House of Commons
CANADA

# Standing Committee on Aboriginal Affairs and Northern Development

AANO • NUMBER 008 • 2nd SESSION • 39th PARLIAMENT

**EVIDENCE**

## Thursday, December 13, 2007

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## Chair

**Mr. Barry Devolin**

# Standing Committee on Aboriginal Affairs and Northern Development

**Thursday, December 13, 2007**

● (1535)

[*English*]

**The Chair (Mr. Barry Devolin (Haliburton—Kawartha Lakes—Brock, CPC)):** I call the meeting to order.

Good afternoon, everybody. Welcome to our committee meeting this afternoon.

I was wondering what we would actually have to do here to get on the news tonight as the most-reported committee meeting today. I didn't think setting the table on fire would be enough. I expect the media are busy writing their stories about another committee meeting that took place earlier today.

There are a couple of general points before we get started. Today we have actually scheduled two 2-hour meetings. I'm not sure I was 100% clear on this the other day, when we were talking about extending the length of the meeting. In fact we are having one committee meeting from 3:30 p.m. to 5:30 p.m., and then we are convening a second committee meeting at that time. It will be from 5:30 p.m. until 7:30 p.m.

It is my understanding that a hot meal will be brought here at 5:30 p.m., so my plan is to go until 5:30 p.m. When we adjourn the first meeting, we'll take a brief recess for 10 minutes so that people can get something to eat, and then we will reconvene and continue with the same business. That's really all I need to say on that.

(On clause 1)

**The Chair:** When we left off a week ago, we were dealing with the clause-by-clause study of Bill C-21. Amendment NDP-1 had been brought forward as an amendment to clause 1 of Bill C-21. I had ruled that amendment NDP-1 was inadmissible. That ruling was challenged and subsequently overturned by the committee. Thereafter followed some discussion and debate about amendment NDP-1. As we approached the end of that process, there was a vote taken on NDP-1, and it was passed.

We had actually come to the vote on whether clause 1 as amended would carry. I think there was some very sincere confusion or concern around the table in terms of what all this meant. At that point we chose to adjourn so that people could think through where they were and what they were doing so that we could proceed. Then on Tuesday we were dealing with business other than Bill C-21.

That's the point we're at right now.

Ms. Crowder wanted to say something.

**Ms. Jean Crowder (Nanaimo—Cowichan, NDP):** Yes, thanks, Mr. Chair.

I would like to move that we rescind amendment NDP-1.

**The Chair:** Thanks, Ms. Crowder.

I have received a motion from Ms. Crowder that we actually rescind the committee's decision to adopt amendment NDP-1. Procedurally, it's my understanding that this is a vote that's taken, and that a majority is what is required.

Are there any comments? This is a debatable motion.

Go ahead, Mr. Bruinooge.

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

I just wanted to briefly speak to the motion brought forward by Madam Crowder, though you've already encapsulated the course of action that was taken by the opposition members to get us to this stage. Of course, after you ruled this motion inadmissible, the opposition members chose to rule you out of order and make this amendment admissible.

We've been appealing since the start of this debate as to this amendment not only being inadmissible but clearly it is something our government doesn't agree with, as it takes the Canadian Human Rights Act into an area we simply disagree on. We feel the full benefits of the Canadian Human Rights Act should be extended to individuals living under the Indian Act on reserve. This is the opinion of the government members. This is something that clearly there's debate about, there's no question.

In fact, this very amendment is the recommendation that this committee received from the Assembly of First Nations. This was what they suggested to be put into the bill, and it is the viewpoint of that organization, the leadership of that organization. However, as I have stated on a number of occasions at this committee, and as have various members of our government, we feel the full benefits of the Canadian Human Rights Act should be extended to those without influence—they deserve this—within first nations communities, those first nations individuals who don't have access to the powers that might exist in the various forms of governance.

We feel that this very amendment would in all regards simply create a new exemption for people on reserve to not enjoy the benefits of the Canadian Human Rights Act. So should the opposition now choose to rescind this amendment that they voted for, of course this would be agreeable to the government side, as it is the position we've taken. We have all along said that the AFN position on this is not one we agree with. So should the opposition parties choose to vote against this, it would be something, obviously, we would also agree to.

● (1540)

**The Chair:** Okay, does anybody else have any comments?

Ms. Crowder.

**Ms. Jean Crowder:** Could I just make one comment, Mr. Chair? My understanding of what the parliamentary secretary is saying is that the Conservatives will vote in support of my motion to rescind. I'm just making sure I understand what the parliamentary secretary is saying.

**Mr. Rod Bruinooge:** There's no unanimous consent required. You put this motion forward. I look forward to seeing your votes on this matter.

**Ms. Jean Crowder:** So just to finish, I have a couple of quick remarks.

As we've well seen in the last couple of days, procedural rules are not always well understood. So now that we're more procedurally clear, I want to reiterate the statement that I made last week when I first put forward this amendment and challenged the chair—

**The Chair:** I have to interrupt for the sake of clarifying, because I have asked these procedural questions as well. Last week when the NDP-1 amendment was moved by you, following the discussion of my ruling that it was inadmissible and the committee's decision to overturn that, before the vote was taken on NDP-1, at that time you made a request to withdraw it. It's my understanding that procedurally a request to withdraw requires unanimous consent.

Now that the vote has actually been taken on NDP-1, the procedure now is not to withdraw but actually to rescind, and to rescind something it is a majority rather than unanimous opinion.

**Ms. Jean Crowder:** Thanks for that clarification, Mr. Chair. The point I was simply trying to make is that we could have actually dealt with this a week ago if the original motion to withdraw had been accepted. Now we're in a motion to rescind, which doesn't require unanimous consent.

I was simply trying to make the point again, which was re-emphasized when you indicated the chair's ruling was an interpretation on your part based on information you had, that I think if there is any kind of doubt, there is some room for us to challenge the chair and to have the debate that happened as a result. I just wanted to make that clear.

Thank you, Mr. Chair.

**The Chair:** Yes.

Mr. Storseth.

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

Just to follow up on that, I think the chair was quite clear on why this was inadmissible. I would think it incumbent upon members, before they put a motion before a committee, to give consideration to whether it's an admissible amendment or not. I would suggest that every single member on that side of the committee knew it was inadmissible before they overruled the chair on this.

Quite frankly, I'm a little confused. If we go back to the beginning of this, which I often find quite helpful, you see that when this legislation first came, the opposition agreed unanimously to pass it to committee.

Then they decided they didn't like the way things were going; they decided to delay and filibuster this. Then the opposition decided to pass a motion to postpone it by 10 months—Monsieur Lemay's motion.

When we once again, in our consistent, straightforward manner, insisted that it is important not only to our government but to all Canadians to have equal rights and we held a summer meeting, which is quite extraordinary, showing our dedication to this, the opposition once again delayed and filibustered it.

Finally we got back, and thinking that we were operating in good faith this fall—and I think this is the critical point to have on the record—we sat across the table from the opposition, who then said they were willing to go to clause-by-clause finally and move forward on this in a positive manner, only to overrule a ruling of the chair, which they had to have clearly known was inadmissible. Any legislative assistant on the other side would have told them that this was inadmissible, never mind going to a clerk.

Then they decided to go beyond that and pass this motion. Then they wanted unanimous consent not to pass the motion—to withdraw the motion—but they still voted for it.

Although this goes quite well with the history of the LIberal Party and their flipping and flopping back and forth on human rights, there are people watching at home who are very disappointed with the progress the opposition is making on this.

I would suggest that if the opposition is finally willing to rescind this motion, is finally willing to move forward in a cooperative manner, then in the next three and a half hours that we have left, we could get this motion to the Senate and really get some good work done before we break for Christmas. I would ask the opposition to quit playing silly bugger with these games, with which they very clearly don't even have a cognizant idea where they're going, and move forward with this in a progressive spirit of Christmas to try to get something done on this.

Maybe the opposition would like to clarify whether they're actually voting for this on this occasion, or against it this time, or.... Where are we going here?

● (1545)

**The Chair:** I'll make just a couple of points of clarification. We're talking about NDP-1, which is an amendment rather than a motion.

Secondly, it's my understanding that an agreement has been reached among the parties that the House of Commons will rise this evening and as such will not sit tomorrow, and as such we will not have the opportunity to table this in the House and have it sent to the Senate. It is my understanding, quite frankly, that regardless of what happens here today, if in the best case scenario we complete clause-by-clause today, the committee will be finished with this but it in fact will not be reported back to the House until January.

Ms. Karetak-Lindell.

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

I'm almost not sure where to start, but we were willing to just vote on a motion without someone starting partisan attacks and accusing us of stalling. We could have had this motion, the motion by Madam Crowder, voted on and put through by now. It's very difficult for me to sit here and listen to those kinds of accusations, because again, they are the government. Because they are the government, they were supposed to act responsibly, accept the first offer to withdraw the amendment, take the high road, and act responsibly. We would not have had to deal with any of this, because that's what a government does.

I have been on this committee for ten and a half years, so I speak from experience, and I've seen everything that can be seen, probably, on this committee and other committees.

You forget the history. I also sat in the House of Commons for three days solid while your Minister of Indian Affairs brought in 471 amendments on the Nisga'a. Well, you tell us that we do things for thirteen and a half years every day, so I can sit here and talk about that until the cows come home.

**Hon. Anita Neville (Winnipeg South Centre, Lib.):** Why can you speak, and not us?

**The Chair:** Order.

**Ms. Nancy Karetak-Lindell:** We sat for 43 hours straight, okay, so your Minister of Indian Affairs could change colons to semicolons. That's really what it was. If you want to go back and look at those amendments on the Nisga'a treaty, the current Minister of Indian Affairs spent 43 hours at $26,000 an hour filibustering in the House of Commons. That was $1 million that could have been used in any community across this country to improve the lives of people. So I find it very hard to sit here and listen to someone telling us that we're not acting in good faith.

Many of us on this side live in these very communities that are being affected. You may not think so, but we do. Again, if you want to bring up past histories and stuff like that, then I feel obligated to do so also, because it cost us $1 million to sit through the House of Commons for 43 hours straight. I will not sit here and listen to someone telling us we're wasting time, because that's exactly what he did. If he didn't make comments of that nature, I would not have. I think it's total disrespect for the House of Commons and total lack of respect for the people in this House and on this committee, because we are all equal members of Parliament.

Thank you.

● (1550)

**The Chair:** Thank you.

There are two things.

First of all, we have a motion to rescind on the floor. Ms. Crowder moved. It is debatable. Members of the committee can speak to it, quite frankly, for as long as they want. What they speak about has to be relevant, and I'm going to take a pretty broad definition of what is relevant. So far no one's even come close to the line of not being relevant. If one of you pulls out a phone book and starts reading names, that's going to be on the other side of the line.

I would ask all members of the committee to be respectful of their colleagues and to allow people to say what they want to say on this. They're not restricted on how long they speak, and it must have some relevance to what we're dealing with, but in my opinion everything so far has been more than relevant.

At this point, I have Ms. Crowder, Mr. Storseth, Ms. Neville, and Mr. Bruinooge on the list.

**Ms. Jean Crowder:** I wasn't on the list.

**The Chair:** Okay.

Mr. Storseth.

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

I appreciate the comments of the members opposite. As I said, I'm trying to get clarification here. The reason I bring in past history is due to the history of the last year of the committee sitting here. Quite frankly, from what I've heard in debate around this table from the opposition critics, the position of this amendment that they overruled the chair on and moved forward on and have since voted on was the exact position they were establishing themselves as believing in.

Now I'm sitting here trying to get clarification that they actually want to rescind that position. I'm sorry, it leaves a lot of confusion all over the place. Where does the Liberal Party of Canada actually stand when it comes to human rights? It's not good enough to walk outside of this room and say “We believe in it; we just don't believe in this process”, or “We've made an amendment, and that's exactly what we believe in, and now we're going to rescind the amendment” and hope that nobody pays attention to the fact that they've once again flipped and flopped on this motion.

I very much respect the member opposite. Ms. Karetak-Lindell has spent a lot of time on this committee and works very hard towards enhancing the quality of life of the communities she lives in and works for. I remind her that many of us live in the communities and interact with the same communities on a daily basis.

But it's not just the responsibility of the Government of Canada and the members of the government to act responsibly. It is the responsibility of all members of Parliament to act responsibly on this, and the record speaks for itself.

We are simply trying to get some clarification. Is this your position? Is the position you agreed upon last week your final position on this, or are you now rescinding that and taking a new position on it?

As I said, my constituents are confused and somewhat upset about this, and they want us to move forward on this. They want us to get through clause-by-clause on this and they want this legislation to become law. They want the repeal of section 67. They want all Canadians to have the same access to human rights. I think it's important that we realize this is the fundamental goal here. The amendment that was passed destroys that. There's no doubt about that.

I'd also like to know whether the opposition is going to continue, as soon as they rescind this, to put forward amendments that are not germane to the legislation.

The last point I'll make is actually a question to you, Mr. Chair. I believe there have been some precedents in this Parliament to table legislation after the House has risen. I don't know whether that was in special circumstances; that's something you could perhaps ask your clerk. I believe, if I remember rightly, it happened in the transport committee, but that's just off the top of my head.

● (1555)

**The Chair:** It is my understanding that there have been very rare circumstances in the past when committees were allowed to table something. But it is not common, and at this point I have no intention to.... I don't think there's cause at this point. If the 11 other members of this committee all implore me at some point today to do all I can in my power to bring this forward, I may pursue it, but short of that, I'm not prepared to do it.

Ms. Neville.

**Hon. Anita Neville:** Thank you very much, Mr. Chair. I very much appreciate your efforts.

I will be brief. We will be supporting Ms. Crowder's motion to rescind. But I want to put it on the record that we came in here in good faith. My colleagues and I met before the meeting to determine how we would move forward; we've gone through the amendments, and we've done it. We decided among ourselves that we would take our cue from the government and see whether they were willing and able to operate with good faith and in a spirit of cooperation. I have to say to you that what I've heard and what I've seen to date doesn't give me much hope.

I do not like to see motions like this saying we're filibustering. I could suggest perhaps that they themselves are filibustering in the discussion. We are prepared to move forward and have no desire to prolong the discussion or the debate on this.

**Mr. Brian Storseth:** Mr. Chair, I'm not going to make a habit of interrupting the honourable member, but she says the motion that we're filibustering. Is there a motion presently before the committee stating that there's a—

**The Chair:** Sorry, no. The motion that is before the committee is to rescind the decision on NDP-1.

Ms. Neville.

**Hon. Anita Neville:** That's fine. I'm just saying that we will support it.

**The Chair:** The last speaker I have on my list, hopefully, before the vote is Mr. Bruinooge.

**Mr. Rod Bruinooge:** Mr. Chair, just hearing Madam Neville speak to the fact that she seemingly is prepared to not delay the passage of this bill any longer is very exciting for me to hear, as I've been working all year to have this bill passed, taking time out of my summer, actually on my anniversary, to come here and deal with this important bill, and working all fall to deal with this bill. So you can make the statement that we're filibustering, but of course were not. We are defending our position, and we will continue to do that because we believe very strongly in parts of this bill as written.

Should the opposition members choose to rescind this amendment, originally crafted based on the AFN's position, I would be happy to see that.

**The Chair:** Are there any other comments before we go to Ms. Crowder?

Ms. Crowder.

**Ms. Jean Crowder:** I'm sorry, Mr. Chair. It seems to me that any committee has a responsibility—and I've heard comments about the fact that this bill came before the committee after unanimous consent on the floor—although I understand some bills haven't had this happen, to call forward witnesses to help shape and inform their view of the legislation that's presented to them. And because of past errors, whether it was Bill C-31 in 1985 or other bills such as—it's interesting—Bill C-31 in this Parliament, the committee has a responsibility to do its due diligence.

So hearing from witnesses and trying to craft amendments that would meet the needs of the testimony that witnesses put forward—some very solid testimony—resulted in some amendments, but unfortunately the government developed a bill that had little scope for change. And when the government prorogued the House—if you want to talk about delay—and chose to resubmit a bill that completely ignored the testimony that came before the committee, the committee members, it's my understanding, in good faith attempted to address some of the shortfalls of the bill. But because of the narrow scope of the bill we're simply unable to do some of the things that need to be done.

I think it's important that we reiterate the stance that...I haven't heard one opposition member say that they do not support human rights, the ability of first nations to file human rights complaints against the Indian Act. I haven't heard one opposition member say they don't support that position, but we have an obligation to ensure that the legislation we're considering isn't going to have unintended consequences, and this is part of this process.

We've seen certainly the government members disregard the will of the committee time and time again. So I think that's an important piece to put on the record.

I think also the constant interruptions when somebody doesn't have the floor are completely disrespectful of how we try to operate in this committee. And I appreciate your attempts to try to keep control, Mr. Chair.

● (1600)

**The Chair:** Thank you, Ms. Crowder.

I have no one else on my list, so I'd like to move forward with the motion to rescind.

I'm not sure if these are the right words for the record, but basically Ms. Crowder has moved a motion that the committee rescind the decision that it previously took to amend clause 1 with NDP-1. What this means is that if you are voting yes, you want to rescind that decision, which will reinstate clause 1 in its original form. If you vote no, you are voting in favour of keeping NDP-1 as the replacement for the original clause 1.

Yes.

**Mr. Brian Storseth:** Mr. Chair, I have a point of order. Can we get a recorded vote, please?

**The Chair:** Okay.

(Motion agreed to: yeas 7; nays 0)

**The Chair:** This is like a Nascar track. We're right back where we started, which is at clause 1 as originally put forward in the government bill.

I have a couple of points of clarification for members as we go forward.

As you know, last week several members of the committee put forward proposed amendments to Bill C-21. Those went to our legislative clerk, and he put them in what to him was a logical sequence to deal with them as we work our way through the bill. That package was distributed to all members of the committee.

There are 14 amendments in total. We have now dealt with the first one, which is NDP-1.

Having said all that, the amendments that are in the package are not yet moved. If the members who brought them forward would still like to bring them forward, that is agreeable. If they choose not to, then we'll just move on to the next one.

Pardon me. Before I get to that point, I need to call the question on clause 1. I actually need a vote.

(Clause 1 agreed to)

● (1605)

**The Chair:** Clause 1 in its original form has carried. Now comes my explanation about the amendments.

I will just go through this package as each amendment comes forward. If you don't wish to move it....

Ms. Crowder.

**Ms. Jean Crowder:** I move NDP-2.

**The Chair:** Madam Crowder is moving what we have here as amendment NDP-2.

There is a procedural issue with NDP-2, but before I rule on its admissibility, Ms. Crowder, did you have anything you wanted to say?

**Ms. Jean Crowder:** Yes, I'd like to speak briefly.

I think amendment NDP-2 reflects an attempt to amend the bill to reflect a number of the concerns that were raised by witnesses we heard. It would add a new clause containing a new proposed section 67.1:

> (1) Every First Nation government has jurisdiction to enact laws in respect of human rights that conform to international human rights standards, including laws in respect of any matter for which provision is made under this Act and any other federal human rights legislation.

Part of this was an attempt to look at an interpretive clause that respected both the collective and the individual, and also respected some of the laws that some first nations had in place that already complied with international standards. I think it was clear that we heard this from a number of the witnesses. This was an attempt to address the shortcoming in the bill on this matter.

**The Chair:** Okay. 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 create a new section 67.1, which would impose several conditions in the application of the Canadian Human Rights Act with regard to the creation of legislation by a first nation.

As *House of Commons Procedure and Practice* states on page 654, "An amendment to a bill that was 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 a new framework for legislation created by a first nation is a new concept that is beyond the scope of Bill C-21 and is therefore inadmissible.

So I am ruling amendment NDP-2 inadmissible.

The next item in our package is amendment NDP-3.

Ms. Crowder.

**Ms. Jean Crowder:** I'd like to move that.

**The Chair:** Okay. Would you like to speak to it?

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

Again, this was a matter that a number of witnesses raised around a clause that would allow a non-derogation. This amendment is an attempt to address that shortcoming in the bill to allow a non-derogation clause, and I think it's fairly self-evident.

**The Chair:** Thank you.

Before I go to Mr. Bruinooge, there is just one other point I ought to draw to the attention of the committee members. NDP-3 and LIB-1 deal with similar subject matter, and the committee will, I expect, want to adopt one or the other. So you may want to have a look at LIB-1 as well; if NDP-3 is adopted, then LIB-1 will not be put.

Mr. Bruinooge.

**Mr. Rod Bruinooge:** Yes, Mr. Chair. Thank you for giving me the opportunity to speak about the amendment put forward by Madam Crowder.

The government's position all along has been that in light of the fact that there is a multitude of laws in Canada respecting section 30, to have rights within the highest law of the land, the Charter of Rights and Freedoms, non-derogation is not necessary in this case. But also, all of the advice we have received is that in fact this non-derogation clause goes above and beyond the substance of the bill. The bill is simply a repeal of section 67.

There are non-derogation clauses in other bills that have been drafted—in fact the Government of Canada in the past has occasionally put non-derogation clauses into the bills that previous governments have drafted. There's no question about that. In this case it wasn't done, so right off the bat we are going above and beyond the substance of the bill, because we didn't initially put this in place for the reasons that I have already stated.

However, the previous non-derogation clauses do not go this far. I just want to refer to paragraph (c) of proposed new clause 1.1, where it calls for the law to not derogate from "any rights or freedoms recognized under the customary laws or traditions of the First Nations peoples of Canada". And that goes considerably further than this law should, in many ways.

In fact, it will again be putting—in my opinion and the opinion of our government as well as multiple legal opinions—a considerable strain and anchor on what the Canadian Human Rights Commission will be able to deliberate on in terms of any human rights cases that are being brought forward. Because this is such a broad position, and in my opinion just not even feasible to begin to encompass all of the specific customary laws that might exist across the multitude of first nations, it simply would go down the road of what we've already discussed, which would in essence provide that exemption that we are in fact repealing.

So we do not support a non-derogation clause, but if I could be very specific, I would like to highlight paragraph 1.1(c) as being the very one area where this proposed non-derogation clause becomes something that I would suggest shouldn't be admissible. But of course I have to defer, obviously, to your wisdom on that matter.

● (1610)

**The Chair:** Thank you.

I have Ms. Crowder, but I presume you're going to find out why the bells are ringing. Is this an adjournment?

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

Because you did not rule that this amendment was out of order, I'm presuming that it is in order.

**The Chair:** I did not rule that it was inadmissible, and as such it is, in my view, admissible.

**Ms. Jean Crowder:** Okay. Thank you.

I have a comment about NDP-3 and LIB-1.

Paragraphs (a) and (b) of my proposed amendment 1.1 were actually to highlight the fact that there were the rights and freedoms guaranteed by the Royal Proclamation of October 7, 1763, and the rights and freedoms that now exist by way of land claims agreements or may be so acquired. I thought it was important to highlight those two points.

As to paragraph (c), I'm amenable to an amendment on that. If somebody wants to propose an amendment to remove paragraph (c), I would be amenable to it. I'm not sure if there is a wish to do that.

**The Chair:** Well, we'll get a couple of views on that.

Mr. Storseth was next. Is there anyone else?

**Hon. Anita Neville:** Could I ask a question, through you, for a quick clarification from the legislative clerk?

I'm assuming that your advice is that both NDP-3 and Liberal-1 are allowable within the confines of this bill. Is that correct?

**The Chair:** I have already ruled that NDP-3 is admissible.

**Hon. Anita Neville:** Okay.

**The Chair:** I'm in a bit of a catch-22 here. Having said that, I will tell you that I do not have a problem with Liberal-1 in terms of the admissibility.

**Hon. Anita Neville:** That's fine, but I just want clarity that they will be admissible should this bill return to the House.

● (1615)

**Mr. Brian Storseth:** On a point of order, Mr. Chair, I don't believe, according to the Standing Orders, that the chair can rule on admissibility until a motion is actually put forward. You therefore cannot foresee the future. There could be amendments put to this bill that pass that make it inadmissible or would make further motions inadmissible.

**The Chair:** I appreciate that assistance.

I'll go back to what I was saying. By not ruling NDP-3 inadmissible, I'm saying that I view it as admissible, okay?

**Hon. Anita Neville:** That's fine.

**The Chair:** That's not to say what the clerk's advice was or was not on that, okay?

In terms of Liberal-1, Mr. Storseth is correct, in the sense that it's not actually on the floor yet.

**Hon. Anita Neville:** We can wait.

**The Chair:** Having said that, as the person who moved Liberal-1, you could certainly ask the legislative clerk whether, in his view, it's admissible or not, but that does not necessarily determine my behaviour.

**Hon. Anita Neville:** For clarification, I appreciate that you ruled it admissible. I'd like to know from the legislative clerk that he too sees it as admissible.

**The Chair:** Which are were talking about?

**Hon. Anita Neville:** NDP-3 right now.

**The Chair:** The legislative clerk provided advice to me that it was admissible, and I have ruled it as admissible.

**Hon. Anita Neville:** That's fine, thank you.

**The Chair:** Mr. Storseth.

**Mr. Brian Storseth:** Thank you, Mr. Chair. I'd like to take this opportunity to express my concerns to you on the admissibility of this.

I understand that when looking at this legislation as it sat before we came to committee, there might have been the view that it was admissible. Now that we have passed clause 1—saying specifically that this bill will be dealing with the fact that section 67 of the Canadian Human Rights Act is repealed—I believe if you refer to page 654 of Marleau and Montpetit, under the section of "Principle and Scope":

> An amendment to a bill that was referred to a committee after second reading is out of order if it is beyond the scope and principle of the bill. As well, an amendment which is equivalent to a simple negative of the bill or which reverses the principle of the bill as agreed to at second reading it is also out of order—

There is no doubt in my mind, and I think it is the position of the government, that this does go beyond the scope and the principle of the bill that the government has put forward and therefore should be ruled inadmissible.

I just want to have that on the record, Mr. Chair.

**The Chair:** I appreciate that.

As I said to all members last week in terms of the issue of admissibility or inadmissibility, obviously I receive advice from the legislative clerk. It's non-binding advice. And in a couple of cases I did receive conflicting advice, quite frankly, from others. I have had to weigh that conflicting advice out.

I have made a decision that NDP-3 is admissible, having considered all of that. I appreciate the free advice, but that decision has been made and it's not debatable.

Ms. Karetak-Lindell.

**Ms. Nancy Karetak-Lindell:** I'm just trying to get a clarification on procedure. Is he therefore challenging you on your decision in the same way as, when you declared NDP-1 inadmissible, if that's a correct word, Jean challenged you?

**The Chair:** I want to thank all members. I thought when I became a chair that it would take me a long time to learn the procedural rules, but thanks to the efforts of all my colleagues I've had an intense tutorial in the last three weeks.

**Ms. Nancy Karetak-Lindell:** You've had a crash course.

**The Chair:** If the chair deems that an amendment is admissible, he doesn't actually state as such that it's considered admissible. Having said that, a member of the committee can challenge admissibility in the same way as a chair who deems something is inadmissible can be challenged. So it is possible for a member to challenge the decision of the chair and to suggest that it is in fact inadmissible.

Maybe the easiest thing to do is to go to Mr. Storseth and ask whether he was merely offering free advice or he was challenging the ruling of the chair.

● (1620)

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

I appreciate the opportunity to clarify my position on this. Unlike the opposition, I did not say I was challenging the ruling of the chair.

Once again, I refer all committee members to Marleau and Montpetit, page 654, which allows the chair to rule an amendment out of order even after he has ruled it admissible.

I'm just suggesting it is the position of the government that this is the case and that I hope the chair would take that position. If not, I'm sure this can be ruled upon by the Speaker at report stage.

**The Chair:** Okay. I appreciate that if I do change my mind, I'm allowed to. At this point, I have no intention to do that.

I have Mr. Warkentin and then Ms. Crowder.

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

I was remiss in doing my homework, so I will ask Ms. Crowder for some information. With regard to the reference in paragraph (a) on the Royal Proclamation of October 7, 1763, I'm wondering if you could elaborate as to the reason for the inclusion. I only ask, as I said, because I was remiss in not doing my homework last night.

**Ms. Jean Crowder:** Thanks. There are a number of mechanisms that have provided rights and freedoms. In particular the Royal Proclamation of 1763 granted some nations, for example Six Nations, some rights and freedoms under that proclamation. I thought it was important to list a couple of those. That's why the Royal Proclamation plus the land claims agreement are included, so those two pieces are not overlooked.

**Mr. Chris Warkentin:** If I might ask then, Ms. Crowder, is it your opinion that we've covered everything that's necessary in these points? I'm curious as to whether there should be other points, or if by including certain points we leave out different nations and different rulings over the past years and decades. Do we run the risk of having forgotten important clarifications? If that's the case, what I—

**The Chair:** Mr. Warkentin, can you address the chair, please.

**Mr. Chris Warkentin:** I'll address the chair. I'd ask Ms. Crowder whether there's any possibility that we should remove the subpoints for fear that we might have forgotten something. Is there something of substantial consequence that's included in the three points, or are we reinforcing rulings that are already in existence?

**The Chair:** I appreciate the question. All members have the opportunity to weigh in on this discussion before this question is brought forward. I presume that other members of the committee, including Ms. Crowder, may have views on this. I am not prepared to weigh in as an expert on the content of the amendment and whether it is or it is not.

We have officials here from the department. If you have a technical question you want to ask, possibly one of those gentlemen could answer.

**Mr. Chris Warkentin:** Thank you, Mr. Chair.

I would redirect the question, through you, to the experts as to whether there is something in new paragraphs 1.1(a), (b), and (c) that is necessary and wouldn't be implied otherwise with other legislation.

**The Chair:** Mr. Pryce.

**Mr. Charles Pryce (Senior Counsel, Aboriginal Law and Strategic Policy, Department of Justice):** I'll try to provide what assistance I can.

The wording in this proposed clause, other than new paragraph 1.1(c), is fairly close to what appears in section 25 of the charter. In that sense there is a precedent for it, admittedly in a very different context.

Without getting into what is included in new paragraphs 1.1(a), (b), and (c) and whether something is missed, I would simply point out that the opening part of that provision talks about aboriginal treaty rights and other rights and freedoms, including what's listed in those new paragraphs. So in that sense, I suppose—this hasn't been interpreted by the courts very much—that new paragraphs 1.1(a), (b), and (c) in one sense may well be examples of what is in the umbrella clause of the opening words of clause 1.

I'm just not sure it's necessary to get into what's in new paragraphs (a), (b), and (c).

● (1625)

**Mr. Chris Warkentin:** I would then understand that paragraphs (a), (b), and (c) are merely examples of what's outlined in new clause 1.1. Is that correct?

**Mr. Charles Pryce:** It says "including", so the broader term is aboriginal treaty and other rights or freedoms that pertain to first nations people.

**Mr. Chris Warkentin:** Honestly, I do this only for the intent of being constructive.

If we're going to get into a listing of examples, are there additional examples that we should have included, or should we maybe remove the examples and just let new clause 1.1 stand alone?

It is my understanding that (a), (b), and (c) are examples referring to new clause 1.1.

**Mr. Charles Pryce:** That's one way of looking at it. They could also colour what is thought of as aboriginal treaty rights and other rights and freedoms; they could be indicative of what's included under that umbrella.

**Mr. Chris Warkentin:** It would be part of the explanation.

**Mr. Charles Pryce:** It could well be. It does have a precedent, if you want to call it that, in the sense that a somewhat similar provision—admittedly in a very different context—does appear in section 25 of the charter. I think new paragraph 1.1(c) is the one that isn't in section 25. That provision has not been interpreted, at least not authoritatively by the courts. So exactly what it means, even in the context of the charter, is not clear.

What I'm indicating here is hypothetical. They could be examples; they could colour what is intended by that umbrella term "aboriginal treaty rights and other rights and freedoms".

**Mr. Chris Warkentin:** I would ask whether Ms. Crowder would accept a friendly amendment to remove new paragraph 1.1(c) as she suggested.

**The Chair:** Before I put that forward, I would like to ask the departmental officials a question for clarification.

Earlier Mr. Bruinooge raised a concern that he had with new paragraph 1.1(c). Am I to understand that you just said new paragraphs 1.1(a) and (b) are the same or very similar to what's in the charter, and paragraph (c) is something different? I'm a bit confused myself.

**Mr. Charles Pryce:** I'm just looking at section 25 of the charter. Obviously new clause 1.1 has been altered for the context, but otherwise it is quite similar to section 25. New paragraph 1.1(c) doesn't appear in section 25 of the charter.

**The Chair:** I have Ms. Crowder and then Ms. Neville.

**Ms. Jean Crowder:** Actually, I'll defer.

**The Chair:** Ms. Neville.

Oh, sorry, I thought you were finished.

**Mr. Chris Warkentin:** I would make what I hope would be a friendly amendment if Ms. Crowder would agree. I'd look to strike paragraph (c) from the amendment, if the committee so wished.

● (1630)

**The Chair:** Ms. Crowder, do you want to respond to that now or do you need a minute?

Mr. Warkentin has asked whether you would be prepared to consider striking paragraph (c).

**Ms. Jean Crowder:** I guess I'm not sure about the process on this, because I understand there are other members who want to speak to that.

**The Chair:** Okay, I'll leave that.

We'll hear from Ms. Neville and then Mr. Lemay.

**Hon. Anita Neville:** Thank you, Mr. Chair.

I support Ms. Crowder's amendment NDP-3. If we were to remove proposed paragraph (c), I would ask that the first paragraph of NDP-3 reflect what is in the first paragraph of LIB-1.

First, that was not my original intent. I think what I want to speak to is the purpose of a non-derogation clause and put on the record some of the comments we've heard. We criticized and others criticized the lack of consultation that's taken place on this bill, but we also have heard from many people who came before this committee and talked about the importance of a non-derogation clause.

I want to just quote a few to make the point.

Candice Metallic from the AFN commented on the purpose of a non-derogation clause:

> First nations people in this country have individual rights, but they also have collective rights that are constitutionally recognized and protected.
>
> The purpose of a non-derogation clause is to ensure that whoever is adjudicating a dispute about discrimination will be able to take into consideration the distinct and unique nature of aboriginal and treaty rights of first nations people in the consideration of the dispute at hand. It's essentially what the purpose of a non-derogation clause would be.

Mr. Christopher Devlin from the national aboriginal law section of the Canadian Bar Association, made the comment, and he said:

> Our primary reason for urging the extension of time and the interpretive and non-derogation provisions is that the repeal of section 67 has the potential for the inadvertent repealing of the Indian Act itself and for significant reforms to the Indian Act itself, but in a piecemeal fashion.

Chief Angus Toulouse of the Ontario Regional Chiefs of Ontario commented that there should be a non-derogation clause protecting aboriginal and treaty rights; and Chief Lawrence Paul, the co-chair of the Atlantic Policy Congress of First Nation Chiefs Secretariat, said:

> In order to be consistent with various court rulings, first nations must be properly consulted on the proposed repeal of section 67 of the CHRA and, more specifically, on the development of an interpretive non-derogation clause, on the potential impacts on aboriginal and treaty rights, and on implementation issues before any legislation is tabled.

One final one, and I have many more, from Chief John Beaucage of the Anishinabek Nation, the Union of Ontario Indians. said:

> We would also look at having a non-abrogation and a non-derogation clause included in Bill C-44. That would actually provide greater certainty for aboriginal and treaty rights, but then we would want an interpretive clause as well

—which, Mr. Chair, we'll come to—

> on the individual and collective rights of first nations.

I could go on with more, but I think it's important that we have a non-derogation clause. I'm pleased that you have ruled this to be within the context of the bill, and we will support it.

**The Chair:** Before I go to Mr. Lemay, I want to try to express where I think the discussion is right now regarding derogation clauses.

The first point is that there was some discussion about the admissibility of a derogation clause. The chair has ruled that both of these amendments—particularly the one we're talking about—are admissible. At least one member has questioned that issue of whether or not it is admissible, but has not gone to the point of actually challenging the ruling.

Beyond the issue of admissibility, there's another discussion about whether it is necessary or not. I'm hearing some difference of opinion in terms of whether or not, in a generic sense, a non-derogation clause is necessary or desirable.

Then the third level of the discussion really gets down into the weeds on NDP-3 and LIB-1 to look at, once committee members have decided that (a) it's admissible and (b) it's desirable, how they would actually like it to be worded. Sooner or later we will get to that more specific discussion about whether we're cutting and pasting the two together.

● (1635)

**Hon. Anita Neville:** That's fine, thank you.

**The Chair:** Also, just to remind the committee, the legislative clerk has reminded me that in this context there's really no such thing as a friendly amendment. If the amendment is on the floor, a subamendment is just put forward through the normal process, whether it is through the mover or someone else. We can do that, but it's just in the normal process that we would amend something.

Monsieur Lemay.

[*Translation*]

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

My colleagues may have noticed that I have not spoken frequently, and I do not intend to speak out more frequently.

However, on this specific issue, we cannot pass an amendment that would remove a significant component of the amendment that Ms. Crowder has tabled with respect to the non-derogation clause. Ms. Crowder's amendment is complete in and of itself, and if any one of its constituent paragraphs were to be removed, we would be removing a significant part of the amendment's substance.

The Grand Chief of the Assembly of First Nations, as well as many other people, have testified before this committee. I listened to them as they repeatedly explained to us what stems from a non-derogation clause.

They told us that we must take into consideration the rights and freedoms recognized by the Royal Proclamation. If this didn't happen, they told us that we should take into consideration the rights and freedoms that now exist by way of land claim agreements or may be so acquired. Lastly, and this is just as important, they told us that we should take into consideration the rights and freedoms recognized under the customary laws or traditions of the first nations peoples of Canada.

All these make up a whole. I will not dare say, as it would be misleading, that the amendment is like a house of cards that would collapse were we to remove a card. No, it constitutes a whole. To take away one paragraph... I'm referring simply to the possibility, because up until now, I have not heard that the amendment will not be supported. Nonetheless, if an amendment were to be proposed, it is certain that we would argue to vote down that amendment because it would remove a significant, if not essential component of the bill.

In fact, if we do not take into consideration what happened following the Royal Proclamation of October 7, 1763, and if we do not take into consideration the rights or freedoms that now exist by way of treaties or land claim agreements, we must absolutely take into consideration the rights and freedoms recognized under the customary laws, the fundamental laws of the first nations and the traditions of these peoples.

As a result, Mr. Chairman, we must vote on NDP-3 in its entirety. After that, we can deal with LIB-1. Like you, I realize that if we vote in favour of NDP-3, we must set aside LIB-1. However, for now, everything is grouped under this one proposed amendment. This is exactly what the Assembly of First Nations asked of us, and it is exactly what we are getting ready to do. We therefore cannot split the proposed amendment.

[*English*]

**The Chair:** Thank you, Monsieur Lemay.

On the list I have Mr. Storseth, Mr. Bruinooge, and Mr. Warkentin.

Before I go to Mr. Storseth, I want to explain the process we're dealing with. At this time, NDP-3 is being considered. We are not yet considering LIB-1. With NDP-3, if any member of the committee wants to propose an amendment to NDP-3, they can do that. There have been a couple of suggestions of possible changes. If someone wants to propose an amendment to NDP-3, we'll consider that. Subsequently we would go to a vote on NDP-3, either as it currently stands or as amended.

If NDP-3 carries, we will not consider LIB-1. We will immediately carry on. If, however, NDP-3 is defeated, we will consider LIB-1 afterwards. So we are still talking about NDP-3.

Mr. Storseth.

● (1640)

**Mr. Brian Storseth:** Thank you very much, Mr. Chair. I'd just like to get back to Mr. Pryce's comments for a minute and just get some clarification.

You stated, if I remember correctly, that in proposed new clause 1.1 in this amendment, paragraphs (a) and (b) are almost identical to the charter?

**Mr. Charles Pryce:** They're almost identical to section 25 of the charter, which is not section 35 of the Constitution Act.

**Mr. Brian Storseth:** Now though, paragraph (c) significantly alters that. Would that affect the charter itself?

**Mr. Charles Pryce:** I don't think so, in the sense that this is a statutory provision, it's not amending section 25 of the charter. Section 25 of the charter will sit there, and there's a whole process for amending Constitution provisions. So even though the wording tracks a lot of section 25, it's quite separate.

**Mr. Brian Storseth:** It will have no impact, then, on section 25 of the charter?

**Mr. Charles Pryce:** I think that's correct.

**Mr. Brian Storseth:** Thank you for the clarification.

**The Chair:** Mr. Bruinooge.

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

Similarly, some of my questions pertained to text we've seen here within this non-derogation clause. Of course, I've already raised our concerns about the entire non-derogation clause, though again, I'd like to highlight how my colleague has called for a friendly amendment in relation to paragraph (c) of the clause.

Just to speak to it again, I feel that really this would set new precedents and constrict the ability of the Canadian Human Rights Commission to adjudicate in the very important and essential responsibility of adjudicating between the collective rights of first nations peoples and individual rights that also exist.

So again, I would just hope that what has been suggested by my colleague would be considered by Madam Crowder.

**The Chair:** Thank you, Mr. Bruinooge.

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

**Mr. Chris Warkentin:** In terms of paragraph (c), I think we've made it clear that we have some concerns with regard to a non-derogation clause, but in the efforts of working constructively... because I think what I've heard is that we will undoubtedly end up with one.

I'm wondering if there could be some explanation as to how the courts or anybody looking at this may interpret it the way it's written. I'm speaking of paragraph (c), which states, “any rights or freedoms recognized under the customary laws or traditions of the First Nations peoples of Canada”. And I do recognize that so much of aboriginal culture is oral, and so much of the culture and the customary law may be different from one end of this vast country of ours to the other.

I'm wondering if our experts might be able to walk us through how something like this might be interpreted and how that would work into the framework that the Human Rights Commission works with.

**The Chair:** Mr. Hendry.

**Mr. Jim Hendry (General Counsel, Human Rights Law Section, Department of Justice):** I might start off by saying that the reference to other rights in proposed new clause 1.1 and paragraph (c) and perhaps even (b) raises issues that really have not been resolved by the courts. Other rights may include a number of things that have not yet been defined, and I suppose the—

● (1645)

**Mr. Chris Warkentin:** I'm sorry to interrupt. Is there any possibility of giving examples? I'm hearing that an exhaustive list isn't in existence, but for my benefit, I'm wondering if you might speak of some specific examples that might fall into that definition.

**Mr. Jim Hendry:** At this point, as far as I know, the courts have not defined an “other right” for the purposes of section 25 of the charter. There has been some discussion in some of the lower courts, for example, on some fishing rights, but they would presumably be separate and apart from the aboriginal or treaty rights that are recognized as constitutional by section 35 of the Constitution Act, 1982 and would not take precedence over the Human Rights Act, unless some very stringent tests for infringement, established by the court, have been met.

I can't really give you an example of an other right, because even after all these years, the courts really have not been very clear as to what those other rights might contain. They have not really specified what they are, and the Supreme Court has not yet said what an other right is for the purposes of section 25 of the charter.

I suppose what I'm suggesting is that there may be rights—perhaps in the distribution of land or something of this nature; I'm just offering a hypothetical—that might be regulated by customary laws or traditions. A non-derogation clause might then be put forward to make an argument, for example, that section 67 was repealed, but that did not repeal our right to distribute land in a certain way, which may or may not be discriminatory. At this point, I can't offer anything more than that, because the courts just have not had a chance to fill in what exactly those things mean.

But the possibility is that those terms “other rights” and “customary laws or traditions” may, in a sense, reinstate some of the problems that are now protected by section 67. As I say, at this point, it's still somewhat unclear. We're waiting for guidance, even from some of the lower courts, as to how other rights or the customary laws or traditions will play into the analysis.

What I might say, though, as I mentioned the last time, is that the Jacobs case was one in which a membership practice that resulted in the refusal of some services was based on certain beliefs or on a law established by the Mohawks. The tribunal found, in that particular case, after considering issues involving traditional matters, including laws and so on, that the particular exclusion was discriminatory.

**Mr. Chris Warkentin:** I'd like to continue with this for a bit, if that's all right.

**The Chair:** Yes, you can. Can I just interrupt to clarify something for those who are following along at home?

In Liberal amendment LIB-1, the reference is "from any aboriginal or treaty rights", and in amendment NDP-3, in a very similar paragraph, the reference is "from any aboriginal, treaty or other rights". For those who are following along, that is the distinction that is being explored here, is it not?

**Mr. Chris Warkentin:** It is specifically referencing proposed paragraph 1.1(c) with regard to "any rights or freedoms recognized under the customary laws or traditions of the First Nations peoples of Canada".

My concern is one you've identified, and that is the possibility that by including paragraph 1.1(c), we would then see the possibility of a discriminatory act based on familial lines or on some other type of tradition or customary laws based on a community's long-standing tradition.

The Human Rights Act, most importantly, deals with the issues of employment and service provision within our country, if my understanding is correct. I'm just not so sure, and maybe I'm just looking for some clarification as to where we might see the benefits. I know it wasn't the intent of the person to write this, but my fear is that we might be providing an avenue for discrimination, through customary laws or traditions, in employment or service provision within a community. I'm not certain. I can see where maybe customary laws or traditions would be very important in terms of being able to ensure that there was the advancement of some religious leader within the community or that type of thing. But I'm not certain that in a situation of employment or service provision it would be necessary to reference customary laws or traditions to discriminate.

Are there any that you're aware of?

● (1650)

**Mr. Jim Hendry:** Once again, I did mention the Jacobs case, where a membership law was accepted by the Mohawk band, and it was used as a means of saying the two complainants could not get certain services. The case was examined within the means created by Parliament for the balancing of rights and obligations of the collective and individual, as it were, in that the right to those services by those individuals was essentially balanced against the particular restrictions placed upon it, which took into account the particular membership law in the case. The result was that the particular restriction that excluded the complainants was found to be discriminatory.

As I've said before, the law has changed a little bit since then as to accommodation of other people, but I believe the commission itself said that there was room within the bona fide justifications, that is the defences, or the bona fide occupational requirement for employment purposes, to take into account relevant considerations, and those should include customary laws, traditions, and so on, and they would go into that balance that seems to be an issue here.

**Mr. Chris Warkentin:** So in the Jacobs case, you're saying that the suggestion was made that the complainants were being disallowed from membership because of some customary law or tradition?

**Mr. Jim Hendry:** I believe it was a law that was accepted by the band, so it presumably would become the custom for that particular purpose. The result was that they did not receive some services because he was adopted and the rules prohibited those who are adopted from being members. She was a member of the band and was not married. She married Mr. Jacobs, and then lost her membership, and the two of them lost some services based on the particular membership law in question.

But then there was a bona fide justification defence in which evidence was given by experts on the nature of the community, the community's needs and practices, and so on. It was given due consideration, but they held in that particular case that, at least for a time, there was discrimination resulting.

**Mr. Chris Warkentin:** Okay. So then in that situation a recognized customary law or tradition, if it had been upheld, would have in fact created a discrimination.

● (1655)

**Mr. Jim Hendry:** Well, if a tribunal read this to mean that this protected all customary laws or traditions, that might possibly be the effect. But once again, this area is largely unexplored and we're just at this point trying to develop the thinking that would go into this consideration.

**Mr. Chris Warkentin:** I guess that's my fear. As I say, I'm certain that it wouldn't be anybody's intention around this table to create a loophole, nor would it be the vast desire of any community to create a loophole in which discrimination could occur. I'm seeing that there's a possibility within the way it's written.

Mr. Chair, I would like to make a motion to strike proposed paragraph 1.1 (c) from this amendment, if that would be considered at this point.

**The Chair:** Yes.

Mr. Warkentin has proposed a subamendment to NDP-3 that would strike or remove proposed paragraph 1.1 (c). Obviously now our discussion is more specifically focused on that subamendment.

**Ms. Tina Keeper (Churchill, Lib.):** Can we continue our discussion on the—

[*Translation*]

**Mr. Marc Lemay:** Are we on Mr. Warkentin's subamendment?

[*English*]

**The Chair:** Yes, he has moved a subamendment.

[*Translation*]

**Mr. Marc Lemay:** Very well. I would like to speak.

[*English*]

**The Chair:** I have a list of speakers who had come forward to deal with the amendment itself. At this point, Ms. Keeper, Mr. Albrecht, and Ms. Crowder were on that list. Now that a subamendment is on the floor, I'll set that list aside and strike a new list for the subamendment.

Monsieur Lemay, you're quickest out of the box.

**Ms. Tina Keeper:** I'm on the list.

**The Chair:** On the amendment. We're dealing with the subamendment now.

**Ms. Tina Keeper:** Can't I stay on the list? Don't you just continue down and then we get the choice to—

**The Chair:** No, sorry. The list for dealing with the amendment will be set aside for a moment. You're right, you are next on that, but we are actually now dealing with the subamendment.

**Ms. Tina Keeper:** Okay. I'll be after Mr. Lemay.

**The Chair:** Okay, Ms. Keeper.

Monsieur Lemay.

[*Translation*]

**Mr. Marc Lemay:** Mr. Chairman, with all due respect for my colleague, we are going to vote against the subamendment moved by Mr. Warkentin, and I hope all of my colleagues will do the same. Once again, I will provide an explanation, slowly but with certainty.

When a land claim is made pursuant to the Canadian Human Rights Act, the commission reviewing the matter must determine if the Canadian Human Rights Act, was, could have been, or may be undermined, based on very specific points.

A non-derogation clause has been asked for. I know that my colleague was not present when all of the groups came to testify before us. Everyone from representatives of the Human Rights Commission to several aboriginal groups, including the Assembly of First Nations, and the government's greatest supporter, Mr. Brazeau, all admitted that a non-derogation clause with regard to aboriginal peoples' rights would be necessary in order to interpret section 67 and the Canadian Human Rights Act, and that any court reviewing an application would have to consider the following points.

Firstly, is this a right or freedom that has been recognized by the Royal Proclamation of October 17, 1763? If the answer to this question is yes, it will then be approved by the court. If the answer is no, the court must ask the following question.

Does the claim stem from any rights or freedoms that now exist by way of land claim agreements or may be so acquired? The court may then determine if it stems from a treaty. Take for example Treaty No. 9. Does the claim stem from another treaty? Is anything provided for under that? If the answer to the second question is no, the court must then ask the third and final question.

Is this a right or freedom recognized under the customary laws or traditions of first nations peoples of Canada? The finest example of this is the right to fish beyond the dates authorized by a province and the right to hunt for subsistence purposes, as confirmed by the Supreme Court in several of its rulings.

We cannot and we must not vote in favour of my colleague's subamendment, because if we are to accept it, we would be effectively removing an essential element on which the court could establish grounds to make a ruling pursuant to the Canadian Human Rights Act.

The amendment represents a whole. The three paragraphs proposed by my colleague, impacting Ms. Crowder's amendment, make up one single entity. They cannot be divided up. Mr. Chairman, if we are to do so, and I say this with all due respect to my colleague, we would be taking away an entire part of the customary laws or traditions of certain first nations groups.

● (1700)

I can cite several Algonquin nations living in northeastern Ontario, northwestern Ontario, and Abitibi-Témiscamingue, and elsewhere in Canada that do not fall under any treaty. These groups do not have any established land claims, nor any rights recognized by the Royal Proclamation of October 7, 1763. One very good example is the Naskapis, who appeared before us last Tuesday.

Mr. Chairman, I urge my colleagues to defeat the subamendment, because my colleague Ms. Crowder's amendment must be passed as a whole. All groups that appeared before us, without any exception, asked for a non-derogation clause.

As such, we will be voting against my colleague's subamendment.

[*English*]

**The Chair:** Thank you, Mr. Lemay.

Ms. Keeper.

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

I am in agreement with my colleague from the Bloc on his position on this subamendment.

I have to say that I think the concerns of first nations have been very clearly articulated to this committee in terms of the impacts and in terms of how they want to proceed. It has been said repeatedly that nobody is against the repeal of section 67, but that it clearly has to move forward in a way that respects aboriginal and treaty rights, the inherent rights, and customary laws.

I would like to read a couple of quotes that I think are pertinent. One is from Chief Balfour of Norway House Cree Nation, who was here yesterday. As we all know, there was unanimous consent to support Jordan's principle. Jordan is from Norway House Cree Nation.

Chief Balfour of Norway House Cree Nation said clearly that:

> ...the extension of equality rights under the CHRA to apply to the Indian Act is a laudable goal. At the same time, I doubt that blindly extending these rights without providing for protection of collective human rights of First Nations peoples, including 17 inherent Aboriginal Rights and treaty rights of First Nations, will serve the best interests of Canada's First Nations people living under the Indian Act.
>
> Now, one could argue that any concerns that Bill C-44 does not adequately take into account First Nations collective rights as protected under the Charter could, of course, be addressed by litigation. My response to such arguments is simple. Part of the purpose of the CHRA is to provide simplified, cost-effective administrative remedies to Canadians. Why should First Nations be required to undergo costly Charter litigation to have these issues resolved when their concerns could be addressed by actually consulting First Nations and providing draft legislation that takes into account legitimate First Nations concerns for applying the CHRA to the Indian Act right from the start?

Further to that, the Manitoba Keewatinook Ininew Okimowin, also in my riding, have stated that:

> Bill C-44 will impose a review of customary laws, beliefs, values, and principles of first nations by the Canadian Human Rights Tribunal without a statutory requirement to take into account how the MKIO first nations perceive individual and collective human rights as well as concepts of transparency, access, and accountability.

> Bill C-44 also fails to recognize that a source of many human rights issues of importance to first nations arise directly from federal government policies, including the significant and persistent underfunding of social services, housing, and infrastructure that are administered under the authority of first nations governments and are beyond the capacity of first nations governments to remedy.

We saw that quite clearly and we heard it quite clearly through our discussions on Jordan's principle. Health services that are available to every other Canadian are not available to first nations children residing on reserve.

I would like to add that the Assembly of Manitoba Chiefs made a recommendation, which they presented to this committee, that Bill C-44 be amended to include an interpretive clause so that the Human Rights Commission tribunal and courts will be guided in their application of the Canadian Human Rights Act to the unique collective inherent rights, interests, and values of first nations peoples and communities. They said an interpretative provision is necessary to more specifically guide adjudicative analyses in order to strike an appropriate balance between individual and collective rights.

The repeal legislation should include provisions—

● (1705)

**Mr. Brian Storseth:** On a point of order, I would just like that we keep it to relevance. I understand that you have amendments on the interpretive provision coming up—

**Ms. Tina Keeper:** It is relevant. It's absolutely relevant to the—

**Mr. Brian Storseth:** But if we could keep it to the non-derogation clause....

**The Chair:** Thank you, Mr. Storseth.

I rule that Ms. Keeper is within the bounds of relevance. Please continue, Ms. Keeper.

**Ms. Tina Keeper:** Thank you very much, Mr. Chair.

The repeal legislation should include provisions to enable the development and enactment, in full consultation with first nations, of an interpretive provision that will take into consideration the rights and interests—

**Mr. Harold Albrecht (Kitchener—Conestoga, CPC):** Mr. Chair, on a point of order, she's clearly referring to an interpretive clause. My understanding is that we've moved beyond that. We're on the non-derogation clause.

**Ms. Tina Keeper:** No, we're talking about the removal—

**The Chair:** Order.

Ms. Keeper, you can continue. Go ahead, Ms. Keeper.

**Ms. Tina Keeper:** Thank you.

The repeal legislation should include provisions to enable the development and enactment, in full consultation with first nations, of an interpretative provision that will take into consideration the rights and interests of first nations.

I would like to add that, as we've heard repeatedly, without consideration of the rights and freedoms recognized under the customary laws or traditions of first nations peoples of Canada, it would be seen as a violation of human rights for our first nations, absolutely.

Thank you.

**The Chair:** Thank you, Ms. Keeper.

Mr. Bruinooge.

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

I would like to speak to the subamendment put forward by Mr. Warkentin, and I take some exception to the points made by both Monsieur Lemay and Madam Keeper.

Perhaps I will start specifically in relation to how this paragraph (c), which we are talking about removing, goes above and beyond any non-derogation clause we've seen. We are attempting to provide the Canadian Human Rights Commission with the opportunity to adjudicate on human rights violations that individuals put forward. Non-derogation, which has been suggested by a number of witnesses who have come before this committee, and there's no denying that fact.... Mr. Lemay suggests that all of them demand non-derogation; I wouldn't say that all of them did. But the point he didn't make was that they did not refer to this particular non-derogation clause, which is calling for something very specific and very new within paragraph (c). I have to take exception with your point there.

As I've said already, I feel this will put an undue encumbrance on the individuals who will be tasked with an incredible responsibility to rule on human rights matters that have never been ruled on within first nations communities. This is going to be a substantial step forward for individuals in first nations communities, to be able to bring forward human rights cases.

I am an individual who has access to the full benefits of the Canadian Human Rights Act. I am not restricted by something such as this, where customary laws or traditions of a first nations community would be able to stop the adjudication process in its tracks.

Mr. Chair, again, this comes back to my original suggestion that inclusion of this point brings this particular amendment into the realm of inadmissibility.

There are a number of non-derogation clauses in other legislations that have passed in previous Parliaments; none go this far. We've heard testimony from our expert witnesses, and they have also said that this would go above and beyond what we've seen in our Constitution and other laws that have been passed.

Mr. Chair, we need to proceed with a bill that accomplishes the repeal of section 67. It is my opinion that by including this one point we will undo all the work we've done. The government is not going to support non-derogation. I have to ask the members to consider that paragraph (c) will put an anchor on the Canadian Human Rights Commission that they shouldn't have to deal with.

I would also like to deal with Madam Keeper's points. I know she's having some discussions, perhaps on this bill, with others in the room. She has referred to her support for the bill, and she brought in testimony of the MKO organization. The leader of MKO, who came before our committee, is a man I have a lot of respect for, but in this particular area I have to disagree with him. He does not support the repeal of section 67. He said that before this committee. He does not support any part of this bill.

● (1710)

And so by bringing in his testimony, I think it's important to note that fact. There are individuals within first nations committees that do not support the repeal of section 67. So should she be bringing in testimony, I think it's important that she also places that on the record; and should she not, as she hasn't, I feel obliged to do so.

As we go beyond the adjournment of the House of Commons, we're all demonstrating our commitment here to trying to deal with this important piece of legislation. I would just hate to see all of our work being undone by a point that will continue to be challenged by the members of this party, the government here. But also should the bill return to the House, it will be challenged. I feel it will be challenged beyond that as well.

So for the sake of making this bill work in an appropriate way, similar to other pieces of legislation, I have to speak in favour of this important amendment so that we could proceed in a way that will allow for the bill to actually deliver on getting rid of the exemption of section 67.

I'll leave it there, Mr. Chair.

● (1715)

**The Chair:** Thank you, Mr. Bruinooge.

At this point I have Mr. Warkentin and then Ms. Karetak-Lindell on the list, so hopefully we can come to a vote on the subamendment.

Mr. Warkentin.

[*Translation*]

**Mr. Marc Lemay:** I raised my hand.

[*English*]

**Mr. Chris Warkentin:** Thank you, Mr. Chair.

I'm wondering if I can continue with our witnesses for just a few minutes.

We've heard a number of comments with regards to removing paragraph (c) from this point. I'm wondering if you could comment in terms of some of the comments we've heard. We've heard that by removing paragraph (c) from this piece of legislation, we somehow would strip customary laws or traditions or somehow jeopardize traditions of customary laws of native or aboriginal people. I'm wondering if it would be your opinion that this would be the case by not including it. And if in fact that would be the case, I'm wondering if you could explain how we might be able to protect customary laws and traditions without accidentally undoing the work that we're hoping to do by removing section 67.

**Mr. Jim Hendry:** That's a very tall order. I'll address the point about the last point, and that is customary laws or traditions.

In the balancing that the act currently creates, it creates an access to our right to non-discrimination under employment or services, and on the other hand, it creates certain defences by which what you might call collective interests—the interest of the employer, the interest of the service provider—are balanced. And in that sense, although this is an unusual clause, one would expect that the various factors that are relevant to the provision of the service and relevant to justifying the way it has been delivered would be balanced within the current structure of the act. It is made to achieve a balancing purpose, as the Supreme Court has interpreted it.

So those matters that would be relevant to the justification of providing a service in a certain way would be relevant, then, to the issue of the modified justification for providing a service in that way. So if those were based in customary law or tradition, I would assume that evidence of those would be provided to the tribunal for their consideration in achieving the particular balance that Parliament has established in the act itself, as it stands now.

**Mr. Chris Warkentin:** So you're saying they would consider those already? Are you stating that this would be necessary so that they would even consider customary laws and traditions?

**Mr. Jim Hendry:** Well, they're bound to consider those factors that are relevant to the justification provisions that have been established in the act in order to deal with employment justifications and service justifications. And so to the extent that a party before a tribunal has good reasons for doing it in a certain way, they would provide that to the tribunal according to the structure that the Supreme Court has established for interpreting these provisions. These justification provisions tend to be similar across the country in every jurisdiction, and every jurisdiction has a human rights act and they're really quite similar. The Supreme Court tends to interpret the provisions, because they're so similar, in a very similar sort of way.

● (1720)

**Mr. Chris Warkentin:** I'm a little bit concerned, specifically, when I read the testimony from the Canadian Human Rights Commission to this committee, and I'll just quote here:

> The statutory statement of principle should have as its objective a clear articulation of the desired balance, while not indirectly reinstituting the very effects that the repeal is intended to relieve. This is completely consistent with the recommendations of the Canadian Human Rights Act...

I'm just concerned that somehow, by including this, we may inadvertently reinstate the effects that we're trying to in fact repeal. I still am not satisfied that by including this we're not in fact opening up the possibility that we're going to reinstate some discriminations that we're hoping to prevent from happening.

**Mr. Jim Hendry:** If that's a question, I think there is a danger, by referring to other rights in even the opening provision and rights in customary law and tradition, that those may be.... If a tribunal were to interpret “abrogate” or “derogate” to mean a complete bar to applying the Human Rights Act, in contradiction to those particular provisions, it's possible.

Now, as I say, the litigation is very thin on this, and I can't provide you with a great number of examples, but the danger is there that if some laws and traditions and so on become an absolute bar to an adjudication by a tribunal, then it's possible that some of those might be discriminatory and beyond the scope of the tribunal. But once again, that's speculation.

**Mr. Chris Warkentin:** My concern is that if in fact this is going to bring us outside of what the intended outcome of the original bill is, we're going to get ourselves into a situation of possible inadmissibility because of the unintended consequences of some of the amendments that we're making.

But I do appreciate your points on this matter. I guess I'm still very concerned that we might reinstate something that we're intending to relieve, as the Canadian Human Rights Commission specifically asked us not to do.

Thank you very much.

**The Chair:** Thank you, Mr. Warkentin.

I have Ms. Karetak-Lindell and then Mr. Lemay.

Ms. Karetak-Lindell.

**Ms. Nancy Karetak-Lindell:** I want to make a few points directly to the subamendment taking out new paragraph 1.1(c).

We already have affirmative action in this country. We allow certain cases to be looked at in a different way because we want more women to be hired, visible minorities to get jobs, and disabled people to be part of our workforce as much as they can. So I don't see any difference between what we're asking for in new paragraph 1.1(c) and what we already have in this country, which is called affirmative action.

We already follow customary laws in this country. We know in most custody cases it is customary to give custody to the mother, unless there are very difficult circumstances that someone has presented. Up to now, in most cases custody goes to the mother based on customary laws. There are certain cases throughout the law books where case laws are used because they have set precedents. Many of the case laws in this country come from Britain, because it was customary for things to be done a certain way. So I don't see this as being very different.

I am a little disturbed by the fact that as soon as you throw the word “aboriginal” in there, you start to look at things through a very different lens. All common sense goes out the window, and we automatically assume that the conclusion of any of this will be negative, according to the Conservatives; there might not be a positive solution if customary law is used in this case.

I'm disturbed by that fact and by the comments Mr. Warkentin made that we are asking people to go where they've never gone before. I thought the whole case for human advancement was to always go where we have never gone before in order to improve lives for people.

That's why we gave women the vote in the early 1900s. We tried to go beyond what was customary and take people where they'd never gone before. We've heard many comments that Canada is a better place because women can now vote and be recognized as persons. So we asked judges of the day to go beyond and above what no man had ever ruled on before.

I'm a little disturbed that just because the word “aboriginal” is there, we are looking at this through a different lens than how we would look at every other case in this country.

I will leave it at that. I will not vote for the deletion of new paragraph 1.1(c) in the subamendment.

● (1725)

**The Chair:** Thank you, Ms. Karetak-Lindell.

I thought I head echos of *Star Trek* through your logic there.

I have Monsieur Lemay and Mr. Bruinooge on the list. I will go to Mr. Lemay. It's 5:27 p.m., and when he is finished I will adjourn our first meeting. Then we'll immediately start the second meeting.

Monsieur Lemay.

[*Translation*]

**Mr. Marc Lemay:** I will be very brief, Mr. Chairman.

I simply want to reply to Mr. Bruinooge. The burden of proof rests with the one who states that the Canadian Human Rights Act was not complied with, and not the reverse—no one has to prove that the act has been respected. That is why we must keep paragraph (c) which will cover that possibility, should customary law or tradition be invoked.

[*English*]

**The Chair:** It is now 5:28 and I think the food is here. We will adjourn our first meeting and reconvene for our second meeting in about 10 or 15 minutes.

I'm sorry, was there a point of order?

**Ms. Nancy Karetak-Lindell:** Isn't the discussion over on the subamendment? Couldn't we just vote on the subamendment and get it over with at the end of this first meeting?

**The Chair:** I still have a speaker on the list.

**Ms. Nancy Karetak-Lindell:** Okay, sorry.

**The Chair:** When we restart in 10 minutes, Mr. Bruinooge will be the last speaker on the subamendment. We'll vote on that and then go back to our other list.

*Bon appétit.*

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

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

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