changed it should be done so in a more cohesive way.

The fifth is to ensure that the Canadian Human Rights Act applies in an even-handed way to bands and other aboriginal governments and doesn't create arbitrary results. In the view of the panel, section 67 does sometimes lead to arbitrary results.

Let me give you two examples. Sometimes two different bands could make exactly the same decision, and one could do so by using its powers under bylaws under the Indian Act, and another might do so by a more informal internal process. But let's assume they are passing exactly the same regulations. The first one would be exempted from any challenge under section 67, because of section 67, so that you couldn't bring a human rights complaint against that. The second would not come within the exemption of section 67, even though it did exactly the same thing.

A second example is that some aboriginal governments get their powers and use their powers under the Indian Act, and others, for example, do so under self-government agreements. Since section 67 only applies to things done under the Indian Act, the first group is covered by the exemption and the second is not. We thought a more integrated way of looking at things would be appropriate.

So just to remind the committee—I know you know this—about what we did recommend, our longer-run recommendation was to create a human rights system controlled by aboriginal governments, locally, regionally, or nationally.

Our more immediate goal, however, was to repeal section 67 but to add an interpretive clause that said in essence that the Human Rights Act should be interpreted in a way that takes account of aboriginal community needs and aspirations.

I'd like to discuss for a moment or two why we thought an interpretive clause was needed. First, we thought it was needed to achieve that goal of balancing individual and collective rights. If section 67 was repealed and there was no such provision, there is a danger that the largely individual rights in the Canadian Human Rights Act would predominate over the collective rights of aboriginal people.

The second is to ensure that the Canadian Human Rights Act doesn't become a tool for non-aboriginal people to attack the provisions and benefits granted to aboriginal people and perhaps dismantle the Indian Act piecemeal. For example, non-aboriginal people might challenge health and education benefits provided to aboriginal people alone.

Third is to try to ensure that the procedures and remedies used by the Canadian Human Rights Commission and the Canadian Human Rights Tribunal are appropriate to aboriginal communities. That is, require the tribunal to consider what's appropriate, for example, in terms of remedy, which might be different from an appropriate remedy against, say, Bell Canada or Canada Post.

Now there are some general provisions in the Canadian Human Rights Act, as you know, particularly the bona fide justification provisions, that sometimes work to achieve some balancing. But they are not tailored to the needs and interests that arise in this context, and therefore the panel was of the opinion that they aren't enough alone.

I know there's been some discussion of other possible measures that might be used for balancing, and I thought I might explain for a moment why the panel was of the view that an interpretive provision was necessary and why other provisions weren't appropriate or adequate by themselves.

One, of course, which I know you've talked about, is section 35 of the Constitution Act, 1982. The difficulty there is that while section 35 protects certain historical rights and treaty rights of aboriginal people, it doesn't protect all the matters that are of crucial interest to aboriginal people. For example, it doesn't protect fishing and trading traditions that aren't part of a treaty and that developed after European contact. Also, it doesn't protect government entitlements, such as the programs designed for the benefit of aboriginal people under the Indian Act. So it goes partway there, but in our view, it isn't sufficient in itself.

Section 25 of the charter says the charter shall be interpreted in a way that does not affect the rights of aboriginal people, but it doesn't say that the Canadian Human Rights Act shall be. It doesn't apply to the Canadian Human Rights Act. So, in my view, it doesn't have a great deal of effect in this context.

Section 15 of the charter, the equality provisions, really require the same consideration as the Canadian Human Rights Act. They are primarily individual rights provisions, and therefore, in our view, they don't allow for the kind of balancing we thought was appropriate.

I'd like to talk for just a moment about the form we thought the interpretive provisions should take. I certainly don't have statutory language to propose to the committee, but I did want to talk about a couple of things the panel thought were crucial and then present one option for your consideration, without necessarily saying whether I'm recommending it.

The two characteristics we thought were crucial were, number one, that it should be in some binding form. It should require that the act be interpreted in a manner consistent with the needs and aspirations of aboriginal people; it shouldn't just be a statement of principle or purpose. Second, we thought it should be included in the statute, though perhaps supplemented by other provisions in regulations or bylaws.

The option I'd like to present to you is that there could be a fairly general provision in the act itself, talking in relatively general terms, leaving them the possibility or the hope that more specific bylaws or regulations could be enacted to deal more specifically with particular situations after consultation with aboriginal people. If those consultations weren't as productive as we would hope they would be, at least there would be this general provision in the act.

There is some precedent for an interpretive provision in the charter itself. Section 27 of the charter says, “This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians”.

● (1120)

It protects multicultural rights. I think our panel felt that something along the lines of what was in the Canadian Human Rights Act was necessary to equally protect the rights of aboriginal people.

Thank you very much.

The Chair: Thank you, Mr. Black.

We'll move on to Madam Mandell, please.

Ms. Louise Mandell (Mandell Pinder, Barristers and Solicitors): Thank you very much.

I'd like to begin by thanking the panel for inviting me here, and also by stating what I believe to be obvious: that aboriginal organizations unequivocally support in principle the repeal of section 67.

The topic I'd like to address briefly is the process engaged in Bill C-44, which basically makes a unilateral amendment to the act and then engages consultation later.

I'd like to address you briefly on the legal point—that is, the point as to whether this is contrary to the principles of reconciliation and the honour of the Crown that have been articulated by the Supreme Court of Canada. It will be my submission that the whole process of amendment and then later consultation is contrary to the basic principles that have been articulated since 1977, when Parliament enacted the Canadian Human Rights Act unilaterally and then deferred this discussion to now, this date, as to how to incorporate the problems associated with the Indian Act and how we're to deal with it.

What has happened in the jurisprudence since 1977 and with the entrenchment of section 35 is that there has been a wholly changed legal landscape, and the movement in the jurisprudence is away from governance under the Indian Act and towards the general principle of reconciliation, which the Supreme Court of Canada has said is at the heart of aboriginal-Crown relations.

In terms of reconciliation, what is being reconciled is the pre-existence of aboriginal societies, including their legal systems and their laws, with the assertion of crown sovereignty. There's been a general recognition in the courts at both the lower and the higher levels that the assertion of crown sovereignty didn't extinguish the sovereignty of aboriginal people, so the reconciliation involves both the recognition of the aboriginal rights of governance and subsequently, with the recognition, the reconciliation of them. Corresponding duties have arisen on the Crown; they have been articulated by the Supreme Court of Canada, most notably in the Haida case, in order to achieve reconciliation. The duty of germane interest to your panel is the duty of consultation about accommodation.

I'd like to briefly address some of the major elements of the duty, because it does impact greatly on the issues of consultation engaged in this case.

The leading case is the Haida case, and I want to make it clear that this case didn't arise in the context of amending legislation; it arose in the context of crown conduct, in a situation in which the Crown granted a tree farm licence to a large forestry company up in Haida Gwaii—the Queen Charlotte Islands—to basically engage in a multi-year large-scale logging project on the island, and there had been no consultation with the Haida. The issue was whether, in the absence of proof of title or in the absence of concluding a treaty, the Crown was obligated to consult. In the landmark case in the Supreme Court of Canada, the court held that yes, there was a duty on the Crown. This is the duty that is engaged now; it's a government duty. I'll just go through some of its basic parameters.

The court considered where the duty to consult arises. Well, the duty to consult with aboriginal people, they say, is grounded in the honour of the Crown. It arises from the assertion of crown sovereignty, says the court. It continues into the process of treaty-making in all actions between the Crown and aboriginal people. They say the honour of the Crown is always at stake in its dealings with aboriginal people, but in particular the duty engages—and I'm going to read you what the court said:

> But, when precisely does the duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it—

In this case we have an act that is definitely going to affect the governance rights of aboriginal people—not just the band council governance, but also the aboriginal governance rights, which are broader than band council rights. Many band councils, in light of the Indian Act, do exercise both rights that are considered to be more traditional in nature—not arising from delegated authority under the Indian Act—and also rights arising from the delegated authority.

The content of the duty—and it is to this point we say this committee must pay attention—is in proportion to the assessment of the strength of the case and the seriousness of the potentially adverse effect on the right or title claimed.

● (1125)

In all cases, the honour of the Crown requires the Crown to act in good faith to provide meaningful consultation appropriate to the circumstances. So we have in this instance the courts signalling a movement now away from the Indian Act and a movement toward reconciliation being the goal, with the duty to consult being part and parcel of how that reconciliation will occur. The court describes elements of the duty as including an obligation to consult as early as possible in the process of decision-making, providing all relevant information to the aboriginal people, flexibility and willingness to consider alternatives or make changes to its proposed action based on information obtained through consultation, and not promoting but listening with an open mind.

So applied to this legislative amendment you have Parliament being very aware of the potential existence of governance rights and that the constitutional recognition and affirmation of aboriginal rights is meant to reconcile indigenous and Canadian legal systems. Parliament is considering amending legislation in such a way that there is a potential to interfere with these governance rights. Prior to actually passing Bill C-44 and amending the act, the honour of the Crown suggests that Parliament should engage with first nations to determine what the potential effects are and to discuss options for avoiding or mitigating infringements and for reconciliation. Consultation should consider whether the process in the Canadian Human Rights Act is the right one for human rights complaints against a band council or whether a different indigenous institution, perhaps different legislation, might be more appropriate.

Before finishing on this, I'd like to also stress the fact that in 1977 there was a political commitment made by the federal Crown to first nations leaders that there would be consultation that would precede the application of the act, and that commitment directly engages the honour of the Crown.

We turn to the question, then, of who should be consulted. I know there's been some consultation about this, but because first nations across the country are organized according to different levels and types of power and authority, many have their own means of dealing with human rights issues, and all are affected by the operational framework of the Indian Act. So because of the very strong interference and the great impact, which I'm sure this committee has heard about, expressed by aboriginal people across the country as to what could happen and will happen, once human rights complaints are able to be adjudicated in respect of band councils in particular, there will be a great impact on aboriginal communities. So it suggests, because of the test, that merely canvassing the views of aboriginal organizations is not going to meet the test of consultation for all the aboriginal governments and governance issues that will be affected by this bill.

I wanted to briefly touch upon the Corbiere case, which was an analogous kind of situation in the sense that subsection 77(1) of the Indian Act, which excluded off-reserve members of Indian bands from the right to vote in band decisions, was held by the court to be inconsistent with subsection 15(1) of the charter. So it raised the question of how we are going to amend subsection 77(1), which was unconstitutional, in light of the fact that band members who lived off-reserve would be affected, or could be affected, by the regulations that needed to now get brought into being in order to repair the constitutional problem caused by the Corbiere case.

What happened in that case was that having concluded that there was a violation of the Constitution, the court suspended the implementation of the decision for 18 months in order to allow consultation with on-reserve and off-reserve band members before amending the legislation. Canada then engaged in a two-stage consultation process, first with aboriginal organizations, and during that time Canada funded the four national aboriginal groups to consult with their membership. So there was a mandate given by the membership to the organizations to represent their views, and INAC regional offices were funded as well, so there could be meetings and workshops.

● (1130)

Then there were reports. After about nine months of consultation in the first stage, draft amendments to the regulations were released. These were the subject of consultation. Then there was further communication with the chiefs and councils who were invited to comment on the draft regulations. And after input was received, the regulations were revised. Then after the regulations came into force, a second stage of consultation took place. It involved broader discussions on the Indian Act, governance, and accountability.

We think the issues involved in repealing or amending section 67 of the Canadian Human Rights Act are similar to those in Corbiere. In Corbiere, there were important difficulties and costs associated with trying to set up a system that balanced on- and off-reserve membership. Similarly, the cost of setting up systems and changing current systems to bring them into compliance with the Canadian Human Rights Act could be large, and defending challenges would be expensive.

I'd like to spend the last few minutes of my discussion to suggest that the real initiative, right now, in light of the jurisprudence, needs to include, in our view, not just a discussion focusing on the narrow issue of whether and how the Canadian Human Rights Act should apply to band councils making decisions under the Indian Act. To keep current with the jurisprudence and also current with the issues that are actually fully engaged by the negotiation of land claims agreements, self-government agreements, and the evolving jurisprudence that is forcing the recognition of pre-existing legal systems by the legal system of the Crown, what is required is a broader discussion on how to move away from the Indian Act towards aboriginal governance within the Canadian federation based on the recognition of the inherent right of aboriginal people to govern themselves.

If we simply focus on the Indian Act and on making the changes that are engaged there, there are innumerable problems with the Indian Act and innumerable problems in trying to sort out the problems of the Indian Act. But more importantly, the Royal Commission on Aboriginal Peoples, and others that have been looking at the law and looking at the evolution of how to create reconciliation, have strongly recommended that the impetus for any move to self-government must include a movement away from the Indian Act towards the full potential and realization of aboriginal laws and legal systems and aboriginal institutions that co-exist with those of the Crown in a federation. It would be based on a reconciliation. It would not be based on the unilateral imposition of legislation, especially legislation, as the Indian Act is, that is almost 100 years old and that carries the colonial baggage of requiring, in the legislation, a particular kind of government, and in addition, a particular kind of federal imposition as to how that government, over time, is to become civilized. These are problems that we now know to be problems created by the past but that we are really trying to move away from at this point.

Thank you very much.

● (1135)

The Chair: We'll have Mr. Slavik, please.

Mr. Jerome Slavik (Lawyer, Ackroyd, Piasta, Roth and Day, LLP): I'd like to commend the prior two presenters for their very excellent and thorough review of those areas of the law. To save this hearing from becoming an echo chamber, I would like to add just to the fringes of their very substantive and well-considered views.

There is a need and a consensus out there that section 67 should be repealed, but it must be done in a manner that is sensitive to the complex cultural, legislative, regulatory, and evolving constitutional context in which first nations operate. This is a very fluid, evolving area of the law and social policy in Canada.

As Ms. Mandell pointed out, with the introduction of the concept of reconciliation and its emergence to the forefront of a framework for addressing Crown-first nations issues, it's important that Bill C-44 be addressed within the principles and context of reconciliation. I think the current draft of the bill, while well-intentioned, doesn't quite meet the mark. A better reconciliation and balance could be achieved.

I'd like to say a broad comment about the act. It really applies to areas of federal jurisdiction, particularly federal governments and federally regulated entities, and for the most part, these tend to be large entities: large corporations and governments, etc. We are now having that act applied to hundreds of first nations governments in very small communities that make decisions on a wide range of matters about rights, entitlements, and membership—who belongs and who is entitled to receive very scarce resources.

First nations governments are challenged, not only with the huge breadth of decision-making, but they're doing so with very limited resources in very challenging circumstances. To apply human rights in this context is absolutely appropriate and necessary, but it must be done in a way that's sensitive to these circumstances.

In my paper, I outline a wide variety of decisions made by first nations governments that may trigger rights issues, whether they're operating under the Indian Act or self-government regimes.

While we believe that the repeal of section 67 is necessary, we believe it must be done in a process sensitive to the principles of reconciliation and the circumstances of first nations. In that regard, we support the recommendations of the Canadian Human Rights Commission and the Canadian Bar Association to the effect that there must be an appropriate consultation process, designed and initiated, that will lead to the development of an appropriate interpretative clause to provide guidance on the application of the act in the context of section 35 rights and the circumstances and governance of first nations.

In that regard, it may be possible to have the repeal enacted but not take effect until an appropriation transition period has enabled the drafting and adoption of an interpretative provision. I would support Mr. Black's view on the nature of what that interpretative provision should look like, so that it provides guidance not only to the commission and tribunal but to first nations and other parties about how this act is to be applied, particularly in first nations communities.

An extensive transition time is important and relevant here for a couple of other reasons. One is that frankly for most first nations this is not on their political radar screen. We act for 20 or 30 first nations. I checked around, and very few knew about this and what its potential implications would be.

Understanding what its implications may be for them, including perhaps a very significant legal review of their current laws, policies, and decision-making practices—and perhaps needing to amend or change those—would be a challenge for many already under-resourced communities. They would be vulnerable to all kinds of complaints, given the very scarce resources and numerous decisions they have to make and the relatively poor understanding of how this act would presently play out in relation to their authority in decision-making.

● (1140)

I would really plead for some time and resources to enable first nations to adequately review and ensure that they can address these issues in a proactive way, and to avoid complaints and other matters that may arise. I suggest that this extend over at least two fiscal periods, because it will require that these first nations be provided the resources to address these matters.

The second area is a practical one. Given the number of complaints that will arise in this matter, many first nations simply do not have the resources to deal with complaints—to hire counsel or participate effectively in tribunals. They live in remote areas, and their few resources are being stretched to the limit.

There's a need for a federal fund to enable first nations to get the resources to deal with complaints, particularly complaints that may have large ramifications for a number of first nations or that may raise questions regarding the scope of section 35 rights. In other words, there needs to be a fund that will allow first nations to be resourced to handle test cases and other complaints with broad implications.

Finally, it's been noted that this may lead to challenges to not only the operations of first nations governments but to certain key provisions of the Indian Act, including the status and membership provisions and other provisions. This amendment should not be a back-door way of dismantling the Indian Act.

The government, particularly the Department of Indian Affairs, has known for years that there are fundamental problems with the status and membership provisions of the Indian Act. It has avoided these for.... The temporary band-aid was Bill C-31. They said, “This will last a generation.” That generation is up.

Status and membership issues are increasingly moving into focus in aboriginal communities, with the potential—I'm just talking about potential implications of this act—of leading to challenges to the status, membership, and other key provisions of the act. It is very important that the Crown be proactive in initiating a consultation process with first nations on how the status and membership provisions of the Indian Act should be developed on a go-forward basis, taking into consideration human rights and other issues, in particular the authority and jurisdiction of first nations to be self-defining and determine their membership.

I urge you to not underestimate the potential complexity and difficulty that this legislation may raise for first nations. No one is arguing against this in principle. But to push forward at a pace that doesn't attempt to recognize, accommodate, and reconcile not only the rights but the interests involved here would be reckless and unfortunate, particularly when there is a better and more cautious option to achieve the same results. I urge you to be respectful of first nations and their rights and circumstances in the manner in which you go about amending this act.

Thank you.

● (1145)

The Chair: Thank you.

We'll move to questions now and start with Madam Neville.

Hon. Anita Neville (Winnipeg South Centre, Lib.): I'll start. Thank you.

The Chair: It's a 10-minute round.

Hon. Anita Neville: Let me begin by thanking the three of you very much for coming here today. As my colleague beside me said, your testimony has been stunning. We very much appreciate your being here, and the insight.

As you were speaking, and before we go out to Mr. Slavik, my question was, how do we move forward? Where do we go? We know that we're under considerable pressure right now to pass the act as is and do it quickly, and if we don't, we're not supportive of human rights, which is not the case at all. You've articulated for us in a very fine manner the complexities of it.

Professor Slavik, you said proceed with caution.

Ms. Mandell, you talked about the importance of reconciliation.

Mr. Black, you talked about the interpretive clause and how important it is. What I'm wrestling with is, do we pass the legislation with the amendments and then begin a consultative process and outline the issues? Can we be sure that the resources will be there for a meaningful consultative process? My question is, how would you advise this committee to proceed today? We are under considerable pressure.

● (1150)

Prof. William Black: I'll take a first stab at it, and I'm going to stick pretty closely to what our panel talked about. We didn't talk in detail about the timing of things. What we did talk about is the need for consultation. What we talked about was that section 67 shouldn't be repealed without steps to balance individual and aboriginal rights. In other words, don't do the one without the other.

In terms of consultation, I'd like to add one other aspect for the committee's consideration. We've talked about the fact that it's consistent with the cases regarding aboriginal rights and so forth, but I also think one should take account of the fact that the Canadian Human Rights Act is only effective if it's accepted by the groups that have obligations under it. If they resent, no matter how strong the enforcement, it's not going to be very effective. So from purely a human rights perspective, it makes sense to me to do this in a way that promotes buy-in by the organizations.

Ms. Louise Mandell: I'd jump in and say that I think you've probably heard a lot about the actual impact of repealing section 67, but I think the two issues that are preliminary, in my view, to getting this amendment through are, first of all, building in the first instance the capacity for first nations peoples and governments to ensure effective implementation of it.

I say capacity on two levels. One is to actually handle human rights complaints and so forth, but the other is—I've practised aboriginal law for 30 years and I've been on reserves across Canada all the time. I've never once seen one public building, for example, with any wheelchair accessibility. So there needs to be something by way of capacity at the front end, because it certainly isn't going to get solved at the back end once everyone's under the gun and there's now a complex process of adjudication, and penalties and so forth, that kick into place. I'd say that's a preliminary issue.

The second preliminary issue is to create a process, as was done in Corbiere, that actually engages the first nations communities, a specifically designed process. In my view, the question that could be put to them if that process were designed is, what is a coherent human rights regime for first nations people and governments that properly and appropriately balances the human rights needs of first nations people and the requirement to safeguard first nations rights and interests? I think the question is important as well as the process.

Hon. Anita Neville: Can I just ask you, at what point should that consultation, the Corbiere model consultation, take place? Is it prior to passing the bill, after the bill is passed? How do we—

Ms. Louise Mandell: What the Haida case said, which I think provides good guidance, is that consultation is upstream of the breach. It's early; it's not late; it's strategic level.

So, for example, if we're looking at, which we should be, a parallel human rights process through the establishment of aboriginal institutions, if that's part of the consideration that is engaged by the amendment, then the consultation should take place before the bill is passed so that all of our foundational ducks are in order, so to speak. And if we've looked at alternatives, decided collectively how this can be done in the aboriginal community and what's the best way to achieve it, and have the funding understood, then I think the amendment would fly like water.

Hon. Anita Neville: Thank you.

Mr. Slavik.

Mr. Jerome Slavik: I don't disagree with Louise that it would be preferable to have the consultation in place and completed, as well as the capacity-building. By the way, the capacity-building not only needs to happen in first nations communities. I suspect the Human Rights Commission and Tribunal themselves are going to need some capacity-building and resourcing to prepare for this, as well as some time to think about how they may be properly interpreting this in a first nations environment, and perhaps as well a little more thought to its potential implications for the Indian Act. That would be preferable.

I can understand, though, that there is significant pressure to have this act and amendment adopted quickly, so a second option would be to proceed with the amendment but hold off its effective date for 15 to 30 months, something like the Supreme Court did. They made a decision but gave the parties 18 months to carry on a consultation process, a capacity-building and an information process, to prepare for the impact of the decision.

In this case I would suggest a longer period of time, given the fiscal implications, the extent of the educational requirements, and the complexity of the issues that need to be worked out, so something like a passage with a subsequent effective date, but in the meantime work on an appropriate amendment to this that's going to address the concerns you've heard, I'm sure, from this panel and many others.

● (1155)

The Chair: Thank you.

Mr. Lemay, please.

Hon. Anita Neville: Mr. Chair, may I ask a question?

Mr. Slavik came with a prepared document. Could the committee receive that, please?

The Chair: We have to get it translated, but we will supply that.

Hon. Anita Neville: Okay, that's fine. Thank you.

The Chair: Thank you.

Mr. Slavik.

Mr. Jerome Slavik: I could barely get it done in English.

The Chair: Thank you.

Mr. Lemay, please.

[*Translation*]

Mr. Marc Lemay (Abitibi—Témiscamingue, BQ): Good morning. Thank you very much. You all work in this field. You are all experienced lawyers in the field of aboriginal law and I have listened closely to what you had to say because I wanted to see how good is our translation system. What galls me is that I agree with everything you have said.

The problem is that, for the government, consultation does not necessarily mean the same meaning as for the three of you. For the government, meeting a First Nations chief at the airport is part of the consultation. I am not sure that you share this interpretation. I would like some explanation because it is very important.

Mr. Slavik, you said something that is very interesting. Before passing this legislation, should we wait for a consultation process in the form of the Corbiere decision or could we pass the legislation with some amendments establishing specific guidelines about precisely how consultation should be done, perhaps even by extending the transition period to 36 months as was done with section 15 of the Canadian Charter of Rights and Freedoms?

So, those are my two questions. What would be an appropriate consultation, in the meaning of the Supreme Court? I believe that you are all able to tell us precisely. In our work as lawmakers, could we include in the Bill some amendments relating to a transition period, an interpretation clause and, possibly, a no-exemption clause?

You can use the rest of my time for your answers.

● (1200)

[*English*]

Mr. Jerome Slavik: Let me just begin by making a broad statement.

It's been my experience, and I don't know if it's the experience of other counsel, that the federal government as a whole really has not come to grips with the principles of reconciliation or the process of consultation from either a structural or a process point of view. In a number of files we're working on, we are trying to develop consultation frameworks with Canada on much simpler, smaller issues than this, with great difficulty.

The Crown's coming to grips with what the courts are telling them about reconciliation is an area that requires some substantial work. But having said that, in this particular case, consultation with the goal of reconciliation I think is very necessary. If this matter is handled poorly, it could significantly inflame aboriginal/non-aboriginal relations.

Your comment at the airport made me smile. As I was in the airport coming here, I ran into a very prominent aboriginal leader in Alberta. I told him what I was going down to speak to, and he said, “Another nail in the coffin”. That's the perception out there, rightly or wrongly. If you ask him—and his wife was standing right there—if there should be gender equality in the community, there would be no doubt of what would be the politically correct answer for him in that circumstance. That's not the issue, but this is perceived as being political and cultural interference in the affairs of first nations, rightly or wrongly.

Now, that that needs to be reconciled and accommodated and understood is important. My suggestion to you is that there is a need to signal that it is the wish of Canadians and first nations leadership that section 67 be appealed. But do it in a way that allows time for accommodation, for reconciliation, for information to understand, for ways to avoid conflicts within this context, and for ways to anticipate, and perhaps planning for unanticipated, consequences of this.

In that sense, Monsieur Lemay, holding off for a period of 24 to 36 months the effective date of this legislation, in my mind, would be a minimum good faith initiative on the part of the Crown to reconcile and accommodate first nations' apprehensions and concerns around this.

The Chair: You have about 50 seconds left, and then we have to move on to the next questioner.

Ms. Louise Mandell: In 50 seconds I'd like to say—

Mr. Marc Lemay: You are in the Supreme Court.

Ms. Louise Mandell: I am in the Supreme Court. Thank you.

I'd like to say that one of the problems of enacting first and consulting later is the implied assumption that it's the first nations band councils that are going to be the governance of the first nations, and that the band councils themselves are the ones that will be accountable for the violations that are perhaps rooted in the Indian Act, with which they now have to contend with their membership. That's a problematic assumption, both from the standpoint of the jurisprudence and also from the standpoint of consultation. I consult in airports, too, but if this legislation were passed and there were improper consultations about it or embedded in it, they would become subject to court challenge at some point.

The higher, loftier principles that the courts are articulating, that are not part of Parliament's or this committee's necessary daily consciousness, have to be looked at, because of the evolving jurisprudence and the very fast rate at which the courts are informing how Parliament's behaviour is going to be measured up.

I'm in favour, myself, of doing the work properly before passing the act.

The Chair: Thank you.

We'll move on to Madam Crowder, please.

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

I want to thank the witnesses for coming and presenting a very coherent approach to how we might look at this legislation.

I just want to make a couple of comments.

First of all, one of my colleagues talked about pressure. I want to make it clear that the pressure is coming from the government for us to pass this.

What we've heard almost universally from the witnesses is yes, they support the repeal of section 67, as do New Democrats. We absolutely support the repeal of section 67—but after appropriate consultation. What we've heard quite strongly is that this legislation should not be passed prior to consultation. That's been quite clear.

There are a couple of points I wanted to pick up on. You mentioned Bill C-31, Mr. Slavik, and that's come up a number of times. People have been very concerned about Bill C-31, which reinstated women's status, but which in effect, with its second-generation opt-out clause—section 6.2—is going to lead to assimilation across this country. Many of the witnesses who appeared before us talked about the fact that the lack of appropriate consultation before the implementation of that bill has had unintended consequences in communities. The department itself has done an analysis on the impact of Bill C-31 on potential court cases that could come to the government, and they're saying they could ultimately end up with up to 250,000 cases. Now, that's the department's own analysis.

Could you tell me if there's any good reason why we would agree to go forward with this bill prior to consultation? I struggle to see why we would do it, knowing all the things we know. Is there any argument for going forward without consultation that would make sense, when we've got the time and the space to do consultation?

Is there any argument?

● (1205)

Prof. William Black: Obviously, as I said earlier, consultation is not only the way to deal with legal obligations but also to produce effective human rights legislation. At the same time, I think we do have to remind ourselves that there are some people connected with aboriginal communities who are deprived of rights against the government in these circumstances because section 67 protects the government from suits.

Ms. Jean Crowder: Mr. Black, what would happen, then, if we made an amendment to this piece of legislation that said section 67 is enacted to apply only to the government, put in a clause to say that we would do consultation with first nations communities, and then produced an amendment that would impact on first nations communities? Is that doable?

Prof. William Black: I'm wanting more thought to that.

My only worry is that you might, in some circumstances, be able to indirectly attack the powers of aboriginal governments by bringing an action against the government and attacking the section of the Indian Act that they were using for their bylaws, for example.

Ms. Louise Mandell: I haven't given much thought to that two-stage approach, but I like it in theory. I think it makes a lot of sense, because quite a few of the problems that manifest themselves as individual human rights complaints have their origins in the Indian Act. I was interested in the comment by Mr. Justice Muldoon in the Canada Human Rights Commission v. Department of Indian Affairs and Northern Development Canada, the INAC case in 1995; he said that if it were not for section 67 of the Human Rights Act, human rights tribunals would be obliged to tear apart the Indian Act in the name and spirit of equality of human rights in Canada. I mean, there are so many pieces of what band councils are left to administer that have their origin in the act.

The only problem that others may not have thought about is that the complaints are by individuals. It's an awkward moment when you've got individuals being able to take complaints. Perhaps it could be against the act itself.

I think the two-stage process has merit in the sense that we do know the problems in respect of the human rights complaints against Canada, but the real impact, which you're hearing about, has to do with the application of that to band councils.

Mr. Jerome Slavik: This is a “without prejudice” flyer.

It strikes me, as I followed the politics of this issue, that a lot of the drivers behind amending this act have to do with the implications of the Indian Act. In particular, I was looking at some of the other submissions. It seems to me that without getting into the politics of it too much, all parties have an interest in that. Having the act apply immediately to the federal government and removing the exemption of the Indian Act as it relates to the operation of the federal government from this protection would provoke the government to reconsider the status and membership provision of the act, just like the passage of the charter in 1982 provoked the government to reconsider the discriminatory clauses in paragraph 12(1)(b) of the Indian Act that then existed and then provoked an amendment to the Indian Act that we now know as Bill C-31.

That whole change, which was the last major change to the Indian Act, was provoked by the adoption of the charter by Parliament and the legislatures of the provinces. I can see the repeal of section 67 provoking a similar review of these provisions by Canada and the first nations, which in my mind is long overdue. As counsel for first nations—to be frank, we have an interest here—we're concerned about the impact of this on our clients. That's my knowledge. That's my experience. They understand broadly about human rights. People think it's gender inequality. I can tell you that many of our clients are led by women chiefs, women councillors, and women CEOs out there in the last 15 or 20 years and that you wouldn't have seen 20 years ago. I work for one organization that's almost entirely run by aboriginal women leaders.

Nevertheless, the impacts of how this may play out need to be cushioned. There needs to be time to accommodate to this, to reconcile this. There may be a need to make changes to avoid unnecessary complaints and necessary hardships and to think about, more importantly, how remedies to human rights complaints are going to play out in the communities

There has been very little thought given, in my mind, to how actual remedies to this legislation can play out. If someone is discriminated against and not getting a house where there are 20 applications for one house, and there's an act of discrimination, does that person get the house? I don't think so. I'm not too sure what the remedy is, but it's not getting the house. When the Human Rights Commission made an award against Canada for sexual discrimination in wage matters, Canada had to pony up over $1 billion. First nations don't have the resources to pony up money or other remedies that may be anticipated in some of these circumstances. That's another area that I think needs to be given a little thought.

To summarize, by all means, I think there's interest in removing the prohibition vis-à-vis the federal government, but I would really urge you to consider 24 to 36 months to do a thorough reconciliation consultation initiative with the first nations, information capacity-building. I think that could be a win-win.

● (1210)

The Chair: Thank you.

We now go over to the government side.

Mr. Bruinooge.

Mr. Rod Bruinooge (Winnipeg South, CPC): Thank you, Mr. Chair, and thank you to all of our witnesses today for your testimony.

I'll start with Ms. Mandell and some of your comments in relation to consultation. Perhaps I'll start by describing my own position, and I'm sure it won't be a surprise to anyone. I'm very supportive of extending the Canadian Human Rights Act to first nations people. I believe that human rights in Canada are something that should be available to all humans who are within the confines of our territory. That's how this act has been administered, and that's one of the reasons why so many people see Canada as the greatest country in the world.

In light of the fact that I'd like to see this bill passed, in looking at your comments, Ms. Mandell, in relation to evolving jurisprudence, in order to keep current with that evolving jurisprudence, do you believe that my position is in some way in conflict with that evolving jurisprudence because I want to pass the act today perhaps, or tomorrow, or within the next few weeks?

● (1215)

Ms. Louise Mandell: I think in the present act as drafted, bringing in the amendment—I believe it's six months to delay the effect and then a period of five years for some kind of review, without any more—is a problem in terms of the law. I'd have to say that I, like you, agree with the general intent of it, although I have to say, just in terms of the law, that the Supreme Court of Canada has never actually yet addressed what the obligations of consultation are in respect of consulting about legislation.

I really want to make that clear. The principles we've derived from Haida haven't been in that context, so I suppose there's always, as with every outstanding legal debate, the possibility that this might hold muster. But I believe that in light of the principles especially that I recently articulated, if that were to happen, this act certainly would stand the chance of a successful challenge, based on not having taken into account the proper principles that are being required of it. So I recommend caution in that respect.

Mr. Rod Bruinooge: What would then be an adequate amount of time to extend a period of transition? That's the challenge I see: getting communications from individuals within communities who would like to have the opportunity to appeal to the Canadian Human Rights Act; who wish they had had it 15 or 20 years ago, let alone tomorrow. That's the challenge I see. I see this balance as difficult to manage, because for many occasions, the groups we're talking to tend to be groups that perhaps see this as impeding their ability to administer resources, or what have you, within their communities.

On the other side of the situation, we have the individual who is saying yes, I'd like to have this opportunity to express how my rights have been violated. I would argue, though, that it's challenging for any court in the land to extend what you're saying—which would be overturning this repeal because of a shorter implementation period—because of the fact of the individuals who need the human rights extended to them versus the communities. I guess I can't imagine a judge in Canada overturning this repeal, should we proceed.

Perhaps you could talk a bit about...or Mr. Slavik wants to jump in.

Sure, feel free.

Mr. Jerome Slavik: Let me just say that I don't disagree about the extension of human rights to all without exception. That's an international covenant that we've signed. But Canada is a bit unique in the world. We are, I think, the only country that has constitutionalized collective rights of aboriginal people and put them in the Constitution. It's section 35 and the rights therein that in some way make Canada unique. Australia, New Zealand...I'm not aware of any other country in the world that has constitutionalized the aboriginal and treaty rights of their indigenous population.

It's from that charter right that the principle of reconciliation emerges. The extent you have is where those rights may "potentially adversely affect"—not even "actually" but "potentially adversely affect". We have a set of rights whose definition and status are evolving, and we have another piece of legislation that's moving through the system that may affect how first nations are entitled to carry out their collective rights, particularly vis-à-vis governments. This is an evolving area, and I can see it being an issue that an enterprising legal counsel and aboriginal communities might want the courts to decide: what the balance is between the collective and the individual rights.

There is a litigation risk here. How serious it is, you could ask the Department of Justice and others to assess. But I think the litigation risk would be substantially mitigated by the approach of an extensive transition process that attempted to reconcile and accommodate, inform, take into consideration first nations views about how this act is then to be implemented and administered.

I think you can essentially put it in a nutshell: the transition period may significantly minimize your litigation risk for this legislation.

● (1220)

The Chair: You have 20 seconds.

Mr. Rod Bruinooge: In relation to your comment, Mr. Slavik, I would comment that as you so correctly stated, the charter would in fact protect those collective rights. We believe fully that the Canadian Human Rights Commission will be very mindful of the charter in all their decision-making.

But we'll move on.

The Chair: Mr. Russell, for a five-minute round now.

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

Good afternoon to each of you.

I thought your presentations were very balanced and came with a certain sense of optimism that we could see our way through this. That's very important.

In my view, it was also very depoliticized, because this issue is becoming very politicized. People are trying to be painted as being for or against human rights.

I have a little notion. When the government tries to make aboriginal people the same, applying laws the same, without taking into account cultural or historical issues, or anything like that, I sort of get the sense that this is an assimilationist type of an approach.

But when it comes to the transition period, whether it's 6, 12, or 36 months, what difference does it make if we have a fundamentally flawed bill? So what if you have more transition time to implement a flawed bill? Fundamentally the argument here is to have a bill that meets the needs and desires that we're trying to articulate: the protection of human rights. The transition period, when it comes to this particular bill, is a moot point for me, because I believe the bill is fundamentally flawed in terms of its approach and process.

Mr. Brian Storseth (Westlock—St. Paul, CPC): So let's vote on it and see.

Mr. Todd Russell: I'm there, don't you worry. I'll be voting against this bill as it is, come hell or high water.

If we have a consultation period for 12 or 18 months and then at the end of it we introduce a bill that first nations and aboriginal communities can live with, would this not cut down on the time we would require for it to take effect, depending on how the consultation process was designed, while understanding that you can do a number of these things concurrently?

Can I get your comment on that?

Ms. Louise Mandell: I agree.

Prof. William Black: I don't have a solution for the committee. But it would be wonderful if the committee could come up with a solution that allowed for consultation but did not result in the same result as when section 67 came into effect, where 30 years from now, in 2037, we'll still be saying, well, we haven't quite done it yet.

So how do we achieve this in a way that allows for the consultation but somehow makes that consultation a priority over the next whatever it is—12, 24, or 36 months?

Mr. Todd Russell: Is there greater potential for human rights abuses in situations where we have challenging socio-economic conditions? Is that generally the view?

● (1225)

Mr. Jerome Slavik: There's a lot more political unhappiness in small communities that have elected leadership making allocation of scarce resources, whether it's a job, a house, or post-secondary funding. People are bound to feel aggrieved by what they perceive to be an unfair process, and this will offer them a formal complaints mechanism. To the extent that it's used, to the extent that it's abused, that's as yet unknown generally, you're right.

I want to come back to your other comment, if I may. My understanding is that the aboriginal organizations do support the repeal of this bill. Proceeding with the repeal of this bill in the manner that we've talked about here, which immediately repeals it vis-à-vis the Indian Act and the federal government, has a number of positive features for all sides of this debate. So for those who are adamantly pushing for that, I think there is merit in doing so because the issue of the status and membership provisions of the Indian Act need to be addressed. In fact, for a government that may not want to look at those, it would be hard going against this repeal.

The implications are that first nations are going to have to come to grips sooner or later with these human rights issues. I don't think they can continue to be excluded or exempted as this act contemplates. My simple point on the transition time is that while Louise makes a very admirable and legitimate and thoughtful point about doing it in a manner that promotes reconciliation and accommodation, more importantly, it's just the fairness of giving them the opportunity to build capacity and respond effectively. We need, in my view, to move ahead with that process. I know there are many first nations out there that do not think this should happen at all, but we live in a larger Canadian society where first nations have to also accommodate and reconcile.

The Chair: Mr. Albrecht, please.

Mr. Harold Albrecht (Kitchener—Conestoga, CPC): Thank you, Mr. Chair.

Thank you to each of the witnesses for appearing today.

I want to point out that there's been some comment that we're under a great deal of pressure to put this bill into force in its current form. I want to indicate that is not the case. All we're asking for, Mr. Chair, is to move ahead to clause-by-clause, at which time there could be amendments suggested and we could move ahead.

We also know that there have been many previous attempts to repeal section 67 under various bills by at least two different political parties. I think it's unfair to suggest that this is just the move of this government. In 1992, there was Bill C-108. In 2000, there was the independent review panel, and, incidentally, all groups that represent aboriginal women strongly supported that recommendation. In 2002, there was Bill C-7, and in 2005, Bill S-45. In October 2005, the Canadian Human Rights Commission, again, on the matter of rights, strongly recommended immediate repeal. Again, in 2006 the international community, the United Nations, condemned our record in Canada for our failure to repeal section 67.

In light of all of that previous discussion, I'm surprised by your comment that this item is not even on the radar screen of the people whom you've discussed this with. I'm wondering what the general perception would have been in the Canadian public in 1977 in terms of their radar screen prior to the actual implementation of the Canadian Human Rights Act. You may not be able to answer that, but it's a question I have. Is it fair to assume that this will not become clear on the radar screen until we actually get it passed and maybe have a reasonable time for implementation?

Mr. Jerome Slavik: If I could clarify that, what I meant was that I don't think most first nations understand that this amendment is proceeding through the House or what its implications or consequences are. If you ask the average Canadian on the street, you might get a similar response, and perhaps more so in isolated communities.

That doesn't necessarily speak to the merits or necessity of this legislation. What it does speak to is the need for a period of time to reconcile, accommodate, and adjust to this legislation. That's where I was going with that, sir.

● (1230)

Mr. Harold Albrecht: I think you made that point. In fact, if I understood you correctly, you encouraged us, as one option, to proceed with the amendment but to hold off on the implementation for a longer period of time, as opposed to doing all the consultation up front.

Mr. Jerome Slavik: Yes, the implementation, insofar as it addresses first nations, the implementation vis-à-vis the Indian Act and the federal government, can proceed. I don't have any objection to that proceeding right away.

Mr. Harold Albrecht: Another point that—

Ms. Louise Mandell: I just want to comment as well.

I think the efforts to amend the legislation, including the international engagement of human rights standards, in terms of the political radar among the aboriginal people, is largely keyed toward the colonial legacy of the Indian Act and the problems that creates. That's as opposed to the problems associated with the band councils' actions in implementing the Indian Act.

I really wanted to reinforce the question from the opposition, especially on the point about this two-tiered approach. I do think that if you went ahead and made challenges against the Canadian government and the legislation coming out of Canada a first priority, you would, I'm quite sure, capture a lot of the political sentiment in terms of Canada not living up to its own human rights standards and its legislation.

If I could, I'll just say one other thing quite quickly. I don't know how well it's been expressed, but I want to re-express the point that many of the problems associated with the band councils' implementation, which result in potential human rights violations on the ground, have their origin in the Indian Act. It's hard to unlock them. For example, taking the example of the Bill C-31 issue, you have the original 12(1)(b) becoming Bill C-31. Then, through Bill C-31, you have the severing of status and band membership and a lot of aboriginal people passing membership codes that are inclusive. And then you have the federal government's allocation of moneys to bands that cover only status Indians. So a band that includes in its membership non-status spouses and children has to deal with the scarcity of resources. The problem winnows itself back to the amendment in 12(1)(b) and the problems it creates.

Similarly, many of the human rights complaints we can expect to see derive from the Indian Act section itself. For example, I have just gone through the Indian Act and looked at where the rubber might hit the road. You might have, for example, some bands with property tax bylaws levelling property taxes on commercial and non-member residents but exempting resident members from paying property tax. That all has its origin in the Indian Act and is now possibly the subject of a challenge. Or in the context of wills and estates, it might be the Indian Act preventing heirs not entitled to live on reserve from inheriting rights to possession on reserve. The band council simply mirrors what the act tells them to do. The complaint would be against the band council, because they're the ones making the decision, but the origin of the problem is in the Indian Act.

Similarly, certain Indian Act exemptions for taxation and protection from seizure of personal property on reserve, again, only for people who can meet the requirement of being registered status Indians, signals the chances of there being an attack and raises human rights issues.

● (1235)

Mr. Harold Albrecht: Mr. Chair, since she answered some of the questions of the opposition, could I have an extra bit of time?

The Chair: No, you can't.

We're going to move to Mr. Lévesque or Mr. Lemay.

Go ahead, Mr. Lévesque.

[*Translation*]

Mr. Yvon Lévesque (Abitibi—Baie-James—Nunavik—Eeyou, BQ): Thank you for having come here to give us your explanations and your opinions. Let me tell you that you have used some words that reflect my concerns.

You have referred to an interpretation clause, a transition period, the need to consult the First Nations and the duty of the Crown relating to reconciliation. There is however a matter that keeps bothering me. I am not a lawyer but I wonder if we could repeal section 67 and include at the same time in the Bill a clause postponing its coming into force with specific conditions and obligations for the Crown?

If at the end those objectives were not met, would the repealing of section 67 become null and void?

We may want to rely on the good faith of the government — someone referred to that — after repealing section 67 and on the commitment of the First Nations not to take legal action on the basis of the Canadian Human Rights Act but that would remain voluntary.

Taking all that into account and considering also the fact that governments may change, since we've had minority governments... I would like to remind you of the May 31st, 2005 example when the government made the commitment to improve its cooperation with the First Nations and to discuss with them before developing any new policy affecting them. Has that been done with this initiative? Not at all. Absolutely not.

There was also the commitment made by the government in the fall of 2005 with the Kelowna Accord. Has that commitment been met? Absolutely not.

If we repeal section 67, can we expect that in the future, despite all the good faith of the present government, a future government would be as committed to implementing this provision?

I wonder if you are not in fact suggesting to us instead to amend the Indian Act, perhaps even on a piecemeal basis, until it meets in the objectives of the Canadian Human Rights Act?

[*English*]

Prof. William Black: I certainly don't disagree with amending the Indian Act. But my colleagues are much more expert on that.

What I would say is that even if there's all good faith on everybody's part, there's a possibility or the danger that consultation would not come up with an adequate solution within the period of time. That's why our panel recommended that in the legislation there be in a sense a fallback interpretation clause. We'd hope that we could spell that out, and that much more elaborate and specific provisions could come into effect as a result of the consultation. But if all of that failed, the result would be that we still had some interpretation clause protecting the collective rights of aboriginal peoples in the legislation so that the ultimate result was not just to repeal section 67 and put nothing else in place.

Mr. Jerome Slavik: I think for any government to start down the road of amending the Indian Act, and particularly some of the more problematic provisions of that, is a challenge I don't see being undertaken in the near future. I don't think the amendments to the Indian Act should be in lieu of repealing section 67, which has its own merits and integrity.

You asked about a transition time and whether this had been applied in any other circumstances. When the Indian Act was amended in 1985 in Bill C-31, which was really an amendment to the Indian Act, that was done three years after the charter. The department and Canada had time to make it. The first nations had another two years after that, at any time, to put in place their own membership codes and essentially oust the membership provisions, to a certain extent, of the Indian Act.

That's another example of where there were two periods of time in which first nations could take steps to accommodate federal legislation that affected the composition of their communities or the governance of their communities. That's why, at a minimum, we're urging an appropriate transition time here to allow first nations to, if I could say, accommodate and in some cases support this.

If we're leaving you the impression that first nations are opposed to human rights leadership, I don't want to give you that impression. That is not my clients' position.

● (1240)

The Chair: Thank you. I have to move on to finish this round.

We're on the government side. Mr. Storseth, please, for five minutes.

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

I want to thank you very much for coming forward with very well thought out presentations today.

Ms. Mandell, you talked about the consultation process and when it's most necessary to undergo this process. Would you not agree that the consultation should indeed take place prior, during, and after—throughout—the process?

Ms. Louise Mandell: It depends upon what it is you're consulting about. I don't disagree with the fact that you could develop some system that has a prior, during, and after, so it's definitely not to preclude that, but I did want to emphasize the prior only because the Supreme Court of Canada has emphasized the prior. This has come about in their discussion about when consultation should occur and on what issues, and they've stated in the context of the Haida case that it should occur at the strategic planning level.

The Supreme Court has said upstream of the actual impact, so that's the legal requirement. So I'd say you'd want to put most of your eggs in that basket, but that's not to say there wouldn't be issues upon which consultation would continue. For example, I see capacity being an issue where you're going to learn more as you do it, and that's going to give rise to different obligations. I can easily see an after consultation about that.

Mr. Brian Storseth: That would help us prevent some of Mr. Slavik's unanticipated/anticipated results.

In that case. then, would you consider the work that we are doing here as parliamentarians, as a standing committee of Parliament meeting with different organizations, groups, and individuals such as you as one piece of the consultative process?

Ms. Louise Mandell: It's like meeting at the airport in a way, in the sense that it hasn't really taken into account what the Supreme Court has said, and that is the consultation is with those who are affected by the decision when the Crown has knowledge it's making a decision that contemplates an interference. Because of the nature of this, that is, every first nation, rural, urban, is going to be affected differently.... Those that have human rights bylaws or traditional laws operating will be affected differently from those that don't; those that are wealthy will be affected differently from those that are administering poverty. So there is a broader need, in my opinion, for consultation of affected communities.

If the aboriginal organizations are going to be proxy for that, then the aboriginal communities need to know that so they can get their position to the organizations to talk to you.

Mr. Brian Storseth: Thank you.

I don't mean to be rude, but would you consider this a part of the consultative process?

Ms. Louise Mandell: I have no authority to be consulted on behalf of any first nation. I don't bring their views to you based on having been authorized by them to represent to you what their views are. So I'd say it's part of the process, but it doesn't take the place of real consultation as the courts have described it. It's not my rights that are affected; it's the communities rights that are affected.

Mr. Rod Bruinooge: Mr. Chair, I'm just going to jump in for a moment on Mr. Storseth's time.

Ms. Mandell, do you believe this duty to consult is incumbent upon the judiciary as well?

Ms. Louise Mandell: The judiciary interprets what the actions of government or government agents are, so I don't think the judiciary has the duty of consultation.

● (1245)

Mr. Rod Bruinooge: So, for instance, subsequent to Taku-Haida, the Supreme Court ruled in favour of, in particular, my group of aboriginal people. I'm Métis. The Supreme Court ruled that, according to the Powley case, hunting rights were going to be applicable to Métis people. This is subsequent to Taku-Haida. This decision by the Supreme Court affects other aboriginal groups, first nations in particular. Would it not then be incumbent upon the Supreme Court to engage in the type of consultation you're talking about?

Ms. Louise Mandell: The court will declare what the framework for consultation or rights determination is, but they leave the consultation or the implementation of that to government.

Mr. Rod Bruinooge: How can they make a decision like that? It impacts aboriginal people, yet it's subsequent to Taku-Haida.

Ms. Louise Mandell: It's the nature of our system.

Mr. Rod Bruinooge: I guess it is. It's the nature of our being elected here to represent Canadians.

Mr. Jerome Slavik: To put it bluntly, the courts, usually by the time it gets to that level, have heard the case three times, and first nations and other parties directly affected by those decisions have had extensive input into that decision-making.

Mr. Rod Bruinooge: That's much like the 30 years that we've been here talking about this, or at least MPs have been doing so.

Mr. Jerome Slavik: Yes, this has been a long time coming.

Mr. Rod Bruinooge: Yes, it has.

The Chair: We'll move on to Madam Crowder, please.

Ms. Jean Crowder: Thank you, Mr. Chair.

There are a couple of issues I want to address. First, I don't know if you said everything you wanted to say about consultation in the committee. One of the things we have heard from groups that have come before the committee is that in their view, this committee process is not considered consultation.

I come back to the point you made earlier about another nail in the coffin, regarding when you were speaking to an aboriginal leader in an airport. People are very concerned that people try to characterize this as consultation.

In my understanding of some of the court decisions, and certainly Wendy Grant-John did a great job in her recommendations around MRP, around what some of those elements of consultation might look like, given that the Auditor General has pointed out that the government has failed to develop a policy on consultation....

I don't know if you wanted to say something else about that consultation. Mr. Black, I know you didn't get a chance to jump in there.

Prof. William Black: The only thing I would say is that there has been some discussion about the consultation that was carried out by the Canadian Human Rights Act review panel. We certainly made attempts to talk to first nations organizations, but I think I should put that in context. Our panel was looking at the entire Canadian Human Rights Act. We were looking at whether social condition should be added, what is the situation with regard to urban people, and so on.

While we did consult for a year, I wouldn't want to leave the impression that our focus was entirely, or even primarily, on this particular issue.

Ms. Jean Crowder: A couple of times things have come up around capacity, both in terms of the first nations' capacity to respond to human rights complaints and that there is the remedy.

We know that the Assembly of First Nations and others have done an analysis of the 2% funding cap, which has been in place since 1996. The department also did an analysis on the implications of that 2% funding cap.

I wonder if you can comment on where that would leave first nations communities if they were found to.... You used housing as an example; other people talked about child care. But if you simply do not have the resources to deliver the services, where does that leave the first nations community?

Prof. William Black: I agree with everything that has been said by others about the need for resources. It would be sad if the result of your deliberations was just to say a different group of people didn't have houses, but the same number of people still didn't have houses.

Ms. Jean Crowder: I want to come back then to status of membership provisions. Mr. Slavik, when you talked about status of membership, were you talking about outside of Bill C-31? Could you expand on that?

Mr. Jerome Slavik: We just did some work. We think there are about 300 to 400 first nations that have their own membership codes. By their very purpose, these codes define who is a member and therefore entitled to certain rights, privileges, and benefits of being a member of that first nation. Also, by definition, it excludes others.

Right now these codes are exempt from human rights considerations. If this section is repealed, those first nations with membership codes would have to have their current codes reviewed, probably by legal counsel, to ensure that they're compliant with the Canadian Human Rights Act.

I can't tell you how many are or aren't, but that's just one example of a transitional initiative that would need to be undertaken. I can tell you that we did an extensive number of drafts of membership codes, and there are a lot of political, social, and fiscal factors that went into the development of those codes that would all have to be revisited.

Tax bylaws are another that would need to be reviewed, along with a whole range of policies and practices out there. It's not to say that they're in violation, but they would need to be checked.

● (1250)

The Chair: Thank you.

Mr. Epp, please.

Mr. Ken Epp (Edmonton—Sherwood Park, CPC): Thank you very much, Mr. Chairman.

I'm intrigued with this subject, and the presentations you've made have certainly given me a lot of really varying thoughts about how this should be handled.

The message I'm hearing from you is that the first nations leaders are supportive of repealing the section; that's generally what I'm hearing. And yet, Mr. Slavik, you mentioned that there was an individual who said “Another nail in our coffin”. I would think they would be supportive of this and would say, “Great, we're glad this is happening”.

Can you speculate for me, or did he tell you, why he characterized it in that way?

Mr. Jerome Slavik: I think it was the intrusive character of it. If you asked this individual “Are you in favour of human rights?”—this is quite a sophisticated guy—he would say yes. But what he sees is the unilateral imposition of the way it's occurring. If he had a chance to better understand why it's occurring and to prepare and accommodate to it and reconcile current practices to it, whether or not there are problems, I think his concerns would be greatly ameliorated.

This was just a kind of gut reaction, sir, and we all have our gut reactions to things that are perceived as being imposed on us, regardless of whether in fact they're not good for us—we're all married.

Mr. Ken Epp: So he's probably reacting to the lack of consultation that's being imposed on him. That's the conclusion I'm trying to reach here now, then.

You have all mentioned the importance of consultation. Again, I agree with this. We as members of Parliament consult with our constituents. We bring their ideas here as much as we can. Very often, our constituents have conflicting points of view on issues, and then we have a difficult choice: which side do we represent, and how do we vote? There comes a day when we have to vote either yes or no on these issues.

My next question is, what would be the actual form of a consultation that would satisfy the first nations people?

Ms. Louise Mandell: In terms of the first question you raised, I want to also point out that the Canadian Human Rights Act creates the two institutions, the commission and the Human Rights Tribunal. The whole act is keyed for the adjudication of individual breaches or individual wrongs that are being addressed in that forum.

On the "nail in the coffin" point, what I've heard expressed is, first of all, the institutional inappropriateness of the commission and the tribunal to address many of the issues of concern to aboriginal people in terms of how they would address their own human rights violations under their law, and in terms of these being processes that aren't married to, or even trying to conform to, the aboriginal way of doing things—process issues involving the tribunals and the way they work.

In addition, I think primarily people are also concerned about the preserving of their collective rights and about there being no mechanism at the moment inside the Human Rights Act's system for the collective rights to be recognized.

For example, I work for a first nation. They're a fishing community, and the band council is responsible for distributing fish that are caught under their communal licence. Now, their practice would be to distribute fish first to elders, so in times of shortage, younger people might get no fish, or not enough. In that context, who's to say, if a younger person brought a human rights violation complaint on the basis that they got none but it conflicted with the value and principles of the society, how it would be addressed? I think that's the "nail in the coffin" kind of point, from the perspective of people I've talked to.

But on the other side, concerning what would be sufficient, I believe we had a good go-around about it, and the two important things are identifying the constituency with whom consultation needs to occur—and I agree with Madam Crowder about this forum not really addressing the people who need to be addressed—and the second, getting the question right that we're asking of them. That's where I suggested that the better question is to ask what a coherent human rights regime is from the perspective of the collective rights at stake.

Also, if there's going to be Indian Act impact, what is the driving policy that needs to be examined by way of amendments to the Indian Act directly?

I think these are the kinds of questions that would stimulate answers that would create a regime everyone would feel very proud of.

● (1255)

The Chair: Mr. Black.

Prof. William Black: I would just quickly say that I think the difficult challenge for this committee is how to expand the human rights that are presently limited by section 67, but to do so in a way that doesn't infringe on other rights that could be considered human rights, that is to say the collective rights of aboriginal people.

I think everybody on all sides of this table agrees that human rights should be expanded, and your difficult challenge is how to make sure that it's a win-win situation rather than a win-lose.

The Chair: I'm going to finish up.

I just want to thank the witnesses.

Just as a comment from the chair, I'm duly elected in Okanagan-Shuswap, and I have five bands. I engage those five bands in dialogue to understand some of their needs and wishes that they want me to represent, as I do the non-aboriginal people in my constituency. So that has merit too, and I think we've marginalized some of the fact that we are duly elected and that we do represent, as members of Parliament, aboriginal people from our various communities.

Thank you very much. It's been a great presentation, a very informative presentation.

I adjourn the meeting.

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
