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Mr. Colin Mayes

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● (1110)

[*English*]

The Chair (Mr. Colin Mayes (Okanagan—Shuswap, CPC)): I'll open this Standing Committee on Aboriginal Affairs and Northern Development of Thursday, June 7, 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.

We have two panels today. The first witnesses are from the Department of Indian Affairs and Northern Development. With us today are Daniel Watson, senior assistant deputy minister, policy and strategic direction, and Daniel Ricard, director general, litigation management and resolution branch. From the Department of Justice we have Douglas Kropp, senior counsel, resolution strategy unit; Charles Pryce, senior counsel, aboriginal law and strategic policy; and Martin Reiher, senior counsel, operations and programs section.

Welcome, witnesses.

We will begin with a 10-minute presentation. Mr. Watson, are you going to do it? Then we'll move into our question period.

Thank you.

Mr. Daniel Watson (Senior Assistant Deputy Minister, Policy and Strategic Direction, Department of Indian Affairs and Northern Development): I've timed it, and I think I can keep it to a bit less than 10 minutes.

My colleague, Monsieur Ricard, has been unavoidably detained, but he should be here very shortly.

[*Translation*]

Thank you, Mr. Chairman.

It is a pleasure to be here once again to discuss Bill C-44. Today, I would like to comment on some of the testimony you have heard, and then my colleagues and I would be pleased to answer your questions.

As you are fully aware, Bill C-44 addresses an important principle. Simply put, this Bill will ensure all Canadians share in the right to be free from discrimination under the *Canadian Human Rights Act*. This Bill responds to repeated calls for repeal of section 67 and would remove a discriminatory provision which was originally intended as a temporary measure.

Let us talk about the difficult matter of balance. Mr. Chairman, your committee will soon have the extremely important work of determining how to deal with clause-by-clause study of Bill C-44, a task that will no doubt be informed by the vast testimony provided.

Witnesses have addressed the wide range of issues and offered many different perspectives. I think it would be fair to say that there are many areas in which testimony provided has not pointed to a clear consensus. On some issues, greater clarity may be useful to assist you in your deliberations.

[*English*]

In particular, we could highlight the discussions on the question of whether or not there is a need for an interpretive or a non-derogation clause. This is clearly a key issue for which there is no simple or consensus-based solution and around which there are many different conceptions.

Some witnesses have called for a non-derogation clause. Others have proposed interpretive clauses. Still others have proposed both or have used the terms interchangeably. Some witnesses have suggested that a provision be included in the Canadian Human Rights Act, while others, most notably the Canadian Human Rights Commission, have proposed that guidelines be developed outside the act, in concert with aboriginal communities.

It is important to distinguish between these two kinds of provisions. A non-derogation clause is a provision that sets out the relationship between a statute and the aboriginal and treaty rights protected by section 35 of the Constitution Act, 1982. The CHRA, like all other statutes, is automatically subject to the operation of section 35.

As the commission indicated in its report on the repeal of section 67, a non-derogation clause in the CHRA referring to section 35 of the Constitution would be redundant. In addition, such a clause may be problematic, as courts may treat the provision as giving additional protection to aboriginal and treaty rights beyond that provided by section 35.

In contrast to a non-derogation clause, an interpretive provision is a substantive clause that directs officials or tribunals to apply or interpret the statute in a particular way. In the context of the CHRA, in complaints against first nations it could be a provision that ensures that discrimination and defences under the CHRA are interpreted in a way that respects the collective and cultural interests of the first nation.

There are differing views about whether such a provision should be inside or outside of the CHRA and whether it should be a statement of principle or a substantive provision, and there have been various formulations proposed with differing effects. We have seen from experience that in an attempt to reach some consensus, interpretive clauses inevitably end up with language that is general and rather vague. The job of determining the precise meaning to be given to an interpretive clause will therefore fall to the tribunal, resulting in litigation to ultimately determine the issue on a case-by-case basis.

In our view, for the reasons I've just set out, including a statutory non-derogation or interpretive clause may result in legal challenges with uncertain or unintended consequences, including a possible weakening of the protection that the repeal of section 67 would bring.

Moreover, we don't believe a non-derogation clause is required. Rather than including a statutory interpretive provision, the commission could work with first nations and other aboriginal communities to develop appropriate guidelines, regulations, or policies to ensure that the CHRA is applied in a manner that is consistent and sensitive to the particular needs of those communities.

The commission's aboriginal employment policy is a key example of how the CHRC has already exercised its authority to address the needs of aboriginal people.

● (1115)

[*Translation*]

The other topic I would like to comment on today is the preparation for and impact of repeal. Many concerns have been put forth to this committee. It is certainly not the Minister's or the department's objective to further burden the First Nations as a result of repealing section 67.

The application of the Canadian Human Rights Act to federal programs and to First Nations is not entirely new. As Professor Chartrand pointed out in his testimony, the Commission and the courts have interpreted section 67 narrowly. Many activities that take place on reserves or are administered by the Department are already subject to the Act. So, while the repeal of section 67 is extremely important, we should not overstate the potential impacts.

Chief Commissioner Lynch testified that the Commission currently handles over 40 cases per year and Professor Chartrand concluded that the impacts would be “moderate” following repeal. We do not anticipate a huge influx of complaints. But we all knowledge that it is not possible to accurately predict the number of individual human rights complaints that would be directed to band councils, as these would be fact-specific, driven by whether an individual chooses to lodge a complaint if, for example, they feel that they have unjustifiably been denied a job or service.

[*English*]

Safeguards have been provided to give first nations time to adjust and to help them prepare, that is, there will be the six-month delay of the coming into force of the repeal and guidance from the commission.

As you are aware, the commission's funding is being adjusted to support its extended responsibilities following the repeal of section 67. It has established a national aboriginal program and is committed to the introduction of human rights redress mechanisms in a manner consistent with the diverse cultures and modes of decision-making of first nations in Canada.

You may wish to question commission representatives further on this matter during their appearance today and to also discuss with them the work they plan to undertake under their program. I'm certain that their testimony will go a long way towards alleviating some of the fears expressed by first nation groups and individuals that they will be alone in shouldering the impact of repeal.

Bill C-44 also includes a means to address unintended consequences, should they result, by way of clause 2 of the bill. This mandatory review of the effects of the repeal must occur within five years but could occur earlier if the designated parliamentary committee so chooses. The committee could also request a comprehensive response from the government on its findings.

Your committee has heard various views on the length of the transition period. Although six months has been viewed by many as insufficient, I would suggest that it is an adequate amount of time for first nations to begin to prepare for full implementation and for the commission to work with communities. And of course work with the first nations does not end after the transition period. Rather, work will be ongoing as the effect of the repeal becomes more clear and as we gain experience. On this and other issues, Minister Prentice welcomes the recommendations the committee will reach after hearing such a broad scope of witnesses.

[*Translation*]

In closing, Bill C-44 committee hearings have provided witnesses with an opportunity to express their concerns about the need to ensure Aboriginal rights, traditions and cultures are protected. This testimony has been passionate at times. I would like to acknowledge the concerns raised. I would also note that with the exception of two witnesses, all witnesses have testified that they support the principle of repealing section 67, further demonstrating the overwhelming desire to eliminate this exemption. I would respectfully suggest any considered changes to Bill C-44 need to be assessed against this important principle and the urgency of taking action.

Once again, Mr. Chairman and members of the committee, thank you for your invitation to reappear before you today. My colleagues and I are prepared to answer your questions.

● (1120)

[*English*]

The Chair: Thank you, Mr. Watson.

Mr. Pryce, are you going to do a presentation? No. Okay. Thank you very much.

We'll move into our seven-minute round, and we'll start with the opposition Liberals.

Go ahead, Madam Neville.

Hon. Anita Neville (Winnipeg South Centre, Lib.): Thank you very much, and thank you again to all of you for being here today and to those of you who have returned. Your presentation raises more questions, I fear, than it provides answers—at least to me it does.

You note at the end, Mr. Watson, that with the exception of two witnesses, all witnesses have indicated that they support the intent of Bill C-44. You did not note the many, many concerns they had, whether with substance or process, which they expressed. I think their expressions of intent have very significant qualifications with them, and I think that has to be acknowledged.

I don't know where to begin. Let's talk about the interpretive clause to begin with.

What I'm hearing is trust the government, trust the Human Rights Commission. You know the Human Rights Commissioner is coming before us to present an option of an interpretive principle as opposed to an interpretive clause. Can you comment a little further on the whole issue of an interpretive clause? Then I have many other questions.

Mr. Daniel Watson: If I could spend a couple of seconds on the first part of your question, absolutely we have heard many concerns about the transition period, about resources, about a whole host of other issues, and I'm certainly not trying to suggest that we haven't heard that wasn't there.

On the interpretive clause, certainly we believe there is the possibility under the act as it exists today, as has been done in a number of areas of employment-related matters, to be very sensitive to the balance of issues that would need to be treated in dealing with complaints in an aboriginal context. We believe there is some history of that, and we believe it is already possible under the act.

My colleagues from the Department of Justice have done some more analysis on this, and it might be helpful to hear their thoughts on it.

Hon. Anita Neville: It would be, please.

Mr. Douglas Kropp (Senior Counsel, Resolution Strategy Unit, Department of Justice): Thank you.

If I understand the part of your question referring to the commission's suggestion of having a statement of principle with regard to adding an interpretive clause or interpretive language, we have some concerns that that would itself lead to further complexity, vagueness, and confusion and would itself need to be interpreted, and it would open the doors to further litigation and challenges down the road, so it wouldn't perhaps achieve its objective.

Hon. Anita Neville: You're talking about the principle, not the clause.

Mr. Douglas Kropp: Correct. I thought your question was about it, yes.

Hon. Anita Neville: Okay. That's important to know. Thank you.

I'm also struck by your comments—and we've had so many discussions on the impact of the implementation of Bill C-44 and the repeal—that you don't think it's going to be significant. What we are struck by, or what I am struck by, is the lack of any kind of impact analysis. You haven't been able to take some community as a model and try to do some analysis of what the impact would be. We've heard from some delegations that have come before the committee that the impact is going to be far-reaching, that they don't have either the capacity or the resources to deal with it, and that there's no attention to enhancing capacity or resources. So I'd like a little bit more comment from you on the impact, because the views we've heard have been widely divergent.

● (1125)

Mr. Daniel Watson: Absolutely. Obviously we've heard the same comments out there.

I think it's useful to divide, maybe, the concerns into two categories, as I've heard them. There are a number of very real and important questions about how you deal with a complaint if it arises. I think it's fair to say that the first time somebody thinks about how they would deal with this, there are a lot of unknowns.

We've been working closely with the Canadian Human Rights Commission, and I know the Canadian Human Rights Commission is planning to work closely with communities so that people understand the process once it comes into play. That's been one set of issues.

The second set of concerns, as I look at the body of them out there, relates to the substantive impact, that is to say, what would it do on a program or service in our community?

Certainly we have looked at those things—not on a community level, but we've looked at them on a broad level. When I was here last time, one of the members spoke about a risk management framework, and we certainly have a risk management framework in the department. We look at programs as a whole, and certainly as we look at those things, we can say we know there are some areas where people are more likely to launch complaints in than in others.

I think it would be expected if those who saw a difference in levels of funding for a particular program, for example, against some comparator they had seen...they may well want to make that a complaint. The complaints themselves are fact-specific, are circumstance-specific, so we can't tell exactly what complaints might eventually be made.

Hon. Anita Neville: Have you done an analysis of...?

Do I have time, Mr. Chair?

The Chair: No, you don't.

Hon. Anita Neville: I hope I get another round.

Thank you.

The Chair: I'll move on to Mr. Lemay, please.

[*Translation*]

Mr. Marc Lemay (Abitibi—Témiscamingue, BQ): Welcome and thank you for being here. This will be fun because I have quite a few lawyers in front of me.

My question is for Mr. Watson or someone from the department. According to you, how many First Nations does the Assembly of First Nations represent?

Mr. Daniel Watson: If I remember correctly, they have over 600 members.

Mr. Marc Lemay: Have you read the report the Assembly tabled on March 29th before the committee? I suppose you have.

Mr. Daniel Watson: Yes but I do not have it in front of me.

Mr. Marc Lemay: On behalf of the 600 members, I noted that there does not seem to be any trust between the department and the Assembly of First Nations. I do not know if you have noticed the same thing but this is what I have concluded after having heard all the witnesses.

There is a matter on which I would very much like to hear you and I will put the question to you. All the witnesses from the First Nations, men and women — because some female chiefs have also appeared before us — talked about a lack of consultation. I suppose that there is around this table someone who has read the Corbiere and Haïda decisions of the Supreme Court.

How would you define consultation in the context of Bill C-44? Have there been consultations or not?

Mr. Daniel Watson: I will perhaps talk about one aspect of this issue and then I will ask my colleagues from Justice to provide more details.

First of all, as you all know, this is not a new initiative since it has been talked about for 30 years and has been studied in several reports. So, this has been part of the public debate for a very long time.

I will ask my colleagues from the Department of Justice to talk more specifically about the consultations, in particular in relation with clause 35.

● (1130)

[*English*]

Mr. Charles Pryce (Senior Counsel, Aboriginal Law and Strategic Policy, Department of Justice): Thank you.

Many of the issues have been about whether there's a legal duty to consult and whether it has been fulfilled in this context. I was particularly interested in the testimony, I think it was Tuesday this week, by a number of lawyers, and I think there was unanimity. But Louise Mandell indicated that it's not clear whether there's a duty to consult in the context of the development of legislation. I think the Minister of Indian Affairs said the same thing in his testimony much earlier.

[*Translation*]

Mr. Marc Lemay: One moment, please.

I am a lawyer, you are a lawyer. I have asked you a direct question. I am quite sure that you have read the Corbiere and Haïda decisions of the Supreme Court. So, do you believe that the government has the duty to consult in accordance with the rules of the Supreme Court, well before the implementation of Bill C-44? My question is clear.

[*English*]

Mr. Charles Pryce: The answer, unfortunately, is that we don't know. The Supreme Court hasn't dealt with that issue directly. What it's dealt with in cases like Haida, Taku, and Mikisew Cree are government decisions pursuant to legislation dealing with resource management issues, so whether it would apply to the development of legislation and the legislative process and whether it would apply to legislation that deals, as Bill C-44 does, with human rights issues is unclear. There's no clear legal answer.

[*Translation*]

Mr. Marc Lemay: No. I like lawyers because I am one of them.

My question is aimed at knowing the position of the Department of Justice, which you represent on this issue, in relation to the duty to consult. Do you have the obligation to consult, yes or no? It's clear.

The advice you would have to give your minister, and which would of course influence the minister of Indian and Northern Affairs, would be, yes, we have the obligation to consult because of the Corbiere decision or, no, we do not have the obligation to consult and we can pass the legislation. That is the question you would have to answer. You cannot say that you would ask the Supreme Court of Canada.

[*English*]

Mr. Charles Pryce: I'm sorry to be repetitive, but it's not clear. Other lawyers have said the same thing. Again, struck by the testimony on Tuesday, Jerome Slavik indicated that it's a matter of risk management. Whether or not there is a clear duty to consult, consultation as a matter of risk management or as a matter of policy to help develop good and effective legislation makes a lot of sense.

What would happen if it's more policy-based consultation than legally based consultation is that there's more flexibility. A lot of the questions that get raised about whether the hearings before this committee meet the duty to consult and whether it is necessary to consult with all first nations directly become less important if you look at consultation more broadly as simply a way to develop good and effective legislation.

[*Translation*]

Mr. Marc Lemay: Is my time up? *Gracias*. I will come back for the next round.

[*English*]

The Chair: I think the answer was that it hasn't been established yet.

Madam Crowder is next.

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

I want to thank the witnesses.

Of course, I'm going to preface my statement by saying that I think it's incumbent upon the Crown to consult, then legislate, and then look at a transition period.

I am not a lawyer, but my understanding from Ms. Mandell's testimony the other day was that she actually talked about the existence of aboriginal right or title, so there is a question around aboriginal right, and many would argue that this particular piece of legislation has the potential to infringe on aboriginal rights.

I have two questions around that. Again, I'm not a lawyer; I'm sure you know this legislation far better than I do, but my understanding is that there's actually an ability for the government to put a question to the Supreme Court about whether or not it has a duty to consult—I think it's section 55 of some piece of legislation—so there's that question about why in this particular case, in which it seems there's confusion about whether there's a duty to consult, we would not put that question to the Supreme Court for clarification before developing legislation.

Second, it seems there is some jurisdictional question here. Are you in effect saying that first nations do not have jurisdiction over human rights and therefore the government must step in?

● (1135)

Mr. Daniel Watson: Perhaps I can touch on that, in the first instance.

I think it is fair to say, in terms of the approach here and the urgency that the minister has described about wanting to make sure the ability to discriminate is removed—

Ms. Jean Crowder: Under the Indian Act; let's put that in there.

Mr. Daniel Watson: I'm sorry, under the Indian Act, yes.

Ms. Jean Crowder: Yes, thank you.

Mr. Daniel Watson: To deal with that situation in as timely a way as possible probably is inconsistent with the length of time that any number of options and accords might take. If you were to go down the route of asking the Supreme Court on this, that is a very extended period of time.

Ms. Jean Crowder: My understanding of this, and again I'm not a lawyer, is that simply asking the Supreme Court for an opinion on whether there is a duty to consult is not as lengthy a process as if we were in full litigation.

Mr. Daniel Watson: It would probably be quicker than if you started and a trial went through all the different levels; there is no doubt about that. But it can also be a very lengthy process.

Ms. Jean Crowder: In your own testimony you indicated that there is a great deal of confusion around whether there is agreement. If there is that much confusion, it would seem to me that we would perhaps pre-empt extensive litigation down the road by sorting out that duty to consult, because I would argue that many bands, as soon as their first human rights complaint is filed, will file a case against the fact that the government failed in its duty to consult and will let that play out through the court system, which will then stall all other activity. That is my understanding. Am I right?

● (1140)

Mr. Daniel Watson: There are a couple things on that.

As my colleague here has said, it isn't our reading of the law from the Supreme Court yet that there is a duty to consult in legislative development clearly established at this point in time.

If we look at all of the different areas where there would be significantly different views about whether or not a particular piece of federal legislation has an impact on aboriginal rights—I think, for example, of questions around the Natural Resource Transfer Agreement of the 1930s, where there is a significant question, which many first nations have raised, about whether or not it in fact infringed on any section 35-protected rights—we could be moving in a direction with any number of pieces of legislation we try to work with whereby we're consistently going to the Supreme Court, time and time again, for each and every piece of legislation.

The risk management technique we have is to do our assessment whether or not we think there is a duty to consult legally. In a whole bunch of cases we consult, as my colleague has pointed out, not necessarily because we believe there is a legal duty to consult, but because in fact for good policy reasons it makes sense. I think Mr. Slavik's testimony the other day about risk management is a very good description of that.

Ms. Jean Crowder: Have you done the risk management around the duty to consult on this particular piece of legislation?

Mr. Daniel Watson: Our view on this, I guess, is twofold. The Supreme Court has not established a clear direction that there needs to be consultation on legislative development, and the Supreme Court has been very clear on some other aspects of requirements to consult. But in addition to that, we believe it's important for us, for public policy reasons, to consult and engage.

We look at this against the backdrop of all the work that has been done over the last 30 years. It is that broad range of things that we take into consideration, including the testimony that has been heard at this committee. The minister and the department are obviously very interested to hear what the conclusions are and have indicated an openness to considering recommendations in a number of areas.

The Chair: You have less than a minute, Ms. Crowder.

Ms. Jean Crowder: Concerning the record on duty to consult, it appears to me that the government has in most serious cases only undertaken its duty to consult when it has been pushed into it by the Supreme Court.

I would argue that this is an opportunity to actually do the appropriate consultation in advance of the legislation, to pre-empt unintended consequences like those we've heard of many times about Bill C-31.

I know the department itself has done an analysis on Bill C-31 and the potential impacts and is saying that there could be up to 250,000 cases that could come forward.

In light of previous circumstances where that duty to consult was not undertaken and the consequences we are now seeing as a result of that legislation, I wonder why the department wouldn't encourage the minister to undertake that duty to consult.

Mr. Daniel Watson: And, again, I think it is the full range of activities that are under way that inform that decision-making. Certainly you're quite right in pointing out that the Supreme Court is making clearer and clearer what the rules in this area are. I think it's helpful to all parties to understand when it's required, when it may not be required, when we move into a policy-based consultation as opposed to a legally required consultation. But certainly we recognize both of them as being very important, and we recognize the importance of the parliamentary process of hearing from affected parties and interested parties and take great note of what you found out in this process.

The Chair: Thank you.

Over to the government side. Mr. Storseth.

Mr. Brian Storseth (Westlock—St. Paul, CPC): Thank you, very much, Mr. Chair. I want to thank the witnesses for taking the time to come forward today.

One of the things I was happy to hear from some our witnesses in their responses was that the Government of Canada will continue to work with our first nations communities and leadership throughout this process, not only in the consultation period prior to, but during and after, helping solve any of the unintended consequences that may follow out of this. I was happy to hear that from Mr. Watson.

I think it's important to set the record straight on some of these facts that are being addressed today. I mention the fact that the operative clause of this legislation is nine words long, and perhaps that's why the opposition is so desperate to try to avoid getting to clause-by-clause before the summer break.

One of the concerns I have coming out of Mr. Slavik's testimony, which I heard on Tuesday, was that he felt that the repeal of section 67 was very important. He feels that we need to move forward on it, but he did have two concerns. One was on the transition period, increasing the transition period to a longer time, such as perhaps 18 months, and the other was the potential need for more resources, and of course nobody can assume what resources we're going to need until we actually get into the process.

What would your thoughts be on extending this transition period and the additional resources, and is this not a better solution than shelving this for the summer?

Mr. Daniel Watson: In terms of the working together, if I can touch on that part first, yes, we're very committed to working with the CHRC where appropriate and working with first nations to understand the impacts. We understand very clearly that there are some legitimate questions out there on the part of first nations about how this would work. Any responsible government, as first nations are, wants to make sure they know how this will work and how they will be able to deal with it, and we want to work with them to make sure that happens.

On the transition period, the amount of time that's currently in there, which is six months, is a timeframe the minister has expressed as being adequate in his mind to allow for this to come into force. As I said today, that's a beginning, not necessarily an end, but the minister has also indicated that he's prepared to take advice on that from the committee as well in terms of whether or not that is precisely the amount of time that makes the most sense. Clearly, I don't think there have been any witnesses who have come forward and suggested that they think six months was the right one, so, again, he's open to recommendation on that front.

On the resource side of things, there are a bunch of open questions about exactly what this might require, what this might take, what impact this might have. We are instructed, not absolutely, but we find useful the information we do have that today there are some 40 cases a year involving first nations. It's not 400; it's not 4,000. That's not at all to say that it wouldn't change from this number. We fully anticipate that it would, but when we look at the commission's strong ability in a number of cases to work very closely with communities and with employers elsewhere to make sure that discrimination is avoided in the first instance, I think this has been one of the great successes of the commission in comparison to a number of places around the world. They actually work with people to make sure they understand the law and how to avoid being in a situation where there's a complaint in the first place.

Given all those types of things, it's not absolutely clear today what level of resources would be required, but the minister has again indicated that he would be happy to receive recommendations on that front. Certainly we would want to look at that over time. I cannot imagine any review that would take place under this act that wouldn't get into that set of questions in a fairly detailed way, and it would certainly be something that would come up there and need to be addressed. And that's in the second point of dealing with it, because you would have to deal with it in the first instance too.

● (1145)

Mr. Brian Storseth: Indeed, I have to agree with you. Any time the minister has been gracious enough to come forward and talk to us on this issue, he has always shown he is willing to work in cooperation with first nations communities. The witnesses who come forward have suggested they are more than willing to work with the Government of Canada on these issues.

It's unfortunate that we have members of the opposition saying that come hell or high water they're voting against this.

Hon. Anita Neville: On a point of order, Mr. Chairman, I'm sorry, but no member of the opposition has said come hell or high water we're voting against this. This is an important piece of legislation that has to be dealt with thoroughly; the implications are far reaching.

I very much resent that kind of comment.

The Chair: The chair takes note.

Please refer to the act and direct your questions to the witnesses in reference to the act, rather than the position of any other party.

Mr. Brian Storseth: Thank you very much, Mr. Chair. I would be more than happy to do so.

Mr. Chair, is the point of order going to take up my time?

The Chair: No, just carry on.

Mr. Brian Storseth: I'll be more than happy to show the blues from the last committee meeting to my honourable colleague.

I guess the question I have, or my second question, is whether the goal of this legislation is to provide the same basic human rights to first nations people as other Canadians have and enjoy.

I fear that the interpretive provision and repeal of section 67 of the Canadian Human Rights Act could diminish the protective effects of that section of the act. Could you give me some more details on this and your opinion on whether there is the potential for this to happen?

Mr. Daniel Watson: My colleagues from the Department of Justice have given a fair bit of thought to this, and I would turn to one of them.

Mr. Douglas Kropp: Thank you for the question.

It is indeed a concern of ours as well that an interpretive clause could...as I said earlier, because it will be open to interpretation and to challenges and it is not clear how it will be interpreted and how the balancing it suggests between the individual and the collective interests will play out. The rest of Canadians to whom the CHRA applies do not have a similar balancing clause, so there is a concern that you would have, for instance, the development of dual systems, basically, or two systems, which could weaken the individual rights of first nations individuals, who might not then have the same protections that other Canadians enjoy.

One particular area of concern would be aboriginal women under the act—unless there were something specific to protect their rights in that balancing.

● (1150)

The Chair: We will move on to the five-minute round, please.

Madam Karetak-Lindell.

Ms. Nancy Karetak-Lindell (Nunavut, Lib.): Thank you.

I want to reiterate that on page 9 of your presentation there seems to be a section missing. When you say that all witnesses testified that they support the principle, many of them said, “but not Bill C-44”. I think that's very critical to the discussion, and also to answer what Mr. Storseth was insinuating, that we're stalling because we don't want to give rights to people who live on reserve and are under the Indian Act. I think that is very misrepresentative.

You're asking people to trust a government that with those nine words says the impact will be minimal and that there will be new resources to deal with these complaints. We've already heard from many chiefs that they don't have enough resources to offer the very benefits that people across the way are saying they're entitled to. Already they don't have enough money to give proper housing. They don't have enough money to give education to all the people who are applying. They don't have money to give proper health care.

These people are supposed to trust a government that says there will be resources to be able to deliver those very services that they will most likely receive complaints about for not receiving, while at the United Nations, Canada is one of the two countries that is not supporting the declaration for the rights of indigenous people. They are supposed to trust a government that on the one hand is fighting to get Bill C-44 through and on the international level is fighting against the declaration for the rights of indigenous people.

These people are supposed to trust a government that is still calling itself “new” after 16 months. They are indicating, “Give us time to learn to run a country. Give us time to learn to work on a new relationship with people.” I feel a government should not have to be legislated to be respectful to people who are going to be impacted by legislation, and they should not have to be legislated to form a good working relationship with people.

I'm really puzzled as to how people should trust the good word of the government without an interpretive clause, without a non-derogation clause, and without legislation stating there will be resources and capacity-building. They're supposed to take the words—as I say, nine words in a bill—and assume that all good trust is going to come after that. It's very hard for me to believe that.

Thank you.

Mr. Daniel Watson: Thank you.

I've worked with enough different first nations, Métis, and Inuit groups across the country to know there is nothing that I, or I suspect any other government official, could say that would create that trust.

What I can say is that the approach is designed with a number of different pieces. I don't expect that simply because somebody has outlined a path here that people will say we automatically lose what has led to the lack of trust we see in many instances across the country.

In this area I would say we are taking a known quantity in the CHRA and applying it more broadly than it has been applied before. It is not absolutely new in the context it's going into, but there are new parts of it. There is no doubt about that.

We are working very hard—and the CHRC is prepared to work very hard—with communities to understand how to deal with the impact. Again, it's not to focus simply on how you deal with complaints, but how to avoid complaints in the first instance.

The next part is that there would be—

● (1155)

Ms. Nancy Karetak-Lindell: I have just one question. Why wouldn't you do that now?

The Chair: Would you just allow Mr. Watson to finish speaking?

Ms. Nancy Karetak-Lindell: I'm just asking why they wouldn't do that now for Bill C-44.

The Chair: I realize that, but we're already—

Ms. Nancy Karetak-Lindell: Such as building capacity so that they don't—

The Chair: Let Mr. Watson answer, please.

Mr. Daniel Watson: Certainly, we're prepared to do that. We've had many discussions with a number of different organizations about this area and how to avoid complaints. Again, it's a discussion that we certainly need to have a lot more of. We're prepared to have that. We've worked it so that there will be an increase in funding to the CHRC to allow them to do that type of work as well.

Again, I'm not under any illusion that there's anything that I or, I suspect, anybody else in government can say that would allow that issue of trust to melt away. I guess what we can offer is a staged approach by which we have some background, we have some experience, and we can demonstrate that we're prepared to go down those routes. The test will be to make good on it.

The Chair: Thank you.

The chair would like to ask a question, and I'd like to direct it to Mr. Pryce.

Does the duty to consult, as defined by the Supreme Court, refer to an issue, or is it site-specific in contrast to the duty of an elected body of the Government of Canada to pass laws for all Canadians, all citizens? Would you say that this particular act is more to do with the duty of an elected body rather than a site-specific issue?

Mr. Charles Pryce: Thank you, Mr. Chair.

Again, to sound a little indecisive, in the Supreme Court case of Haida, there was definitely a very fact- and site-specific claim to aboriginal rights over title, dealing with a specific first nation, the Haida Nation or the Taku Tlingit First Nation. This current bill, Bill C-44, is a very different animal, if you can put it that way, in what the legislation is intended to do. It has broad impact across every first nation.

You mentioned fact- and site-specific, but that is how the jurisprudence on aboriginal treaty rights has evolved or exists. Different groups have different rights, so as far as how exactly this legislation will impact on particular first nations goes, it will vary. It is a very different animal.

The Supreme Court has not addressed the issue, first, of whether the duty to consult applies to the passage of legislation and, even if it does, whether it's engaged in this particular kind of legislation, which is about amending the Human Rights Act.

There would certainly be some difficulties or challenges if the court wanted to go down the path of finding the duty to consult in the legislative process. You know, there are well-established traditions of parliamentary supremacy, and the courts generally get involved once legislation is passed rather than during the passage of legislation. So it would require some deep analysis or thinking by the Supreme Court if they were to move in the direction of saying, in this particular context, that there is a duty to consult.

● (1200)

The Chair: You've just said there's a good argument for what I've just said.

I'm going to turn it over to Mr. Bruinooge.

Mr. Rod Bruinooge (Winnipeg South, CPC): Well, perhaps I'll just follow up on the chair's question, though I'd first like to point out that the Canadian Human Rights Commission is an independent body that I'm sure will achieve a very good balance in delivering human rights to first nations people. I'm looking forward to seeing that happen.

Just following up on the concept of the duty to consult, in relation to Taku-Haida, you mentioned that there wasn't any deep analysis done at this point as to how it would relate, perhaps, to subsequent decisions or other matters maybe outside the realm of resources.

I had an argument that I was testing a little at the previous meeting, and perhaps I'll put it before you as well. Subsequent to Taku-Haida, the Supreme Court ruled to extend rights to the Métis people, like me, in regard to hunting and fishing. This, of course, impacts first nations people as these are finite resources we're talking about. They themselves didn't consult, so how would that be interpreted in relation to Taku-Haida?

Mr. Charles Pryce: Thank you for the question.

I think I was here at that previous meeting, and I can't remember exactly the response, but from a legal perspective the courts adjudicate on rights and they interpret the Constitution and the common law. So it's difficult to conceive I think conceptually that the court would have to consult with other people who might be affected by a particular decision.

What tends to happen, certainly by the time a case gets to the Supreme Court of Canada, is that other people who might be affected are allied to or they seek to intervene in the particular case. So in that way the judges do actually hear the views of other people who might be for or against the particular proposition.

Mr. Rod Bruinooge: That's what we're doing here to some extent. We're taking the views of multiple—

Mr. Charles Pryce: Yes. I mean, there is a process in place that allows other views to be heard.

Mr. Rod Bruinooge: One could argue that this is consultation similar to what occurs at the Supreme Court, and we can of course proceed with this bill.

The Chair: I'll have to cut you off with the time, unfortunately.

Members of the committee, we have a second panel, and I know we started late. What is the pleasure? Do you want to continue or move on to the second panel?

Move on to the second panel? Okay.

I apologize for the lateness. We do appreciate your attendance at our meeting here and the information you have forwarded. Thank you very much.

We will recess now for a couple of minutes.

I want to also make the committee and the witnesses aware that we do have lunch. If you wish to partake, please do so. Thank you.

●

(Pause)

●

● (1205)

The Chair: Can we reconvene, please?

We are going to be entertaining our second panel, the witnesses from the Canadian Human Rights Commission.

We have with us Jennifer Lynch, chief commissioner; David Langtry, commissioner; Hélène Goulet, secretary general; and Harvey Goldberg, proactive team leader, strategic initiatives branch.

Welcome to the committee.

Madam Lynch, will you have an opening address?

Welcome, again.

Ms. Jennifer Lynch (Chief Commisioner, Canadian Human Rights Commission): Thank you very much.

[*Translation*]

Thank you for your words of welcome.

[*English*]

Thank you for the opportunity to appear again before you as you conclude your hearings.

We, of course, have been following the hearings very carefully. We've listened and we've learned. And today, before answering your questions, I'd like to link the key points of our original submission with some of the testimony you've heard. I'd also like to provide a very brief analysis of some of what we might call misconceptions and concerns that have been raised by other witnesses about the impact of the repeal.

To begin with, to link our submission to others' testimony, on April 19 we made four key points: we support the immediate repeal of the section; there is a need to ensure that our act is interpreted in a manner that strikes an appropriate balance between individual rights and interests and collective rights and interests; the transitional period, in our opinion, should be much longer than six months—at a minimum it should be 18 months; and proper funding of the commission and first nations is crucial to ensure successful implementation of the repeal.

The witnesses before you, I would submit, have confirmed the strong validity of these four points.

● (1210)

[*Translation*]

Let us begin with the immediate repeal.

Almost all the witnesses that appeared before the committee supported the need for a system of human rights protection for First Nations. This is not surprising. We continue to stress the urgency of repeal. The Commission has been calling for repeal for 30 years. Although the *Canadian Human Rights Act* has been amended several times in order to maintain the Commission's ability to protect and promote human rights, section 67 has remained in the Act.

Thirty years is far too long to wait for people to have access to basic human rights protection that other Canadians take for granted. The time to act is now. Clearly, the issue is not whether there should be the fullest human rights protection for First Nations but how best to implement such protection.

[*English*]

You've heard testimony that the protection of both collective and individual rights is recognized by first nations as a core value necessary to the good governance and well-being of their citizens and that the balancing of these rights is consistent with first nations traditions and cultures. You've heard eloquent and moving testimony about the need to ensure that human rights are applied in first nations in a manner consistent with existing aboriginal and treaty rights, cultures, and traditions.

The need to develop a suitable mechanism to achieve the appropriate balance was emphasized by almost all witnesses. We submit that one way of proceeding is to amend the bill to include a statement of principle to guide the commission and the tribunal in the interpretation of complaints against aboriginal authorities, and today we are bringing suggested wording, which would read:

> In relation to a complaint made under the Canadian Human Rights Act against an Aboriginal authority, the Act is to be interpreted and applied in a manner that balances individual rights and interests with collective rights and interests.

Such a provision is consistent with sections 15 and 16 of our act. Section 15 enables the commission and the tribunal to take into consideration matters such as the justifiable occupational requirements of a job in considering whether the act has been contravened. For example, denying a job as an airline pilot to a person who has poor vision is discriminatory under our act, but the discrimination may be justifiable, given the requirements of the job.

In their testimony before you, Professor Larry Chartrand and Ms. Wendy Cornet referred to court and the Canadian Human Rights Tribunal decisions regarding first nations, where balancing of collective and individual rights has already occurred using section 15. As for section 16 of our act, this allows for special programs that discriminate in favour of a particular group if the reason of the program is to overcome past discrimination.

As a result of sections 15 and 16, the commission and the tribunal already have considerable experience in balancing interests in the determination of human rights claims. To give practical effect to this balancing of collective and individual rights and interests, the commission has committed to working closely with first nations and other stakeholders on an ongoing basis. Dialogue is essential before considering what further instruments, such as regulations, guidelines, or policies, or some combination of these, might best help to ensure that the statutory principle is realized in the day-to-day handling of human rights complaints. And of course we've already begun this dialogue.

● (1215)

[*Translation*]

I will now deal with the transition period.

Almost all witnesses agreed that time is needed to build the necessary capacity and processes to deal with potential human rights issues in communities.

Some noted that while their communities support human rights, they have little understanding or knowledge of how a human rights redress system might work in their communities.

Many times it was emphasized that First Nations communities need time to build the consensus and understanding that is essential to establishing a strong foundation for an effective system for managing and resolving human rights issues.

This testimnoy has confirmed our conviction that six months is entirely inadequate to do the work required. At a very minimum, we believe that 18 months should be allowed before the Act applies to First Nations and preferably significantly longer.

Let us now deal with the matter of resources.

Witnesses before you emphasized the need for adequate resources to ensure a smooth implementation and ongoing operation of First Nation's human rights systems. In their testimony before you, DIAND officials indicated that the government was aware of this need and willing to consider it further, although they did not feel financial matters should be included in the legislation. The Commission understands the concern of First Nations that the resource demands that may result from repeal should not come at the expense of other urgent priorities such as housing, health and education.

As we indicated to you when we appeared previously, the Commission has been in discussion with the government on the resource requirements of the Commission to effectively implement repeal.

However, as of today, no new resources have been allocated to support the Commission's initiatives to engage with First Nations stakeholders or to plan for the implementation of repeal.

Given that resources would not flow until passage of the Bill, we are only able to modestly implement our outreach strategy at this time.

[*English*]

The second portion of my remarks is related to the impact of the repeal, what I might call perception and reality.

Some misconceptions have arisen during your hearings on the possible impacts of the repeal. For example, a hypothesis has been advanced that a complaint to the commission could result in significant changes and impacts on first nations governments. Some have suggested that repeal of section 67 will undermine the whole structure of relations between the government and first nations, leading to a wholesale dismantling of the Indian Act.

These are difficult issues for the commission to comment on. I do so with great caution.

The commission considers each complaint that comes before it on the basis of its statutory mandate, the evidence presented, and the relevant jurisprudence. Nevertheless, in the interest of assisting committee members in better understanding the statutory mandate of the commission and how it operates, I make these points.

First, the statutory mandate of the commission, as important as it is, is relatively narrow. Human rights have many dimensions, including a panoply of civil, political, social, cultural, indigenous, and many other forms of rights. The work of the commission focuses primarily on the right to be free from discrimination in employment and in provision of services.

Second, in order for a complaint to proceed, it must be based on one or more of 11 specified grounds: sex, age, colour, national or ethnic origin, marital status, family status, sexual orientation, disability, religion, and conviction for which a pardon has been granted.

It is not sufficient to simply assert that two individuals or groups have been treated differently, or that the quality or level of service received by one group is different from that received by another group. In order for the commission to proceed with a complaint, the link to one of the specific grounds must be demonstrated. I should point out that at this moment, “social condition” is not a prohibited form of discrimination.

Third, there are many situations where a person may feel that they have been treated unfairly. They may feel that their human rights, in the broadest sense of that term, have been infringed. Or they may feel that an administrative error has been made. Often, no doubt, they may be justified in these allegations. However, the commission can only deal with the prohibited forms of discrimination specified in the act. The commission is not an ombudsperson and has no authority to act as one.

Fourth, while some complaints are lengthy, litigious, and costly, they are the exception. Most complaints can be resolved in nine months or less; 27% are settled; and 28% are dismissed because the claim of discrimination is not well founded or are discontinued for other reasons. And 35% are referred to alternate means of redress or are not admissible. Just 10% of cases are referred to the tribunal, and many of these are resolved through mediation.

Because the commission actively promotes a non-litigious approach to resolving complaints, the need for the involvement of lawyers is minimal. Many, if not most, human rights situations are resolved before a formal complaint is filed with the commission. The commission actively encourages employers to implement their own internal conflict management systems.

A fairly major point is a misperception that our mandate is restricted to complaint processing. One of the key aspects of our implementation strategy is to work with first nations to build community-level redress systems and strengthen existing ones. In modern conflict management approaches, strong complaint processes are important, yet they should be a remedy of last resort. Our vision and mandate are for much more than an internal complaints system. Formal dispute resolution, although important, should be a relatively small part of an overall system that would also embrace prevention and education.

There is such enormous potential here to develop a whole system that starts with a dispute resolution structure providing multiple options for the resolution of disputes and is supported by other processes and practices that will shift the emphasis towards the front end: prevention of discrimination, and education.

● (1220)

The core principles to be developed should have as their goal the fostering of a culture that treats conflict resolution as a building block to creating inclusive and productive communities and workplaces.

By establishing integrated human rights and conflict management systems, first nations citizens will better understand their rights and how to realize them, first nations governments will better appreciate the rights they are mandated to promote and respect, and all parties will be able to work together to prevent discrimination and resolve human rights complaints.

Sixth, while it is true that a complaint could result in parts of a federal statute being found to be discriminatory, it is unlikely that such a determination could ever result in the piecemeal dismantling of a legislative regime. The commission operates remedially and not as a sword. A government faced with a finding of discrimination has the opportunity to use such a finding as an impetus to examine its procedures or laws and adjust them so as to not conflict with the CHRA.

In closing, I would like to reiterate the commission's respect for first nations communities and governments. We respect the right of first nations to self-government. We respect their legal traditions, customary laws, and systems of dispute resolution. We are committed to working with first nations to develop a human rights system that fosters and sustains this respect and enhances human rights for all first nations citizens.

I hope these comments on the hearings will be of assistance to the committee in completing your very important deliberations on this bill.

My colleagues and I would be pleased to answer your questions.

● (1225)

The Chair: Thank you, Madam Lynch.

The chair is going to move forward with a five-minute round, just to make sure everybody has an opportunity. We left off with the government side; now we will go to Mr. Lévesque.

Hon. Anita Neville: This is a new panel. You start the panel around—

The Chair: It's at the chair's discretion, I think. We only have 25 minutes, and I want to make sure everybody has an opportunity to ask questions.

Go ahead, Mr. Lemay.

[*Translation*]

Mr. Marc Lemay: Mr. Chairman, I too believe that this is a new round. To avoid wasting time, I suggest that we start with the Liberals and that Yvon get the floor afterwards. I will not ask questions since I have made an agreement with him. My colleague will ask our questions and we could then go to the government members. In that way, everyone will have enough time to ask one question.

[*English*]

The Chair: Okay, I will do that, but only for five minutes.

Hon. Anita Neville: We're happy with five minutes, Mr. Chair. We're anxious that everybody have a chance as well.

I will ask a brief question and hope there's time for Mr. Russell to pick up on it.

Thank you for your presentation. You've addressed a number of important points of clarification, and I certainly appreciate it.

Mr. Pryce, who was here before, indicated that this bill has a broad impact, in spite of the nine words that are constantly referred to, and it is important that we do it well.

As you know, we met yesterday with the Human Rights Commission, and an interpretive principle was proposed to us. I am aware that aboriginal communities have suggested that you include the words in your principle, “indigenous legal traditions and customary law”. For some reason you're choosing not to include that in the interpretive principle.

You referenced in your closing, Ms. Lynch, that you respect the legal traditions, customary laws, and systems of dispute resolution. Why would you not include it, and could you tell us how those apply to those first nations that currently would not fall under Bill C-44— those that are currently exempt from it in your dealings with them?

Ms. Jennifer Lynch: I will make a preliminary over-arching answer and then I'm going to ask Commissioner Langtry to go into a little bit more detail.

This proposal was raised with us in a meeting and we considered it afterward. One of our concerns is that we have potentially 600 communities with which we could be dealing, and the language proposed could lead us to having to make 600 different interpretations about traditions and cultures. Any given one would not necessarily inform or become a precedent for another.

That's an introductory comment, and Mr. Langtry is going to provide you with further detail.

Mr. David Langtry (Commissioner, Canadian Human Rights Commission): Thank you.

Quite rightly, the question was asked. Our concern about it, our understanding—and I'll get back to our understanding in a moment—was that some first nations do have the legal tradition or customary law and others do not, and they're different from one to the other.

Quite frankly, from our point of view, part of the transition and part of the reason we want to develop the interpretive guidelines or whatever instrument in discussion and dialogue with first nations across the country is to learn more. So for us to incorporate or propose language on something we're not all that familiar with we felt was not appropriate. Also, we thought that collective interests could be broad enough to include legal traditions and customary laws.

The other aspect is that the legal tradition and customary law may in fact be an alternative dispute mechanism, which would mean that we wouldn't even deal with it because we do move disputes to alternative redress if it exists. So rather than building it into a statement of principle, we felt it was something that would be worked at with us through the transition period.

● (1230)

The Chair: You still have a minute and 20 seconds.

Mr. Todd Russell (Labrador, Lib.): Just very quickly, you said linking your submission to other testimony, you support an expeditious repeal of section 67.

Are you saying you support an expeditious repeal of section 67 once we have dealt with your other three points—points 2, 3, and 4?

That was on page 2, I believe.

Ms. Jennifer Lynch: Yes, thank you very much. I'm very well aware of our key points; I was just formulating a response to your question.

I'd like to speak to the reality, first of point 4, which is the proper funding. It is absolutely correct that because of our own principles of wishing to engage stakeholders in dialogue about matters that affect them, we have embarked on as much dialogue as we can right now. This is very tied in to point 3, the transitional period, as well.

The two are inextricably combined, because although we are very gratified by a previous witness's testimony that talks about our involvement and our commitment to dialogue and interaction, we simply do not have the funding now to begin that in any real way.

Similarly, because our mandate and our vision is much broader than a smart recourse mechanism that is easily accessed and moves efficiently, because our vision is well beyond that and we want to shift towards education and awareness and behaviours that do not give rise to discrimination, it's a very long process that is needed for us to work with the various communities to achieve that end. Consequently, we do need time and we do need resources. However, we believe that can be managed within an appropriate transitional period.

Finally, with the concept of an interpretive principle, we're skilled at dealing with balancing individual rights and interests, striking balances, so in that regard, again, a transition period will enable us to develop whatever guideline or instrument.

I'm not sure if I've answered specifically.

The Chair: That's all the time you have anyway. Thank you.

I'm going to turn to the government side.

Ms. Jean Crowder: Mr. Chair, on a point of order, I understood we were starting a new round; therefore, it's the three opposition parties and then—

An hon. member: That was your understanding, but I think the chair has made a ruling.

Ms. Jean Crowder: No, that wasn't my understanding of it.

The Chair: If I'm going to start a new round, then I have to do seven minutes, and we—

Mr. Lévesque, we're wasting time here. We have to move it forward because we have to give everybody an opportunity.

[*Translation*]

Mr. Yvon Lévesque (Abitibi—Baie-James—Nunavik—Eeyou, BQ): Mrs. Lynch, you have said that this matter has been debated for 30 years and that it is now urgent to act. It is similar to the sovereignty of Québec, in our case: is also urgent to act. However, you would recognize that there are important issues to consider. I am quite sure that you will not tell us today that, after those 30 years, First Nations have really been consulted by the government. You might say that there have been no guidelines about that from any court or government.

However, I am quite sure that you were at the Commission in 2005 and that you remember the commitment made by the government to consult First Nations about all federal policies affecting the members of the Assembly of First Nations and having a specific and significant impact on their future.

I will put all my questions of the same time.

Ms. Jennifer Lynch: I did not understand your first question. Could you repeat, please?

Mr. Yvon Lévesque: We might say that Bill C-44 is very important since it is going to change the life of the First Nations. Can you tell us if they have been consulted by the government since it made the commitment to consult them, on May 31st, 2005, two years ago?

Furthermore, I am quite sure that you were here when the department officials testified before us. You probably heard Mr. Watson's presentation. You have said that after repeal and in the implementation of Bill C-44, an interpretation clause would be necessary. You heard Mr. Watson express a contrary opinion. Do you maintain your position despite Mr. Watson's statement?

● (1235)

Ms. Jennifer Lynch: Thank you, I will answer in English.

[*English*]

For your first question, about whether or not the government has consulted, I'm sorry, sir, that our commission is not in a position to interpret those activities and provide an opinion on that. The duty to consult is a duty of government; it's not part of our role.

With regard to the interpretive principle, there are divergent opinions about this, and we have heard all of them. We have a statute that provides us with avenues for developing an interpretive provision by the way, for example, of a guideline. The guideline may not be the appropriate approach; it may be a policy, it may be a regulation.

Hearing the stakeholders and knowing how impacted they may be by this repeal, we have come to you today to propose a principle, at least. In fact, when it goes into the statute it will be a clause within. However, a statement of principle that's broad, yet refers to rights and interests, will be helpful. And then afterward we will have more time during the transition period to flesh this out to create some more interpretive guidelines.

[*Translation*]

Mr. Yvon Lévesque: You are the chief Commissioner of the Canadian Human Rights Commission. We know that there are individual rights and collective rights. On the basis of nation-to-nation respect as well as on the basis of respect for human rights, should the government show respect to the other side and act on the basis of the vision of the Canadian Human Rights Commission?

[*English*]

The Chair: You're down to 15 seconds. If you want an answer, you'd better allow the witness to reply.

Ms. Jennifer Lynch: Thank you very much.

I know that's an important question to you; however, it is not part of our responsibility as a commission, and we can't be helpful in providing you with an answer to that question.

The Chair: That's a sufficient answer, thank you.

We'll have Madam Crowder.

Ms. Jean Crowder: Thank you, Mr. Chair, and I want to thank the witnesses.

I have two brief comments, and I have a question about the Indian Act.

One is that we are actually missing an opportunity. I would argue that we should do the consultation before Bill C-44 is put in place. But we would also be missing an opportunity if we didn't provide the commission with some appropriate resources to undertake education and awareness right now. As we all know, the Canadian Human Rights Act does apply on reserve for non-Indian Act issues. So there would be an opportunity to do some work there.

The other point I want to quickly make is about the remedy. It is outside your mandate, but there has been a lot of concern expressed by the witnesses that if complaints are filed, they do not have the resources to actually address the remedy.

The piece I wanted to deal with was the Indian Act. The reason I wanted to raise it was because it wasn't just witnesses; there were also some experts in the area that raised concerns related to the Indian Act. One was the Bar Association. Their submission, on page 8, which I will not quote, quoted Justice Muldoon of the Federal Court of Canada, who speculated on the fact that the repeal of section 67 could have some substantial impacts on the Indian Act.

The second piece I wanted to bring to your attention was from the Native Women's Association of Canada on access to justice and indigenous legal traditions—it's on page 11 of that brief, in English. They actually quoted from the commission's own report. The commission indicated that they urged the repeal of section 67, but they actually went on to say, “However, the Commission would prefer that the Government take a proactive approach to preventing potential discrimination and not wait for complaints to be filed”, and so on. And it says:

> The Commission, therefore, urges the Government, in consultation with First Nations, the Commission and other relevant bodies, to review provisions of the Indian Act and relevant policies and programs to ensure that they do not conflict with the Canadian Human Rights Act and other relevant provisions of domestic and international human rights law.

Although that doesn't talk about necessarily dismantling the Indian Act, it does address the fact that there are some serious problems with the Indian Act. So I think there was enough concern being raised about the potential one-off impacts of the Indian Act.... A number of people have talked about the fact that they feel a much more comprehensive review is needed.

I wonder, in light of this, if you could comment on your comment.

● (1240)

Ms. Jennifer Lynch: Thank you very much.

Commissioner Langtry, who is our champion of this portfolio, is going to respond.

Mr. David Langtry: If I have it right, certainly, yes, we are aware of some of the concerns, indeed, whether they are about the wholesale dismantling or about specific provisions. I know where some of the concerns may come, and we've been wrestling with how you would then balance.... Or where would provisions of the Indian Act that may be contentious...? I'll use as an example that even though Bill C-31 reinstated didn't give full...as you well know, to children of children and that kind of thing in terms of reinstatement, would those then be subject to the application of grounds of discrimination?

I can say that we have internally begun the process of reviewing the Indian Act just to give ourselves some understanding of where there might be potential complaints. We've also discussed with NWAC those concerns as well as projects they're talking about doing.

Certainly, I have no idea whether the government has undertaken a fulsome review, because of course we're independent of that process. But it does speak to the resource issue. And I quite agree that for us to do that kind of full review.... And how that might in fact apply, again, is one of the issues under the need to do the balancing of the interpretive provision.

I can say that we do that already. There have been examples in which the Indian Act doesn't apply and in which the tribunal has balanced the competing collective with individual rights and interests.

Ms. Jean Crowder: Do I have time?

The Chair: No.

We'll go to Mr. Bruinooge.

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

I'll continue with some of that line of thinking. Would you see it being a good course of action to do the consultation prior to section 67 being repealed, to get a general assessment of how many potential cases there might be out there, in light of the fact that you or someone could go into communities and meet with individuals who are potentially having their human rights violated? But the individuals going into these communities would in essence be meeting with people, giving them a forum to put forward their views, which could put them potentially in further peril for further human rights violations, knowing full well that in the minority context the repeal might not ever happen.

Mr. Langtry, do you see that as something that is potentially possible? Would you feel challenged to go into a community without the repeal in place and ask people for their viewpoints on human rights violations they might be seeing?

● (1245)

Mr. David Langtry: As you know, we did launch a national aboriginal program, and that was prior to Bill C-44 being introduced. It took a long time to develop because we recognized that we don't have, and have not had, a relationship with many first nations because of the existence of section 67. We have developed an aboriginal outreach program or strategy, which is to enter into that engagement and dialogue, from an educational...to describe the work of the commission, as well as to learn from first nations communities.

When the chief commissioner indicated that we've embarked on that in a modest way, it's only because of not having additional resources. But it is our intention to continue to do that, to develop that, to work in partnership with a number of communities, whether or not Bill C-44 passes or doesn't pass. So we want to engage in that education, and as you know, section 67 is not an absolute bar, and we deal with complaints coming to us from reserves.

Ms. Jennifer Lynch: Thank you.

Just to add to that, and thank you for that question, you've raised a key point, and it's going to be there whether or not there's that time scenario you were speaking of. What you were talking about is if we go in to assess impacts and people come forward to talk about what's on their minds, might they, if this is done prior to a repeal, not come forward or fear some form of reprisal? I think that might be what you were suggesting. Is that more or less it?

This is a very key part of conflict management in all society, and I'm sure specifically in aboriginal communities. The reality is that the vast majority of people don't come forward, for many reasons. So when we talk about how many complaints we might have, that is just the tip of the iceberg, which is why we're talking about education, awareness, and prevention. This coming forward and not coming forward issue is critical.

My hypothesis would be: (a) repeal the act; and (b) provide a long enough transitional period that we can create an environment of confidence and confidentiality to develop the mechanisms and the conflict management systems that will not only protect people who do come forward but will create an environment where anyone can raise these issues and come forward with confidence that they will be respectfully heard and responsibly addressed.

Mr. Rod Bruinooge: I think that obviously is the perspective that makes the most sense. Government has been trying for 30 years to repeal section 67. It has failed, unfortunately. In the current governing context, in a minority, it is always challenging to pass legislation such as this. So clearly the government is calling for the immediate repeal of section 67.

How much time do I have?

The Chair: You have seven...six...five...seconds.

I'm going to cut off the questioning. We have some other business to deal with, committee members.

I want to thank the witnesses, once again, for their valued information to this committee. We really appreciate the opportunity to question you. Thank you.

Committee members, we have a.... Yes?

Mr. Brian Storseth: On a point of clarification, I wanted to wait until the witnesses were finished so as not to interrupt their speaking, but I wanted to set the record straight.

Ms. Neville earlier suggested that I may have misled this committee in my comments. I want to quote for the record from the Standing Committee on Aboriginal Affairs and Northern Development, Tuesday, June 5, 2007.

Mr. Russell said:

> The argument here is fundamentally to have a bill that meets the needs and desires that we're trying to articulate, which is 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.

Then I said:

> So let's vote on it and see.

Then Mr. Russell said—and this is the pertinent point, Mr. Chair:

> I'm there, don't you worry. I will be voting against this bill, come hell or high water....

● (1250)

The Chair: Thank you.

Mr. Todd Russell: Mr. Chair, if he's going to quote, he had better quote it accurately, and that is “come hell or high water, as it is”.

Is that not right, Mr. Storseth?

Mr. Brian Storseth: I believe you're probably right.

Mr. Todd Russell: I'm probably right—I'm absolutely right; I'm 100% right.

The Chair: We'll go to the business that the chair wishes to move on to.

We have a motion from Madam Neville that states:

> That the Standing Committee on Aboriginal Affairs and Northern Development call representatives from the Assembly of First Nations (AFN) back to Committee to present their comments on the proceedings and presentations that have been put forth before this committee on Bill C-44.

The chair wants to give some guidance on this. The chair has to determine the balance of opportunity to the public to be heard fairly and equally. In my judgment, if the chair gave an opportunity to be heard to the AFN a second time, then of course this opportunity to be heard should be extended to the previous witnesses. Procedurally the chair is of the mind that we shouldn't entertain a second opportunity for a witness who has already appeared.

The witnesses who appeared just now were government witnesses. They were not what I would call from the public.

That's the opinion of the chair, and I can be challenged.

Hon. Anita Neville: Are you making a ruling, Mr. Chair? I will challenge the ruling of the chair.

The Chair: Certainly you can do that. The matter is open for discussion.

Mr. Rod Bruinooge: Mr. Chair, I think you have ruled correctly. We have a number of witnesses—

Hon. Marlene Jennings: I have a point of order.

The Chair: Yes. One moment, please, Mr. Bruinooge.

I am going to entertain the motion as it is put forward to the committee. Is there any discussion on the motion? This is not on the chair's opinion.

Go ahead, Madam Jennings.

Hon. Marlene Jennings: On a point of order, my understanding is that you made a ruling that this motion is out of order.

The Chair: I was actually advising the committee of my opinion of this.

We'll move into the discussion of the motion as presented.

Go ahead, Madam Crowder.

Ms. Jean Crowder: I would like to propose an amendment adding the Native Women's Association of Canada after the Assembly of First Nations.

The Chair: Go ahead, Mr. Bruinooge.

Mr. Rod Bruinooge: It very much seemed to me that a ruling was made, so I think it's incumbent on the committee now to challenge the ruling.

The Chair: This is the type of thing I was concerned about. It's just what Madam Neville has said. The chair will make a ruling, then, that I'm not willing to open it up for further witnesses. I can be challenged.

Hon. Anita Neville: I'm challenging the ruling of the chairman.

The Chair: Shall the ruling of the chair be sustained?

(Ruling of the chair overturned)

The Chair: Is there further discussion on the motion as presented before we vote on it?

Hon. Anita Neville: I believe there was an amendment put forward.

The Chair: It is the motion that's on the table.

Hon. Anita Neville: Then I'll speak to the motion very briefly, Mr. Chair.

We invited back representatives of government. The Assembly of First Nations and, I would argue, NWAC are impacted more than any other witness that has come before this committee and I think it is important and in fact essential. And I think if we check the blues, we made a commitment to them in their original appearance here that once all testimony was heard we would bring them back.

I also want to put on the record, Mr. Chair, that, speaking for my own party, we have no intention of blocking the movement forward of this bill. This is an important bill. We believe it is necessary to hear all of the components of it so that there are not the unintended consequences of Bill C-31. We too want to move forward with it and are acting in good faith in bringing forward this amendment.

● (1255)

The Chair: This motion. Okay.

Mr. Bruinooge, speaking to the motion, please.

Mr. Rod Bruinooge: As I began to indicate earlier, I think we have heard from a number of witnesses. Unfortunately, as we begin to call back more witnesses we set a bad precedent. I think we've heard a number of positions on our bill, and I think we have the information we need to proceed to clause-by-clause so that we can begin the very important work of extending human rights to first nations people.

So I agreed with your ruling, but at the same time I'm hopeful that the opposition now is going to be prepared to move to clause-by-clause.

I would argue that the Assembly of First Nations and NWAC as well have made very valid sentiments towards this committee. The AFN brought a very fulsome document that indicated their position quite substantively, and I think it is one of the largest submissions you received, actually, of all of the witnesses.

In my opinion, we have received the information that we require at this point, and I would argue that we need to proceed.

The Chair: Okay. Is there any further discussion?

Mr. Storseth, is there anything you can add?

Mr. Brian Storseth: I have a question. We are speaking on the amendment now?

The Chair: No, we are not. The motion as presented. Are you ready for the question?

Madam Crowder, are you going to move an amendment?

Ms. Jean Crowder: I thought I had moved the amendment.

The Chair: We weren't dealing with it at that time.

Ms. Jean Crowder: I move that we add “Native Women's Association” after the words “Assembly of First Nations”.

The Chair: Is there any discussion on the amendment?

All those in favour of the amendment? All those opposed to the amendment—

Mr. Brian Storseth: A point of order, Mr. Chair. I called the point of order before the vote.

It is just a point of clarification—

The Chair: The chair didn't recognize the point of order, and I'm in the middle of a vote.

All those opposed to the amendment?

(Amendment agreed to)

The Chair: Now the motion as amended.

All those in favour? Opposed?

The chair can only recognize two votes on this side.

(Motion as amended agreed to)

The Chair: Is it the pleasure of the committee that we schedule for Tuesday of next week? So be it.

The meeting is adjourned.

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