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Mr. Barry Devolin

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● (1535)

[*English*]

The Chair (Mr. Barry Devolin (Haliburton—Kawartha Lakes —Brock, CPC)): Order. Good afternoon, everybody. Welcome to our committee meeting.

Our order of business today is pursuant to the order of reference of Tuesday, November 13, 2007, Bill C-21, An Act to amend the Canadian Human Rights Act. We do have with us three officials—Mr. Jim Hendry, Mr. Martin Reiher, and Mr. Charles Pryce—if we need assistance along the way today.

Before we actually begin with the clause-by-clause, I just wanted to talk for a second with the committee members.

I am new to this committee, as you know, and new to chairing, as you know. Last week, when we had witnesses, from both the Auditor General's office as well as the minister, I was.... For example, with the witnesses from the Auditor General, I was very loose in terms of dealing with the clock. I wasn't strict in terms of following time. Last Thursday, when we had the minister, I told the committee before we started that I was going to be strict with the clock. I thought that was fair to everyone, and I thought it only fair to tell you before we started how I was going to try to manage the meeting. I thought that worked fairly well.

Today, as we go through this, I just want to say the same thing. We're going to have a discussion of a variety of amendments that have been brought forward. I can't presume to know everything that will be brought forward, but I did see a list earlier today of some draft amendments. I want you to know, in terms of ruling on the admissibility or inadmissibility of these amendments, that I will be cautious, meaning that I need to be convinced that the amendment is admissible.

So as we go through today, I'm sure we're going to have several of those conversations.

Ms. Crowder.

Ms. Jean Crowder (Nanaimo—Cowichan, NDP): I know that the committee members got two letters from the Federation of Saskatchewan Indian Nations. Of course, because Bill C-21 was introduced and brought back to committee, there wasn't an opportunity to bring these witnesses forward, so I wondered how the committee was going to proceed with the request to come and present information around Bill C-21. I think the letters were dated November 19 and November 20.

● (1540)

The Chair: In terms of how the committee is going to proceed, as you know we're going to begin with clause-by-clause today on Bill C-21. If we finish today, then I guess we will have to decide what we're going to do on Thursday. If we don't finish today, we're going to continue with this at our next meeting on Thursday. Next Tuesday, we already have a different meeting set up to hear witnesses. Then it's my expectation that if we're not done with clause-by-clause for Bill C-21 on Thursday, we would continue it next Thursday.

I have no plans to interrupt or postpone the clause-by-clause in order to hear more witnesses, if that was the question.

Ms. Jean Crowder: I guess it was more around what sort of process we're going to use. Will a letter go out from the chair? I'm just curious.

The Chair: We had this conversation two or three meetings ago. The clerk and I did draft a generic letter that we are sending to a variety of different groups who have sent in a request to appear before the committee, telling them that for the coming weeks—which basically is this week and next week and then we're on a six-week break—we don't have available time on the agenda but that in the coming months, I believe the letter says, we'll reconsider those things.

So I think we'll need to have another subcommittee meeting. I don't know whether that will be necessary next week. I was thinking more when we come back the first week of January that we would have a subcommittee meeting and we would look at the coming weeks after that to lay out the agenda.

Ms. Neville, did you have a comment?

Hon. Anita Neville (Winnipeg South Centre, Lib.): I just have a question.

You referenced other letters, and I'm wondering whether any of the other letters pertained to this bill.

The Chair: I don't know.

No?

The clerk says no.

Ms. Keeper.

Ms. Tina Keeper (Churchill, Lib.): I'm not clear what you're saying. You had, in response to Ms. Crowder's request, these letters of request to speak to the committee on Bill C-21. You said you had prepared letters....

So there are no letters that are responding to those requests going from the committee? That's what I'm asking for clarification of; you didn't seem certain.

The Chair: Over the past two or three months, we've received letters from different organizations, including these ones. We drafted what I would call a generic response—i.e., “We got your letter, and we got your request”—

Ms. Tina Keeper: So it has been sent out?

The Chair: Well, it has been sent out to some of the other ones. I don't know whether it has gone out on this one yet or not.

Ms. Tina Keeper: The response, then, to these groups—

The Chair: Oh, I'm sorry; the clerk is saying that the response has gone from the clerk but not from the chair.

Ms. Tina Keeper: Okay.

So we will not be hearing from them, then. You said that we will not be hearing from any more groups on Bill C-21.

The Chair: That's correct.

Ms. Tina Keeper: And now the other witnesses whom we're hearing from next week are on a separate issue, which is an agenda item we had decided upon?

The Chair: That's correct.

We'll turn now to clause-by-clause.

(On clause 1)

The Chair: Ms. Crowder, would you like to speak to this?

Ms. Jean Crowder: Are you asking me if I want to speak to my amendment?

The Chair: Yes, I'm sorry. This is in the package, the first amendment you have put forward, amendment NDP-1.

I just wonder whether you want to make some brief statement about why you brought this forward.

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

This is, as you pointed out, an amendment to clause 1. I think the information is fairly clear from the amendment, but there were a couple of points, in that Six Nations in particular had—

Ms. Tina Keeper: I'm sorry, are we supposed to be provided a copy of that by the committee?

A voice: It was sent out this morning to every office.

Ms. Tina Keeper: I don't have it. I'm sorry.

The Chair: Does everybody have this package on Bill C-21? It lists the different amendments that have been received and organized by the staff.

Ms. Crowder, go ahead.

● (1545)

Ms. Jean Crowder: Part of this came to address the gap between nations that currently have self-government and then have human rights codes built in to their self-government agreements. I believe Nisga'a is a really good example of a self-government agreement that has a first nations human rights code in it.

This was an attempt to address those nations that are in a transition into self-government. The idea was that you would, for example, provide opportunities for first nations to set up some codes that allowed them to do such things as preferential hiring, have programs and services that would benefit first nations on reserve, and give a preference to the members of first nations in the allocation of land resources. It was to protect first nations on reserve in relation to some of the elements that could be open to dispute by people off reserve.

Westbank, for example, although it does not have a self-government agreement, does have a human rights code included in their existing agreement. That would be an example of a nation that does have that kind of agreement while they don't have a self-government agreement in effect.

The Chair: Thank you, Ms. Crowder.

I am going to rule that amendment NDP-1 is inadmissible.

Bill C-21 amends the Canadian Human Rights Act by repealing section 67 of that act. The repeal of section 67 removes an exemption in its application with regard to the Indian Act.

This amendment proposes to not repeal section 67, but rather replace it with a new framework. This new framework would create many conditions and exemptions similar to those contained in the Indian Act.

As *House of Commons Procedure and Practice* states on page 654: “An amendment to a bill that is referred to committee *after* second reading is out of order if it is beyond the scope and principle of the bill.”

In the opinion of the chair, the introduction of this new framework is contrary to the principle of Bill C-21 and is therefore inadmissible.

Ms. Jean Crowder: Can I challenge the chair's ruling?

The Chair: You can challenge the chair's ruling.

This is not debatable. Committee members have two choices. The chair has ruled that amendment NDP-1 is inadmissible. This has been challenged. The vote is whether to sustain the chair's ruling.

If you wish to vote to sustain the chair's ruling that it is inadmissible, please vote yes.

Mr. Brian Storseth (Westlock—St. Paul, CPC): On a point of order, Mr. Chair, can we get a recorded vote, please?

The Chair: Yes, we can.

(Ruling of the chair overturned: nays 6; yeas 4)

The Chair: My ruling has been overturned, so we will proceed with this.

I had interrupted you, Ms. Crowder. Did you have anything further you wanted to say?

Ms. Jean Crowder: There were a couple of points. One of them is that if we're talking about our new relationship between government and first nations, and our recent court decision out of British Columbia on Chilcotin people that talked about reconciliation, this is an attempt to move towards a relationship built on reconciliation. This would include the recognition of first nations jurisdiction in the area of human rights, family law, and so on, as recognized by the Royal Commission on Aboriginal Peoples, with, at a minimum, the floor being the Canadian Human Rights Act.

So this is an attempt to start that conversation around a new relationship between first nations and government. That was the intention behind this proposed amendment.

The Chair: Okay.

Mr. Bruinooge.

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

In relation to Ms. Crowder's opinion on this matter, she has raised the topic of the Chilcotin ruling and her opinions, of course, in relation to first nations communities being able to choose some of the elements within the amendment. These are opinions that she has.

We'll get into debating those points, but I think the first point that is essential to remember here is that all of these amendments go far beyond what this bill is intending to do. The amendment that you're making is in fact changing the Canadian Human Rights Act. It's amending it. And that goes far beyond the scope of what we're doing with this bill.

Should she want to bring forward a private member's bill amending the Canadian Human Rights Act, I believe that is within parliamentary procedure. This would be the right course of action. But in my opinion, to do it in this repeal goes completely against the procedures we've seen this House abide by in the past.

To go into the detail, I think, is really now what we are forced to do because the committee has chosen to overrule the chair. As a result, we have to debate the substance of this amendment that substantively changes the repeal that is before this committee.

The interpretation of the rights that are before first nations communities and the entitlements that are interpreted to be their entitlements, being suggested to the Canadian Human Rights Commission through this amendment, are ones that I feel go in the wrong direction.

I'll have to reference back to former testimony of a number of individuals who suggested that—

An hon. member: Can you name them?

Mr. Rod Bruinooge: I'd be glad to name them.

Professor Larry Chartrand in particular, a very highly respected aboriginal professor—of course, in my home city but I don't think that necessarily states a bias on my part—gave some very credible testimony on the interpretive provisions that were being suggested by a number of groups, including the Assembly of First Nations.

It was his argument that to put into text an interpretation of what should be considered within this act would be a limitation on the first nations communities themselves. By putting any text to an interpretive provision, we would be taking away the ability of the Canadian Human Rights Commission to be able to properly balance the collective rights and the individual rights that need to be contemplated by this repeal.

By putting text to these specific amendments, we are really limiting the hands of the Canadian Human Rights Commission to be able to find that proper balance. They will have only this text to look to. This will define what they can even begin to interpret. There has been no question that the Canadian Human Rights Commission has always had the ability to be able to interpret how they will bring their rulings in future cases on first nations reserves, where people feel their human rights are being abused.

When the transition period is over and human rights complaints are brought before the commission, they will have no choice but to respect the Constitution of Canada and, of course, section 35. But by bringing specific text to what we're suggesting to them is what they will need to follow, I feel we are greatly limiting their ability.

I feel this unfortunately suggests that we're the experts on the interpretation of these rights. It's the Canadian Human Rights Commission that I believe has done a magnificent job over the last 30 years at balancing the rights of Canadians, the minorities versus the majorities.

● (1550)

I think everyone in this room would agree that the Canadian Human Rights Commission has done an admirable job. This amendment by Ms. Crowder unfortunately will take away, in my opinion, much of their ability to interpret the provisions they will need as they apply their rulings subsequent to the transition period ceasing.

Perhaps I will leave it there. I'd like to speak to the points individually, but I'd also like to give some of my other colleagues and those having other opinions in the room an opportunity to talk about this.

● (1555)

The Chair: Ms. Crowder.

Ms. Jean Crowder: Thanks, Mr. Chair.

It's interesting that in “A Matter of Rights“, in a special report of the Canadian Human Rights Commission on the repeal of section 67 of the Canadian Human Rights Act—written by the Canadian Human Rights Commission—they have recommendations about what an interpretive clause needs to look like. So contrary to the parliamentary secretary's suggestion that it should be left to the Canadian Human Rights Commission to look at an interpretive clause, the Human Rights Commission itself asked for this.

I'm going to quote from this. It says, under the rubric “Key features of an interpretative provision”:

> The Canadian Human Rights Act Review Panel made recommendations for what might be included in an interpretative clause. The Panel recommended that an interpretative provision:
>
> ensure that the Aboriginal community's needs and aspirations are taken into account in interpreting the rights and defences in the Act;
>
> ensure that an appropriate balance is established between individual rights and Aboriginal community interests;
>
> operate to aid in interpreting the existing justifications and not as a new justification that would undermine the achievement of equality; and
>
> not justify sex discrimination or be used to perpetuate the historic inequalities created by the Indian Act.
>
> The Commission believes, in general, these are sound principles to guide the interpretation of the CHRA in its application to the First Nation context.

As a footnote on this, it says:

> It should be noted that the Commission and Tribunal have neither the capacity nor the expertise to interpret sections 25 and 35.

The Canadian Human Rights Commission itself indicated that there was a need for an interpretive clause in the legislation. Out of the number of witnesses who came before the committee, there was a significant call from any number of witnesses about the importance of an interpretive clause in the legislation.

When we hear from that many people from a broad cross-section, from legal experts to some of the commissioners, and from the Canadian Human Rights Commission's own report, I'm not sure how we can disregard that in terms of preparing legislation to come before the House.

The Chair: Mr. Bruinooge.

Mr. Rod Bruinooge: In response, Ms. Crowder, in relation to the statements you made on the Canadian Human Rights Commission's own recommendations to this committee, and of course to the multitude of other attempts that have been made at repealing section 67, nowhere in those recommendations has it been suggested that first nations communities or first nations governments should have the exclusive right or ability to provide, on a preferential basis, programs and services to specific members of the first nations community. Nowhere does it suggest that first nations governments should give preference to specific members of the first nations in the training and hiring of employees and contractors.

In relation to allocation of land and other resource benefits, these are things that are not at all contemplated in their recommendations and are the very things that I feel, unfortunately, will keep the status quo in operation, the status quo of being able to allocate lands and homes and jobs to certain individuals in certain communities who have the specific access that others don't have.

That's what the Canadian Human Rights Commission is all about. It's about providing those who are in the minority with equality and benefits that all others in our communities across Canada have.

This is the very fundamental text that I'm talking about—and that wasn't part of the recommendation you read and the recommendations I've seen—and if we were to include this in our bill, we would be keeping the status quo. It would be as if the repeal had never occurred.

I just don't see how we can bring forward these amendments and expect to see any change, once the transition period is in place. If you have these recommendations, if you bring this amendment forward, you might as well make the transition period one day, because it's not going to change anything.

● (1600)

The Chair: Are there any other comments from anybody?

Ms. Keeper.

Ms. Tina Keeper: I'm a little confused by the member's comments. He seems to have a set idea of how the implementation of Bill C-21 would work itself out and what benefits, as he sees fit for first nations, would be put in place. He started to elaborate on that somewhat in reference to the amendment, saying that the very nature of these pieces of the amendment is the very issue that he wants to deal with in terms of Bill C-21, if I understood him correctly.

It seems clear to me that the member does not respect the nation-to-nation relationship that we have heard about in terms of the inherent right to self-determination, in terms of the nation-to-nation relationship embodied in a treaty relationship. Certainly, section 35 of our Constitution states:

> (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit, and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

I mention this because the legal and constitutional framework being alluded to, in terms of it not being part of the consideration of how it seems the member wants to move forward in terms of Bill C-21, is very disturbing, very troubling. Certainly I know that we as a country, we as a nation, as Canada, would certainly not want other nations to be making all of our little laws. That 's what we're talking about here.

The member who moved the amendment made it clear that this is about moving forward in a conciliatory fashion with Canada and first nations. It seems that it's very difficult for us to break away from that within this process and to try to hear what has been presented by first nations.

Although you mentioned a distinguished scholar, why is it that we are not listening to the people whose very lives are affected by this? We have heard repeatedly from AFN, NWAC, and the Canadian Bar Association about the potential impacts and about operating within this constitutional and legal framework.

I find it very troubling.

The Chair: Ms. Karatek-Lindell, do you want to say something?

Ms. Nancy Karetak-Lindell (Nunavut, Lib.): I want to ask a question of the people from Justice Canada, while also making some comments along the lines of where Tina was coming from. I want to make sure my understanding is correct, that similar items like these already exist in other land claims agreements that have been signed.

The Chair: Mr. Hendry.

Mr. Jim Hendry (General Counsel, Human Rights Law Section, Justice Canada): I'm not sure the land claims agreements and so on that have been signed so far actually contain their own human rights codes. They certainly create—

Ms. Nancy Karetak-Lindell: I didn't ask for the human rights codes, sorry.

Take the Nunavut Land Claims Agreement, for example. My understanding is that they can have an affirmative action program. Even though we're not under a self-government agreement, our land claims agreement does provide an Inuit preference—or affirmative action, as I guess you would call it in other understood language—one that does give preference to beneficiaries to provide programs and services in the training and hiring of employees and contractors, in allocation of land and resources, in that if it's on Inuit-owned land, they would have certain rights to the royalties.

Don't those already exist in some land claims that have been signed already?

● (1605)

Mr. Jim Hendry: If I may, the parliamentary secretary mentioned that he was concerned about the possibility that this might make changes to the act. In fact, the Canadian Human Rights Act as it exists right now does provide for certain of those kinds of powers. It may therefore be possible to do a number of these things without having to specify them, and to also enable the first nation—and I'll make another point on that—to develop these kinds of programs.

That's in subsection 16(1) of the Canadian Human Rights Act, which says:

> It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on or related to the prohibited grounds of discrimination

—and that would include race—

> by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.

So in many ways, the act does not have to be fully disturbed in order to accomplish some of the things set out in this motion.

The second point is connected to your specific reference to the Inuit. The motion deals with first nations. That's quite understandable, in the sense that the amending act aims to remove a specific provision that deals with the Indian Act. But in the future, and with a view to reconciliation and so on, the Canadian Human Rights Act would apply to all aboriginal groups within class 24 of section 91, and that would include the Inuit. Limiting it to first nations might well create an equality concern for aboriginal groups that are left out.

I make this point with respect to not only this particular motion but perhaps most of the motions. The natural focus is on first nations because the first nations are the ones governed by the Indian Act, whereas there are other first nations, as Ms. Crowder mentioned, that have treaty governments. There are also Inuit, as well, who have land claims and other governmental organizations.

So there is a charter issue that lies in that specific focus on the first nation governments.

The Chair: Thank you.

Mr. Bruinooge—

Ms. Nancy Karetak-Lindell: I was still speaking, I thought.

The Chair: I'm sorry.

Ms. Nancy Karetak-Lindell: I do know what this legislation is doing. It's that I'm troubled by comments made by Mr. Bruinooge, in that he doesn't believe in these points. That's what I'm understanding. I know we already have affirmative action programs in different parts of the country, so I'm very disturbed by the fact that he is already presuming certain outcomes because of the repeal of the legislation, as Ms. Keeper was saying.

It's very troubling to hear those comments, because I don't know what that does to programs that already exist. What we're going to end up with is very different situations for different people, depending which people have managed to sign land claims agreements and which people have not, if he has a preconceived idea that those are the very things that, in his opinion, are going to be stamped out when this legislation eventually gets through.

● (1610)

The Chair: I have Mr. Bruinooge, then Mr. Storseth and Ms. Neville.

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

In relation to the comments of both Ms. Karetak-Lindell and Ms. Keeper, this amendment says that a first nations government "is entitled to", and then goes on through these points. If it were in relation to section 16, as already quoted by Mr. Hendry, that would be a different story. If it were to allow for the process where, for instance, there were good reasons in a community for the purpose of allocating a certain group of lands, maybe based on family, those are things that I think can be adjudicated by the Canadian Human Rights Commission.

That's not how I read this, though. I read this as being able to actually deliver, basically, all of these things as per the decisions of the first nations government. I think if it went further, to suggest that the Canadian Human Rights Commission was able to actually provide similar ideas as does section 16, which was already suggested, that's a different story.

That's why I was going back to my previous argument, how the Canadian Human Rights Commission needs to not be limited by a section such as this. I feel there are minorities within first nations communities who find themselves on the wrong side of many of these things. That's why we're trying to repeal section 67. That's why we're doing all the things that we've done so far, debating this very point.

And you're right, it is my view, my opinion. Of course, I'm not suggesting it is the be-all and end-all, but everybody needs to have an opinion on these matters, and these are the ones that I'm espousing. I think there's absolutely nothing wrong with these viewpoints. That's why I continue to argue them as fervently as I do.

The Chair: Thanks, Mr. Bruinooge.

Mr. Storseth.

Mr. Brian Storseth: Thank you very much, Mr. Chair.

In the hope that my honourable colleague will be able to clarify the position of her party, I'll defer to Ms. Neville right now.

The Chair: Ms. Neville.

Hon. Anita Neville: I have further questions, Mr. Storseth. I'm sorry to disappoint you.

I want to follow up with Mr. Hendry, then I want to make a comment.

You made the comment that it does not need to be disturbed to deal with these items. I'd like you to expand on that. I'd also like you to elaborate on your comments about first nations, Inuit, and others. Are you saying that these amendments should include all of those other groups?

I need some further information from you.

Mr. Jim Hendry: We have to understand that the Human Rights Act is principally aimed at employment. With respect to the first point, section 16 gives power to an employer or a service provider.

Most of the complaints are about employment or delivery of services. In respect of section 16 they have provided a general policy, which is available on their website, on what they call “special programs”. They also have an aboriginal employment preferences policy. They suggest such things as a reasonableness requirement, and some others. There are five pages of policy in the employment area alone.

So in a sense they have provided guidance on how these programs can be developed. Given time, presumably they could develop one with respect to services, as well, especially in the aboriginal context. They have been working at that.

They also have the power to make guidelines, which is a quasi-legislative power that enables them to set out their interpretation of provisions of the act that must be applied by them and the tribunal. That provides a power to provide guidance to employers and service providers about developing programs, policies, employment practices, and so on, that are consistent with the act.

With respect to the second point, as I said, the Human Rights Act would apply to aboriginal groups, within class 24 of section 91. We're principally talking about the first nations, and what I'm suggesting here is that the equality provision in the charter is concerned usually with exclusion of groups. To the extent there are some aboriginal groups that the Human Rights Act applies to that would not be covered by this particular provision, then that may well give rise to a charter challenge, based on that exclusion.

● (1615)

Hon. Anita Neville: But I'm not sure you're answering my question. Are you saying that others should be included in each of the amendments we're putting forward in order to avoid a charter challenge?

Mr. Jim Hendry: Well, I think that's the inference from what I've said. That's about as far as I can take it, but I think you got the point.

Hon. Anita Neville: Okay.

If I can comment, Mr. Chair, I think we're in this conundrum that we're in because....

Well, let me back up. I don't think there is anybody around this table who opposes the repeal of section 67. I certainly don't, and my party doesn't. I don't think there is anybody here who does, and we have said that countless times. The issue is the manner in which it is being done.

What I'm hearing right now reaffirms the importance of an interpretive clause, the importance of responding to the twenty-plus groups we heard from, who came before the committee, and the importance, as well, of further consultation.

For me, the sadness of it is that the opportunity was lost when the House prorogued. When I first met with the new minister right after we reconvened, and he indicated that he was reintroducing the old Bill C-44, he didn't at that time tell me that it was exactly as we had it before. My hope was that there would be some consideration and accommodation by the committee from the various representations we had before us.

When I listen to Mr. Hendry, it reaffirms even further for me the importance of responding to the communities' anxieties, fear, perhaps their lack of trust—I'm not sure whether that plays into it as well—but the need for as much detail as we can have within the bill.

I'll conclude with that.

The Chair: Thanks, Ms. Neville.

On my list I have Ms. Keeper, Mr. Storseth, Mr. Warkentin, and Mr. Albrecht.

Ms. Keeper.

Ms. Tina Keeper: I have a question for the justice officials as well.

I'd like to go back to what I was talking about in terms of section 35, the constitutional and legal framework, Supreme Court rulings that have recommended consultation with first nations, so that when we're moving towards legislation with first nations, there should actually be a good-faith type of negotiations to move forward in developing that legislation.

As we see in this amendment that was put forward, there is a chasm between the response of the Conservative member to what is here in this amendment, which is taken from a first nations self-government agreement. We're talking about that chasm and really we require a process in which we can negotiate and move forward in a conciliatory manner.

Could we talk about maybe how it is that this process could possibly fit in that framework?

● (1620)

The Chair: Who wants to try that?

Mr. Pryce.

Mr. Charles Pryce (Senior Counsel, Aboriginal Law and Strategic Policy, Department of Justice): I'm not entirely clear what the question is.

Ms. Tina Keeper: If we're moving towards this type of legislation without that process, without the process of consultation, does that reflect the constitutional and legal framework and the Supreme Court recommendations, the Supreme Court rulings, in terms of a recommended course in which to move forward?

Mr. Charles Pryce: If your question is about the need to consult —

Ms. Tina Keeper: Are you a lawyer?

Mr. Charles Pryce: Yes, I am.

Ms. Tina Keeper: Okay, I will get out the specific sentence.

I'll just be a moment, Mr. Chair.

In Badger, the court said that the honour of the crown is always at stake when dealing with Indian people and it is always to be assumed that the crown intends to fulfill its promises. The integrity of the crown must be maintained when interpreting statutes or treaties that affect aboriginal and treaty rights. The appearance of sharp dealing is not sanctioned. When interpreting a treaty or document, any ambiguities or doubtful expressions in wording must be resolved in favour of the Indians. Any limitations that restrict Indian treaty rights must be narrowly construed and the onus of proving....

What I'm asking is that if these are the type of judgments that have been made by the Supreme Court of Canada...recommendations. The decisions of the Supreme Court of Canada in Sparrow, Delgamuukw, and others confirm the duty of the crown to consult...requires a fundamental shift in the way the crown has traditionally interacted with aboriginal people. And as a result of Delgamuukw and other judicial decisions, some governments have attempted to enhance their consultation policies and mechanisms. However, crown aboriginal consultation regimes have not yet resulted in the necessary stability with respect to government decision-making and predictability.

What I'm asking is that if this is the recommendation of the Supreme Court of Canada, do you think there is a possibility that there should be a process in place, or that there's an onus on the government to put a process in place, to move towards legislation of this type?

Mr. Charles Pryce: In terms of kinds of policies government chooses by way of consultation, if I understand the question about... that it's a duty to consult in relation to the development of legislation. This was, I assume, in the earlier session a subject of quite considerable discussion, as to whether there is a duty to consult in the development of legislation.

I think there was...I won't say there was a consensus, but I heard lawyers who gave evidence to this committee say that the Supreme Court had not determined that question, and that it may well be, as a matter of risk management, that consultation would be appropriate. But the court had not clearly said that consultation was a prerequisite to the development and passage of legislation.

Ms. Tina Keeper: I actually do have another question.

You're saying that there have not been Supreme Court recommendations that say there's a duty to consult, that it's all.... Like, even that concept is negotiable.

● (1625)

Mr. Charles Pryce: I didn't say that. I said, in the context of the passage of legislation as to whether there's a duty to consult, the court has clearly said there's a duty to consult, and others have said this.

Ms. Tina Keeper: Right, on aboriginal title....

Mr. Charles Pryce: When there's a crown action dealing with decisions respecting lands and resources and economic development, there may well be a duty to consult. Whether that translates into a duty to consult when passing legislation—any legislation, but legislation of this kind—has not been determined by the Supreme Court.

Ms. Tina Keeper: I'm not a lawyer, and I don't have a law background, so that's why I'm asking. Is there a possibility that if we say there's a possible infringement of an aboriginal treaty right here—say that's the argument—then the argument on the other side could be that, no, there isn't, and that's sort of what puts everything up in the air?

Mr. Charles Pryce: Yes, but it would then have to be resolved. If there is not adequate consultation, but the proposed legislation becomes law, then subsequently it can be challenged as an infringement of an aboriginal or treaty right. If the aboriginal treaty right is established, if the infringement is established, then the burden is on government to justify an infringement, and it may not be able to do so. One of the reasons it may not be able to do so is a lack of consultation. It's determined after the passage of the legislation.

Ms. Tina Keeper: As I understand it, these Supreme Court rulings are also calling for a shift in terms of how government moves forward in that sort of relationship with first nations so we don't have to end up in the courts afterwards, right?

Mr. Charles Pryce: Certainly, they constantly call for negotiation over litigation, reconciliation, and so on. Those are clear signals.

Ms. Crowder has mentioned Roger William. That case, too, although not a Supreme Court of Canada decision, talks of reconciliation and negotiation over litigation, and how law is only part of the bigger picture of how aboriginal and non-aboriginal Canadians are going to live together.

The Chair: Mr. Storseth.

Mr. Brian Storseth: Thank you very much, Mr. Chair.

I would like to start by clarifying for the record that, contrary to Ms. Neville's comments, each one of the parties had the opportunity to have their say on this in the House of Commons. Everybody voted unanimously in favour of sending this to committee, and we should not forget that.

The second thing is, Mr. Chair, this is fundamentally arrogant—ignoring the rules and precedents of Parliament. It's very clear that this is looking at amending a parent act. It is not dealing with anything that is within Bill C-21. In Marleau and Montpetit, under relevance:

> An amendment to a bill must be relevant; that is, it must always relate to the subject matter of the bill or the clause under consideration. For a bill referred to a committee after second reading, an amendment is inadmissible if it amends a statute that is not before the committee or a section of the parent Act unless it is being specifically amended by a clause of the bill.

Very clearly, in my opinion, in the opinion of the chair, and I think in the opinion of any legal counsel, this is outside the scope of this legislation.

Mr. Reiher, I understand you're the representative from Justice Canada on this issue. In your opinion, would this amendment be within the scope of Bill C-21?

Mr. Martin Reiher (Senior Counsel, Operations and Programs Section, Justice Canada): There are certain paragraphs of this proposed amendment that are clearly broader than the scope of the Canadian Human Rights Act, I can say that.

For example, new paragraph 67(1)(e) refers to “matters of concern and priority to the community”. As Mr. Hendry mentioned earlier, the Canadian Human Rights Act deals essentially with employment and service provision. This would seem to be broader.

I won't say I'm an expert in procedures in front of this committee, so I won't make comments that relate to parliamentary procedure, but in terms of the scope of the Canadian Human Rights Act, I can definitely tell you that it seems to us that the amendment would be broader than the Canadian Human Rights Act.

● (1630)

Mr. Brian Storseth: Mr. Hendry or Mr. Pryce, would you like to comment on that as well, if you see otherwise?

Mr. Jim Hendry: I might just add another point, and that relates to paragraph (f) of the motion. Once again, the Canadian Human Rights Act deals with fairly simple things: employment and services. Although hearings can get long, as is usually the case in legal matters, the act does provide within itself the prohibitions of discrimination, and it also provides defences for employers and for service providers to bring a broader perspective, a community perspective, or just simply the employer's perspective, in defence.

One of the concerns that appears here seems to be paragraph (f), which says to ask a human right tribunal

> to consider and apply indigenous legal traditions and customary laws in a manner consistent with principles of equality and justice.

To the extent that these matters are relevant to one of the defences that is currently in the act, then that's taken care of by the current act. I suppose there is a concern that the incorporation of indigenous legal traditions and customary laws into the act may have the effect of broadening the scope of the act's coverage, or it may even contract it. We don't really know.

Professor John Borrows wrote a brilliant book on indigenous law and how it applies, and he develops a very interesting theory about the scope of it within a common law tradition. At the same time, if this becomes part of the act, then a tribunal might be called upon to apply one of many different sets of customary and legal traditions. That could end up having the effect of expanding or contracting parts of the act and actually affecting, in a way, the universality of the principles of non-discrimination that are currently represented in the act as it stands now.

Mr. Brian Storseth: Thank you very much, Mr. Hendry. I have to concur. For us to be as arrogant as to try to amend the Canadian Human Rights Act here—the twelve of us over a two-hour meeting—is absolutely irresponsible. That's the absolute reason why there are these consistencies within parliamentary procedure, which the opposition has very clearly ignored with this. Quite frankly, they need to vote against this.

Ms. Crowder is very well read when it comes to aboriginal issues. Quite frankly, Mr. Chair, this is another example of the tail wagging the dog over there just because they simply put a little bit more work into it at that end.

So I would call for some sense and sensibility to come back into this committee, with a vote against this at this point in time.

Thank you.

The Chair: Mr. Warkentin.

Mr. Chris Warkentin (Peace River, CPC): Thank you, Mr. Chair.

I am new to this committee, so I do apologize if I ask questions that people have had addressed over the past months of hearings on this issue. However, one of the reasons why I asked to be part of this committee, why I joined this committee, was simply the number of calls that I've had to my office specifically regarding minorities within aboriginal communities.

I represent an area that has a significant aboriginal population. I have a significant number of aboriginal communities scattered throughout my constituency. What I'm very concerned about, specifically when it comes to an interpretive clause, is the issue that minorities within first nations...because there are minorities within first nations communities as well.

If anybody would like to meet some of these minorities within first nations communities, I'd be happy to bring you to my constituency and show you some of these horrific examples of where people are being kicked out of their houses because they aren't the right family or didn't support the right person in the past elections. There are all kinds of horrific stories about mothers and children being tossed out because they have done something or spoken out against something.

It's really horrifying for me, so when we discuss an interpretive clause, I get very concerned that individual minorities...and I'll put a face to these people. These people are elderly, these people are mothers, they're children, they're people who have come against what they see as corrupt, systems of corruption. They are being tossed out.

Quite effectively, what I'm seeing with an interpretive clause is the ability for the leadership in that community to say, “We don't care about what you think your rights are, we're just going to just interpret this as being our given right.”

That's my concern. If somebody can say there are ways we can address this to ensure that this won't happen....

I know that there are people who are sitting there in disbelief that these situations are in fact happening.

Ms. Keeper, I'd be very happy to have you come to my constituency—

● (1635)

Ms. Tina Keeper: I'm surprised at some of the ways in which you're—

Mr. Chris Warkentin: When I'm speaking—

The Chair: Order, Mr. Bruinooge, Ms. Keeper.

Mr. Warkentin has the floor.

Mr. Chris Warkentin: When I think about the Human Rights Act—and it's even been discussed at this meeting—the fact is that the Human Rights Act is responsible for employment and service provisions. I don't think anybody around this table would have any problem ensuring there would be no discrimination in terms of employment on-reserve or within aboriginal communities. I don't think any of us would support any interpretation that would allow discrimination in terms of employment. I also don't think that should be accepted on service provisions.

Now, I know there are issues with regard to aboriginal customs and practices, but I don't think the Human Rights Act speaks specifically to those issues. I think it addresses the issue of employment.

We've been spoken to about the employment and service provision. I'm just wondering if our legal counsel might be able to talk about the possibility that if there's an interpretive clause, some of my concerns would not...that we wouldn't be able to ensure aboriginal people couldn't be discriminated against in terms of employment and service.

Mr. Jim Hendry: I'm not quite sure; are you suggesting that the interpretive provision might be used to create discrimination?

Mr. Chris Warkentin: That's right. I'm thinking specifically if an aboriginal community makes a determination based on any number of things, they should have an interpretation that would allow some type of discrimination.

Mr. Jim Hendry: I suppose, first of all, it depends on the nature of the interpretive clause. It is possible, if you get into something like the adoption of other laws or other rules from other sources, you can have something that is retrograde to the kinds of protections provided in the Human Rights Act.

You may have a custom, a tradition, a long-forgotten law or what have you, that might have the effect of reinstating some of the problems that have given rise to traditional difficulties within a group, if it were given full force. So I suppose the hope of the Human Rights Act is to ensure that employment and services are given on a non-discriminatory basis.

In terms of the possibility of bringing in something that might be, as I say, retrograde, it's possible through an interpretive clause.

Mr. Chris Warkentin: Now that we've solidified that, I'm wondering if you see anything within the Human Rights Act that would discriminate against aboriginal people. If people are given equality in terms of employment and equality within a service provision, is there anything you know of that would be within aboriginal tradition and would be counter to equality of employment and equality of service provision?

● (1640)

Mr. Jim Hendry: I certainly can't speak from a general knowledge of aboriginal tradition. I know a bit more about the Human Rights Act. As it stands, its essence is to ensure substantive equality to people on all the eleven grounds, including race or national/ethnic origin.

Mr. Chris Warkentin: Right, so there wouldn't be anything you can see—that you know of—that would be within aboriginal tradition or culture and run counter to the Human Rights Act.

Mr. Jim Hendry: I suppose I can't name you anything off the top.

Mr. Chris Warkentin: Okay, I appreciate that. Thank you.

The Chair: Thanks, Mr. Warkentin.

Just before I go to Mr. Albrecht, I have Ms. Crowder, Ms. Keeper, and Mr. Russell after that. You're all experienced parliamentarians. You know that we'll keep working our way down this list until everyone has exhausted themselves, either verbally or physically. At that point, we will move on to the second of our long list of proposed amendments.

Mr. Albrecht.

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

This idea of the interpretive clause has certainly come up at a number of our previous committee meetings. One of the key arguments against having an interpretive clause is the real possibility that in crafting that interpretive clause, we're going to leave out some key element.

In this amendment, Ms. Crowder has included under new paragraph 67(1)(a) programs and services, under (b) training and labour, under (c) land and resources, under (d) culture and spiritual practices and traditional practices, under (e) community issues, and finally legal traditions in (f).

The question I have is, are we sure that in this list of suggestions from Ms. Crowder we have covered all eventualities? I think the answer is clearly no. We cannot be sure we have covered every possible scenario that could arise.

I think it's impossible in one clause, or even in a five-page document, to cover all the possibilities that may arise as they relate to any specific first nations group.

We discussed earlier that we've heard from up to 20 groups at this committee as they've given presentations regarding repealing section 67. But we know, Mr. Chairman, there are at least 600 first nations groups across Canada.

To suggest the commission or the tribunal could become experts in all these traditions and laws and all these varied groups across Canada is totally unrealistic.

That is not to say the interests and traditions and customs of first nations people would be irrelevant in the adjudications of the complaints because they will be considered in the specifics surrounding a complaint. But as it relates to the specifics this interpretive clause attempts to speculate about—and I think that's clear—we're trying to look ahead and think of what kind of issues might arise, so we're dealing in speculation. But in reality these can only be dealt with by the commission and the tribunal in the overall context of the complaint, taking into account first nations traditions, customs, and laws.

Mr. Chair, I think it's very unfortunate that this committee has chosen to overrule your very wise earlier ruling. It's important that we do not support this amendment. I am very much opposed to it.

The Chair: Thank you for all of that, Mr. Albrecht.

Ms. Crowder.

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

I have to say that I appreciate the generally respectful tone of the debate today, because I think it's a very important issue. There's just one issue around respect, and Mr. Storseth raised the issue that he felt that this committee wasn't being respectful.

I would argue that if we truly to talk about respect around process, this committee has passed two motions in the past calling for consultation, which the government has chosen to ignore. So in terms of respect for process, when you have a majority of members of the committee laying out a careful framework around consultation, I think that's important to note.

Just to come back to the interpretive clause, I think the big challenge we have before us is the fact that, on a number of occasions, either the Human Rights Commission, in a report that it's put forward, or individual commissioners have talked about the importance of an interpretive clause.

When Jennifer Lynch, the Chief Commissioner of the Canadian Human Rights Commission, appeared before the committee, her submission on April 19, 2007, talked about the need for an interpretive provision:

> The need for an interpretive provision is one important area where differences of view have been voiced and Bill C-44—the now Bill C-21—is silent on this matter. With respect, we submit that it should not be. First nations communities and people have a unique history and a special status in the Canadian constitutional and legal system. Their existing aboriginal and treaty rights are affirmed in the Constitution, and have been progressively confirmed by the courts, and are recognized by governments at all levels.
>
> An interpretive provision is, in our submission, imperative to give application to the inherent right to self-government and is fundamental to developing an appropriate system for first nations human rights redress. An interpretive provision would help to ensure that individual claims are considered in light of legitimate collective rights and interests.
>
> While many agree on the need for an interpretive provision, there are differences on how this should be achieved.

So you have the Chief Commissioner of the Canadian Human Rights Commission calling for an interpretive clause. The very people who are going to be responsible for hearing complaints are saying that they need this particular piece.

I guess this is a question for the department. There were a couple of comments earlier that left me feeling really uncomfortable. It almost seems like there's an underlying presumption that first nations couldn't possibly have egalitarian human rights. I hear these concerns voiced around all kinds of decisions that first nations make that are potentially discriminatory. Inherent in that is a presumption that first nations somehow or other don't recognize human rights as valid in their own context.

I'll frame this in the context of the question that I want to ask. In “A Matter of Rights“, the Canadian Human Rights Commission, as I pointed out earlier, raises interpretive provision but they also point out that there are provisions where there's a bona fide occupational requirement, a bona fide justification—you lawyers know all about this stuff—for why it treated an individual in a way that would otherwise be contrary to human rights law.

They go on in their documentation to outline some cases where there is this bona fide requirement. In footnote 28, they're citing the Ontario Human Rights Commission, but I think it's a legitimate comment. It says, for example, under subsection 24(1) of the Ontario Human Rights Code, that the right under section 5 to equal treatment with respect to employment is not infringed where

> a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status, same-sex partnership status or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and bona fide qualification because of the nature of the employment.

And so on.

● (1645)

So there are human rights codes, and in this context about giving people a bona fide requirement of employment—and arguably a bona fide requirement of employment for first nations might be that you speak the language and have some knowledge of the culture and tradition—I wonder why we wouldn't consider an interpretive clause that looked at some legitimate restrictions around things like employment.

I wonder if you could comment on that.

Mr. Jim Hendry: I think I've mentioned that subsection 16(1) does provide for special programs to develop the concerns of those who have been generally disadvantaged in the past, in this case perhaps because of their race, and it allows for a certain development of economic opportunity.

I mentioned also the aboriginal employment preferences policy, which attempts to develop that. In fact, this is the second iteration the commission has given of its employment preferences policy. It had one approved in 1990; this one was approved 13 years later. So they're busy trying to update this kind of thing.

Those types of policies and programs are possible in the act as it stands now, or many of them, anyway, the ones we've adverted to. Thus, there is a basis for saying there's no need to add greatly to what the commission already has, and it already has a policy on aboriginal employment specifically.

It can do a fair amount itself, and as I say, it has the guideline-making power, which binds itself and the tribunal, under section 29, whereby it can offer interpretations of the act. It can do a fair amount with the materials it has at hand to assist in the adaptation or understanding and application of rules to particular situations.

Now, the particular types of interpretation clauses that you're referring to, the ones that deal with fraternal, sorority educational institutions and so on, are found in provincial acts. There isn't one in the federal act, and that's largely because, as a matter of property and civil rights, the provinces have jurisdiction over the civil or human rights of, say, religious groups, national ethnic origin groups, associations of that nature, the difference being, at the federal level, the main bodies we have jurisdiction over are large organizations: railways, government, airlines, interprovincial and international transport, shipping, the various matters of federal power.

There is a different sort of composition between the types of populations and demographics that the provincial human rights deal with as opposed to the federal act, which tends to have a somewhat more rarefied yet still quite populous group within its jurisdiction. It's a different sort of group and there isn't a similar provision like that. That is, I agree, fairly common within the provinces. They are concerned about the legion, the Ukrainian club, various churches, and so on, so they can hire and provide services to the people who are affiliated with those groups. But those groups generally aren't within federal jurisdiction.

● (1650)

Ms. Jean Crowder: I think part of what you just said highlights the difficulty we're in. You're indicating a difference between the federal act and the provincial human rights acts. Again, we come back to the fact that it's the commission itself that's been calling for an interpretive clause. This isn't something we dreamed up; it's something that clearly came forward in one of their other reports, too, which I haven't quoted from yet.

I think it's a challenge for us when you have the very people who are going to be responsible for hearing complaints saying that they need an interpretive provision, and then we completely disregard the very body that asked for it. They're going to have to be adjudicating these matters.

I don't understand why the people who are expert in this particular area, the people who have been hearing complaints for I don't know how many years it is now, request this be included, and we disregard the experts. It just doesn't make any sense to me that we would do that.

Mr. Jim Hendry: I can't go too much farther than that.

I can mention, though, a case from the Canadian Human Rights Tribunal involving Peter and Trudy Jacobs. Peter was adopted into the Mohawk band. He affiliated very closely with the Mohawk people. He learned the language, longhouse traditions, and so on. He married a full-blooded Mohawk woman, and they lived on the reserve. But according to the code, which was being developed at the time, he was deprived of his membership, as was she.

They filed a complaint that they didn't get certain services under the Canadian Human Rights Act. The tribunal examined the kind of evidence, the traditions, and so on that we're thinking about here. At the end of it all they decided there was no basis in the evidence that they heard from experts about the traditions that an adopted person could be excluded. It does show that within the current act, the current structure, there is room for these kinds of considerations.

After this case, the particular provision that was an issue was amended to provide more accommodation. As it was then, there was still a sensitivity to the concerns and traditions of the people. As I say, the question of the effect of that accommodation issue, which is an important human rights concept, has not been tried in quite the same way. This is a somewhat older case, but nevertheless it does show the sensitivity of the current system to the concerns expressed here.

● (1655)

Ms. Jean Crowder: The Jacobs case is an interesting one in that it also raises the larger issue about who gets to determine band membership and status. That's a much larger discussion, which is certainly outside the scope of what we're talking about here today.

I know the Human Rights Tribunal has typically looked at section 67 in the narrowest of interpretations. There has been a notion bandied about that the repeal of section 67 will grant human rights to first nations, which is simply not true. What it will do is to grant Human Rights the ability to file human rights complaints against the Indian Act. First nations already have human rights outside of the Indian Act, so there has been this massaging of the language around this.

The last comment I have is with respect to the International Convention on the Elimination of All Forms of Racial Discrimination report covering the period February-March 2007. I think this is one of the other problems we're facing; it says this in their recommendation:

> The Committee, while welcoming the recent decision of the State party to repeal Section 67 of the Canadian Human Rights Act (CHRA) which effectively shielded the provisions of the Indian Act and decisions made pursuant to it from the protection provided by the Act, notes that the repeal in itself does not guarantee enjoyment of the right to access to effective remedies by on-reserve Aboriginal individuals (art. 6).
>
> The Committee urges the State party to engage in effective consultations with aboriginal communities so that mechanisms to ensure adequate application of the Canadian Human Rights Act (CHRA) with regard to complaints under the Indian Act are put in place following the repeal.

When you're talking about whether there is or is not an interpretive clause, simple repeal of section 67 will not provide resources in communities to provide redress. I don't know if you've had experience with other human rights complaints with redress mechanisms, but housing and employment comes up. Appealing a decision on a decision that a band has made about allocation of scarce resources simply means that somebody else will be displaced on that list. That's what it means.

I don't know whether you have any comments on that.

● (1700)

Mr. Jim Hendry: Certainly that's a broader question, but there have been complaints filed about employment, and those redress mechanisms are available. There are complaints that have proceeded through—the Jacobs case and others—in which some relief has been obtained.

In other cases, though, section 67 has been the barrier to any relief. I cite the Gordon council, which was a case about the distribution of housing, where the Federal Court of Appeal said section 67 was a bar to relief that the person otherwise would have been able to get from the tribunal they appeared before.

The act does have quite a code of mechanisms for investigating, mediating, conciliating, and ultimately referring cases that merit it to tribunal with a structure that allows a person to take an order from a tribunal and enforce it as an order of the Federal Court.

So it is a system that does have teeth, but there are in some cases—

The Chair: Excuse me.

On a point of order, Mr. Storseth.

Mr. Brian Storseth: Mr. Chair, this is outside the scope of even Ms. Crowder's amendment. I'm wondering if she's making a subamendment to her amendment, or maybe she'd just like to move her motion so we can vote on this.

Ms. Jean Crowder: Sorry, Mr. Chair, I think this is directly related. We're talking about the application of section 67 and whether or not it's actually going to significantly improve people's living conditions.

The Chair: I'll let Mr. Hendry continue, but I believe, Ms. Crowder, you mentioned several minutes ago that you were making your last point, so I may hold you to that.

Ms. Jean Crowder: Well, it went on.

The Chair: Mr. Hendry, could you just wrap it up.

Ms. Jean Crowder: It was new information, Mr. Chair.

Mr. Jim Hendry: I'll just finalize by saying that in the Gordon case the barrier was not in the inability of access to the tribunal, but it was the barrier of section 67 because a band has the power to distribute property on its reserve.

Ms. Jean Crowder: This truly is my final comment.

There's no response to this, because this is outside of your jurisdiction. The problem, and the reality, is that if a band is deemed to not to have provided housing to somebody, I know very few communities where there isn't a substantial waiting list for housing. The tribunal may rule that somebody has been discriminated against, but the reality is that if one person has housing, it will simply displace somebody else on the list.

That's the reality of it. I don't know if any committee members here have communities where there's no wait list for housing. It's just not happening.

So that was my point. If there aren't additional resources, which again is outside the scope of what you can do—unless you can wave a magic wand and provide additional resources to provide housing—the simple repeal will not alleviate the conditions that may lead to a discriminatory complaint.

That is my final comment.

The Chair: Thank you, Ms. Crowder.

I know *I* have figured out what we're going to be doing on Thursday afternoon and also next Thursday afternoon. If anyone has booked early flights next Thursday, I think you might want to reconsider.

I have Ms. Keeper, Mr. Russell, Mr. Albrecht, and Mr. Warkentin.

Ms. Keeper.

Ms. Tina Keeper: I'd like to pick up on this comment that Mr. Hendry made in regard to the amendment. I'm paraphrasing, but you talked about the impact and that it could expand or contract the act. This type of amendment going forward could have that impact on this act.

Mr. Jim Hendry: What I was specifically referring to, I think, was the reference to indigenous legal traditions and customary laws—which we really don't have at our fingertips—that could have the effect of actually changing some of the protections that are currently offered in the act.

Ms. Tina Keeper: Great.

I would like to ask you a question, then, Mr. Justice Men, about that very point, because I represent a riding, a very large riding here in Canada, that has 33 first nations. There is a political organization that represents our first nations in northern Manitoba. Out of the 33 that are in my riding, 27 are represented by the Manitoba Keewatinowi Ininew Okimakanak.

They made a presentation to this committee in which they stated that they saw this bill as an infringement on their rights, and that they have, within the Constitution of Canada, by section 35 and by virtue of their treaty, the right to move forward in terms of developing the codes for their communities, developing laws with Canada, in that process. We also heard from the Canadian Bar Association—now, talk about impact on other legislation—that the possibility is there that if we made this change, repealed section 67, the Indian Act itself could be brought forward to the Canadian Human Rights Commission, under the Canadian Human Rights Act.

Could we talk about that impact? We're just talking about the interrelatedness of what first nations are saying at this table and what the federal government is saying, or what the Conservatives are saying. So I'd like to know from Justice Canada's perspective whether you see that as a possibility, in terms of the Canadian Human Rights Act.

Even Justice Muldoon, I believe, said that if it were not for section 67 of the Canadian Human Rights Act, the Canadian Human Rights Tribunal would be obliged to tear apart the Indian Act in the name and spirit of equality of human rights in Canada.

The point is....

Oh, so that's your point, that you want to do that?

● (1705)

Mr. Chris Warkentin: No, we're saying that we—

Ms. Tina Keeper: You want to tear apart.... So that's your agenda. But what the people are suggesting here is that the Indian Act is the only statute—

Mr. Rod Bruinooge: The argument is that—

The Chair: Guys, order, please.

Ms. Tina Keeper: —that protects Indian lands. In fact, when the Canadian Human Rights Act was introduced into law, it was stated at that time, it was understood, that Canada would move forward to revise the Indian Act, to modernize the Indian Act. That hasn't happened.

I'm asking you if you believe...when we heard from the Canadian Bar Association that this type of impact on other pieces of legislation could happen.

Mr. Jim Hendry: Are you suggesting, then, that someone might file a complaint against the Indian Act itself on the basis of race?

Ms. Tina Keeper: That's what I am asking, yes.

Mr. Jim Hendry: First of all, the complaints system doesn't work quite like that. The charter is an instrument that is constitutional in nature, by which you can challenge specific provisions of an act of Parliament. Under the Human Rights Act what you would challenge is a discriminatory employment decision or a discriminatory failure to provide you with service because of your race.

Just with respect to that point, there was a decision by the Supreme Court of Canada, with all due respect to Justice Muldoon, in Gosselin v. Quebec in 2005, with the universal citation of SCC 15. It was a challenge to the Charter of the French Language, which essentially implemented section 23 of the charter about minority language rights.

What's relevant here is that the court didn't agree with the ability to challenge that statute, which was effectively using the charter.

In paragraph 14 they say the following:

> The linkage is fundamental to an understanding of the constitutional issue. Otherwise, for example, any legislation under s. 91(24) of the Constitution Act, 1867 ("Indians, and Lands reserved for the Indians") would be vulnerable to attack as race-based inequality, and denominational school legislation could be pried loose from its constitutional base and attacked on the ground of religious discrimination. Such an approach would, in effect, nullify any exercise of the constitutional power:

So the suggestion there, what the court is saying, is that these acts are fundamentally connected to their constitutional base.

● (1710)

Ms. Tina Keeper: Right. So you're talking specifically about employment and service.

I want to ask another question.

When you talked about that other case, the one you referred to...I believe it was at Six Nations or Akwesasne.

Mr. Jim Hendry: It was Jacobs.

Ms. Tina Keeper: Yes. That case, to move forward....

Currently, as Ms. Carter said, there's sort of a massaging of the language whereby people are being led to believe that people of first nations have no access to file human rights complaints. They do currently under the Canadian Human Rights Act.

The Assembly of First Nations has filed a complaint with the First Nations Child and Family Caring Society against the federal government with respect to child welfare. There is a child welfare issue in my riding as well, to do with the health services of children living on-reserve, where they don't have access to health services if they have a disability or a complex medical need.

Those issues now can be brought to the Canadian Human Rights Commission.

Mr. Jim Hendry: As you mentioned, a complaint has been filed.

Ms. Tina Keeper: Yes.

So could I ask you, then, when we hear this type of language that says we want to give human rights to first nations, and we hear Mr. Warkentin's comments that these things are happening—and obviously there have been very difficult times for first nations to provide services when they're chronically underfunded, which is the basis of that child welfare complaint—

Mr. Brian Storseth: On a point of order, Mr. Chair, what is the relevance to this amendment? We do have to stay somewhat on topic.

The Chair: I'm allowing a lot of leeway today in terms of what people are talking about. My only encouragement, if can make an observation, is that there seems to be...I don't want to call them "battle lines" emerging, but to any observer in the room, it seems there are two different opinions on this. I'm not sure either side is going to persuade the other.

I would just encourage members to move through the points they want to make and ask their questions. Then let's get to a vote on this, the first of 14 amendments we have to consider.

Ms. Tina Keeper: Thank you, Mr. Chair.

What I'm asking about is the scope of access currently available for first nations, under the Canadian Human Rights Act.

Mr. Jim Hendry: Well, they may file a complaint about discrimination in employment and services, like anyone else, subject to this section 67 qualification right now. That's what we're debating here.

Ms. Tina Keeper: Yes, but the point of the legislation, in your opinion, would be....

Mr. Martin Reiher: If I may, the repeal of section 67 will allow challenges to decisions made pursuant to the Indian Act, which is not possible now.

You referred earlier to the possibility of a very significant impact on the Indian Act. This has been alleged by some other witnesses. We do not think that will be the case. Basically there will be provisions of the Indian Act that will likely be impacted, but the Indian Act has been subject to the charter for 25 years, and it's still intact.

So partly for that, we do not think there is a high risk that the Indian Act would be dismantled.

Ms. Tina Keeper: There's not a high risk, but there is the possibility. We talked about minorities in first nations—and I'm not really sure what that means—from the other members.

Say there was a non-first nations person residing on a first nation. Is that the sort of avenue that could pose a risk?

● (1715)

Mr. Martin Reiher: Any decision made pursuant to the Indian Act cannot be challenged now before the commission because of section 67, and would be challengeable if section 67 were repealed, whether it's by a first nations member or a non-first nations member.

Ms. Tina Keeper: Thank you.

The Chair: Just before I go to Mr. Russell, I will remind you that we do have votes. It's my understanding that the bells will be at 5:30 and the votes at 5:45. This is just to forewarn whoever is speaking at the time that when the bells go, I'm going to end the meeting at that point. Whichever member has the floor at that time will continue in the next meeting.

Mr. Rod Bruinooge: Mr. Chairman, would I be able to move a motion that we extend the time of this meeting into the evening, beyond the votes?

The Chair: Do you mean to return after the votes?

Mr. Rod Bruinooge: Yes. I'm making that motion.

The Chair: Sorry, what would be your motion...?

Mr. Russell.

Mr. Todd Russell (Labrador, Lib.): On a point of order, he's allowed to make a motion if he wishes to make a motion, I don't think he needs the permission of the chair to make a motion.

So if he has a motion, let's not debate whether he can or can't. He can, I think.

The Chair: I have been informed that, given we're already dealing with an amendment, we cannot deal with that motion.

Mr. Rod Bruinooge: So be it.

The Chair: Mr. Russell, you have the floor.

Mr. Todd Russell: Thank you, Mr. Chair.

Good afternoon. My apologies for being late, but when the great snows come, I tell you, snowshoes and shovels are about the greatest inventions we have. I'm happy to be back.

I want to speak to this particular amendment, but first of all, I would say that I was very disappointed...and he may want to clarify with this particular committee. That's my colleague Mr. Warkentin. When he was speaking before the committee a short time ago, he was using references to corruption, almost characterizing first nations as hotbeds of corruption.

At some point, he may want to clarify that. This is not an anti-corruption act, this is the repeal of section 67 of the Canadian Human Rights Act.

Mr. Brian Storseth: A point of order, Mr. Chairman.

Mr. Chris Warkentin: Well, one could argue—

The Chair: Just one moment.

Mr. Warkentin, you have a point of order?

Mr. Chris Warkentin: I'll keep the clarification very simple.

I will clarify: alleged corruption, and there have been cases where corruption has in fact been found to have happened on some of the reserves in my communities.

Mr. Todd Russell: I would only clarify that it is not an anti-corruption bill we're talking about; we're talking about the repeal of section 67 of the Canadian Human Rights Act. So I would just like to say that.

As well, I would say, Mr. Chair, that we have been before the committee and we've heard numerous witnesses. It is very disappointing that the government missed a great opportunity to bring before the committee certain changes from the previous bill that would have reflected the testimony that had been given by aboriginal leadership, aboriginal individuals, non-aboriginal people, legal experts, and the Canadian Human Rights Commission within itself.

I would just like to ask the witnesses, though, a couple of questions, just for clarification, because this amendment seems to arise out of the fact that there is no interpretive clause.

The Chair: Actually, I would just like to intervene, because I know you were a few minutes late arriving today. I would just like to clarify how we got where we are.

At the beginning of the meeting, I had ruled that this amendment inadmissible, not on the basis of merit but on the basis of legislative procedures. It goes beyond the scope of the bill.

At that time, my ruling was challenged and was overturned by a majority of the committee members, so we are proceeding to discuss NDP-1, the amendment that is before us. That is where we are.

The argument has been, in my view, a little disjointed this afternoon because sometimes the discussion is on the merits of some of the notions and concepts in this, and sometimes the discussion has to do with the technical admissibility of it. As you know, if it's not admissible that argument is primary. It would only follow that we would discuss the merits of it afterwards.

That may give you a flavour of the discussion we've had today.

• (1720)

Mr. Todd Russell: I thank you for that. I was aware that the committee had overruled the chair's particular ruling.

I just want to ask this. Does the Canadian Human Rights Commission, within the act itself, have an interpretive clause, as such, when it comes to aboriginal rights, communal rights, aboriginal interests, or is it a general clause which they interpret?

Mr. Jim Hendry: Well, there are a number of prohibitions against discrimination in employment services, accommodations, and so on. That's what they enforce.

Mr. Todd Russell: You said that there was flexibility, that the commission exercises certain flexibility when it makes a ruling or when it makes a judgment.

Mr. Jim Hendry: The commission just decides what it's going to do with a complaint; the tribunal is the one that actually makes the decision. They're distinct organizations. The commission does have some flexibility in making policy and can make quasi-legislative guidelines to help interpret the act, but not general interpretations. They'll say, "This is what we think it means, but this is what you need".

Mr. Todd Russell: What I'm getting at is that if that's already sort of an operating principle of the tribunal—this flexibility, this sense of maybe being able to incorporate various customs and laws and maybe being able to incorporate individual versus communal rights—why could that not also have a parallel within this particular act? Is there anything prohibiting having an interpretive clause within this act?

Mr. Jim Hendry: The Human Rights Tribunal simply applies the law. They find out whether there's discrimination, based on the evidence, and then they apply the defence as is required by, say, a shipping company or a band council. So the evidence will depend on the kind of case.

Mr. Martin Reiher: Just to complement that, I think what you're getting at is that currently, in making a decision, the tribunal has the ability to take into consideration first nation traditions in interpreting the provisions of the Canadian Human Rights Act, which is something that I think Mr. Hendry mentioned before. The difference if there is an interpretive clause is that there will be an obligation to take the collective interest into account. The concern we have raised today is that by so doing, there is a risk. It's not automatic.

We're not assuming that bad decisions will be made. We're just pointing to a possible risk that when collective interests are balanced or weighed against individual interests, the individual interests may not win. Maybe the protection of individual interests will be diminished by this. It's automatic if the collective rights are given more importance. That is what we have alluded to.

Mr. Todd Russell: So the tribunal can now do this, but it's subjective. They can choose to weigh these factors or to not weigh them. If we put it in the bill, then they have an obligation to weigh all these particular factors. That is the difference.

Mr. Jim Hendry: No. I think each sort of defence has a structure by which each element is proved by evidence. I think what we're trying to say is that in a case that involves, say, a band council and its actions, that evidence will probably take into account the collective concerns this band council was attempting to apply in what it did.

Mr. Todd Russell: In essence, there was nothing prohibiting the government from drafting this bill in such a way as to include an interpretive clause. Is that right?

Mr. Jim Hendry: I think that's a matter of policy.

Mr. Todd Russell: Was the Department of Justice involved in the drafting at all? Did the Department of Justice provide any advice to the government on this particular bill?

Mr. Martin Reiher: The answer is yes. The Department of Justice obviously has participated in the drafting of this bill. Whether there can be an interpretive clause or not is not for the Department of Justice to say. It's a decision of Parliament, obviously, and there's no....

The answer is yes; technically, yes.

• (1725)

Mr. Todd Russell: So when you were involved in the drafting of this bill, did the discussion of an interpretive clause get any serious consideration within the department at all? Was there an opinion passed by the department one way or the other that can be shared with the committee?

Mr. Jim Hendry: I think we're not allowed to provide the advice that was given by the Department of Justice. It is protected by solicitor-client privilege. But as Mr. Reiher said, what we can say is that the Department of Justice was involved in the development of the bill.

Mr. Todd Russell: When the department was involved in the development of the bill, did the whole discussion of whether adequate consultation had taken place come up, generally speaking?

Mr. Charles Pryce: The issue of consultation was part of the discussions that took place, but I'm not sure there's much we can say beyond that.

Mr. Todd Russell: Can you elaborate a little bit on what the operating principles are when it comes to consultation? As the Department of Justice, have you arrived at the conclusion that you don't have an obligation to consult with aboriginal people when it comes to drafting legislation? Is that the opinion of the department? Is that the advice you give the client?

Mr. Charles Pryce: Well, as we said, the advice we've given government is subject to solicitor-client privilege, but the advice is consistent with the guidance from the Supreme Court of Canada.

Mr. Todd Russell: So when the government chooses to consult.... I'm making the assumption here that when you say it's consistent with the guidance of the Supreme Court of Canada or other court decisions—

Mr. Charles Pryce: I mentioned to Ms. Keeper that the law is clear about consulting with respect to decisions relating to resource management executive decisions; there is no clear guidance as to a duty to consult with respect to the passage of legislation.

Mr. Todd Russell: But surely there must be an operating principle that you use as a guide in terms of consultation. You don't just say we have no clear position on this.

It's my experience with the Department of Justice that they do take clear positions on things and they will be very substantial in defending those positions. You usually arrive at some collective decision around things like consultation and then you defend it to the hilt. That's why you have 900 lawyers over there, to do that type of thing—

Mr. Rod Bruinooge: On a point of order, Mr. Chair, consultation is not part of this current amendment. We've talked to the consultation debate for many months. Mr. Russell is not discussing the merits of this amendment right now.

The Chair: I have allowed a lot of latitude today, Mr. Russell, on a bunch of things. Mr. Bruinooge is right. Do you have some specific questions, even somewhat related to the clauses that are actually in the—

Mr. Todd Russell: Well, I would beg to differ with the chair. Every question I've asked, in some way, shape, or form, is related to the amendment before us.

I can't speak for Ms. Crowder, but no doubt the amendment itself has arisen because of issues around consultation, interpretive clauses not being included in the bill, and what not. So whether or not they're on each individual a, b, c, or d, they are in fact speaking directly to the amendment.

The Chair: Which I'm hoping we're going to get to vote on today.

Mr. Todd Russell: I mean, there are Christmas wishes out there, and you may want to allow one of them to go to Santa Claus.

I just want to continue. Is there a clear operating principle when it comes to the drafting of legislation by the federal government and consultation with aboriginal people? Can you just answer about whether you have a guideline.

Mr. Charles Pryce: There's no particular guideline. There is a recent announcement—I'm not sure if it's the Ministry of Indian Affairs—about moving toward a policy on consultation with aboriginal people; there's an action plan to get there.

In terms of consulting on the development of legislation, I think the general operating principle, whether it's legal or policy, is that there are many good reasons to consult on the development of legislation in order to get good statutes at the end.

● (1730)

Mr. Todd Russell: I have a final question.

The Chair: Members, the bells are ringing.

On my list for Thursday, when Mr. Russell is finished, I have Mr. Albrecht and Mr. Warkentin.

I hope that in the next 48 hours committee members will see the wisdom of bringing this discussion to an end and moving on to the question. I wasn't going to cut an individual member off, especially on his first question.

I will see everybody back here on Thursday afternoon at 3:30.

The meeting is adjourned

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