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Chair

Mr. Barry Devolin

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● (1535)

[*English*]

The Chair (Mr. Barry Devolin (Haliburton—Kawartha Lakes—Brock, CPC)): Welcome. I would like to call to order the 21st meeting of the House of Commons Standing Committee on Aboriginal Affairs and Northern Development.

We will be continuing today with our hearings regarding Bill C-30, an act to establish the Specific Claims Tribunal and to make consequential amendments to other acts.

Before I introduce our witness for today, I just wanted to make a couple of housekeeping comments for members of the committee.

First of all, during this three-week section that we're beginning now and will continue with for two more weeks, we had invited relatively large numbers of witnesses for each of the six meetings, on the expectation that some would be able to make it and some would not. We thought if we invited ten per meeting that five would say yes. Our 50% average is about right, only we have ten for some and one for others. Our witness today will have our undivided attention, which is a good thing.

But seriously, committee members, we have done our best to try to even this out, with limited success. I ask you to indulge us over the next couple of weeks. We're going to have a couple of meetings with one or two witnesses, and we're going to have a couple of meetings with larger groups. We'll just have to manage through that. We have tried to redistribute the witnesses into some of these other meetings, but again have had limited success, given that people have made travel plans, and a week away it's hard to do these things. I ask you to indulge me in that regard.

The second point I'd like to make is that today we will have bells at 5:15. The meeting will end a little bit early anyway, and we'll try to make our way through two rounds of questions today. I anticipate we will have time to do that. Recently some members have pointed out to me that when we have so many witnesses, we only get one round per questioner, and for some of the members they haven't had the opportunity to speak in those sessions. Hopefully we're going to be able to deal with that today.

Having said that, I would like to welcome our witness for today, Professor Bryan Schwartz, from the University of Manitoba.

Professor Schwartz, I wanted you to know that about a month ago, when we asked committee members to put forward names of who they thought would be strong witnesses and would have something to offer us, your name showed up on several lists, from several different caucuses, as a matter of fact. I know I'm looking forward to hearing what you have today. You can make an opening presentation to us of about ten minutes, and then we will follow that with rounds of questions from our committee members.

Professor Schwartz.

Professor Bryan Schwartz (Professor, University of Manitoba): Thank you very much, Mr. Chairman.

I'm appearing here as an independent academic, which I have been for 26 years. Intermittently in the last eleven years, including in this round, I have been an adviser to the Assembly of the First Nations on the creation of the new specific claims bill. I have some practical experience from that, but any views I express are my own. The Assembly of First Nations is not responsible for them and is certainly free to take a different position on any of these points, but they have graciously permitted me to appear here in my own capacity.

The last time I appeared before a parliamentary committee, it was a Senate committee. It was the committee that produced the Senate report *Negotiation or Confrontation: It's Canada's Choice*, which made a very valuable contribution to this round. Believe me, I had no inside information that anything actually was going to happen. But I did say at the time that in my entire life I had never seen a convergence of elements such as would permit a longstanding and intractable problem to finally be solved. It just seemed to me at the time that everything was coming together.

A lot of work had been done in the past. Some of it had come to naught, but we knew a lot of the pieces that were needed for an independent claims body. Bill C-6 was not a success, but the opposition parties had engaged with the issue and they made a lot of constructive suggestions that were eventually incorporated into this bill.

The basic issue of specific claims, I think, was increasingly recognized—as I colloquially call it—as non-theological. It really doesn't depend on your philosophy, as long as you accept that lawful obligations should be addressed. No matter which party you belong to, most folks think it's the duty of the government to honourably pay its lawful obligations within the larger context of paying down the Canadian national debt generally. All the elements seemed to be right, and here we are a year and a half later, and everything did go right.

I believe that the new specific claims bill that is before you is a tremendous achievement. That doesn't mean that it meets the platonic ideal of what the absolutely impeccable first nations specific claims bill would look like, but I think it is the best agreement, the best piece of legislation achievable, at this point in history. It represents, finally, a successful conclusion of efforts to achieve something like this that has literally taken over 60 years. It would be a great accomplishment to now see it passed into law and passed into law quickly.

My concern, frankly, is that I have a real sense of urgency here. It's a minority Parliament, and anything can happen. I would greatly regret to see this achievement lost and somehow relegated to one other issue in a future Parliament, when we are now so close to finally succeeding after so many years of frustration.

Very briefly, I'll deal with some of the positive features of the bill.

Independence has always been at the core of the debate. The concern was that the federal government had the last say, for all practical purposes, in claims against itself. This bill provides for an independent body. It will be staffed by judges, people trained and expert in making independent decisions. There will be a voice for the Assembly of First Nations in discussing which particular sitting judges will be appointed to the tribunal. That will be done discreetly and according to the terms of the political agreement, because we must respect the dignity of sitting court judges. We don't want public debates about who's good and who's bad for this job. But very significant progress has been made on that issue.

Delay has been a tremendous problem throughout the entire system. Bill C-6, unfortunately, had too many obstacles, too many unilateral choke points for the minister. A creative idea that was made during the Bill C-6 round was to put in fixed timelines, and now we have them. This new bill says that certain stages can only take so long, and then a first nation can move a claim to the next stage. A claim cannot be delayed at the consideration stage by the minister indefinitely. After three years, the first nation has the ability to move it to the tribunal. It is the same thing with a claim that's been stuck in negotiations for more than three years.

With respect to criteria, Bill C-6 made some progress, but there were still some points of very serious omission. One of them was the issue of unilateral undertakings, which had been recognized as a potential source of specific claims in the Guerin case by Chief Justice Dickson. It is very clear now, in the drafting of criteria, that unilateral undertakings that give rise to a legal obligation can be a specific claim.

● (1540)

I know there have been concerns from British Columbia, for example, about Wewaikum claims, a promise by the federal government to carry out a treaty commission report. In my interpretation of this legislation, those are very clearly covered. We were also concerned in the Bill C-6 round about whether pre-Confederation claims were adequately addressed, and there is adequate language in the new draft to address virtually any pre-Confederation claim issue.

Monetary jurisdiction was a very serious concern with Bill C-6. It was sometimes referred to derisively as a small claims commission. The $150 million means that the overwhelming majority of specific claims can be addressed. No federal government to this date has been prepared to proceed without an individual claims cap. Perhaps after a confidence-building process with this new tribunal that can be achieved.

The just treatment of large claims continues to be an issue that I hope will be closely attended to, including by parliamentary committees like this. It is addressed in the political accord, and there's a lot of work still to be done in that. That work in the short run will have to be done outside of legislation, because the $150-million cap means it will not be dealt with. Access to the tribunal will not be provided within the legislation.

One criticism that has been made of the new bill is that the remedial authority of the tribunal is confined to giving money damages. The new tribunal will not have the authority to say “This was your land. It was unlawfully taken away and it's yours again.” No proposal for a new system that has had a buy-in from the federal government over the last eleven years has gone beyond providing for money jurisdiction. Successive federal governments of both stripes have thought that it would be too complicated, too problematic to have an administrative tribunal deciding who owns real property rights, particularly since the federal government doesn't own most of the land to which claims would pertain.

I do want to say that it would underestimate the value of this new bill to have a tunnel vision about the remedial jurisdiction of this new body. Yes, it can only give money damages—that's all the tribunal can do—but before the tribunal makes a decision you have a long process of the claim being considered and opportunities to negotiate. There will be an alternate dispute resolution body to help the parties negotiate. At the negotiation stage the first nation and the federal government are not confined to settling up on the basis of money only. They can be as creative as they wish. The potential that there will be a money award gives an incentive to the federal government to try to negotiate seriously and arrive at creative solutions.

Indeed, after an award is given there is still an opportunity for creative solutions. A band could say, “Well, you gave us our award for $100 million, but actually we would be happier if it was some money and revenue-sharing, or some money and you can find a way where we can get access to some land”. And creative negotiations are possible after an award as well.

So yes, it's a limitation on the jurisdiction of the tribunal. It's a limitation that has never been transcended, even in the model bill, in the 1998 joint task force report. I think one has to recognize that it is a limitation for one specific purpose—what a tribunal can do. It does not limit what the parties can do by way of negotiating a creative settlement before a decision of the tribunal, or afterwards.

Some concern has been expressed about adjudication and adversarial processes. The new system as a whole, not all of which is contained in the bill—some of it will be worked out under the political agreement—will provide for alternate dispute-settling mechanisms, and these will be available at the tribunal stage, not only at the initial filing stage. The rules of the new tribunal do provide for case management and they do provide that a judge can oversee references to mediation, for example.

Sometimes we do a post-mortem when things go wrong. We do it less frequently when things go right, but it's worth doing it in this case. What went right and how can we do it again? In 1998 the joint task force report produced a model bill full of good ideas, many of which are now going to become law if this bill is passed. It was very successful at the technical level: what was missing was sufficient engagement at the highest levels of government.

● (1545)

So officials came up with a really powerful proposal, but government was not ready to seriously move with it at the time. It showed that officials working together can not only engage at the level of concept, but can sit down and wrestle with all the fine details needed to make a functioning system.

The 2003 bill, which is still on the books but hasn't been proclaimed, went off the rails when the dialogue ended even at the technical level. At some point the federal government said, “Consultation is over. Now you're in listening mode. We'll tell you what's happening.” The bill was worked on internally through the federal system. A lot of people in the federal system in good faith said, “This is my problem, that's my problem.” It was sort of an internal negotiation, with the federal government talking to itself. Maybe none of the individual changes seemed to be too bad. You added them all up and ended up with a bill that was simply not acceptable to any significant first nations' constituency.

This time things went right at both the technical and political levels. We had a very successful engagement at the technical level. My colleagues at AFN with whom I worked on this—Candice Metallic, Roger Jones, Tonio Sadik, Vice-Chief Atlee, and so on—at the technical level had a very positive and constructive relationship with federal officials like Sylvia Duquette from INAC, Diana from INAC, Bob Winogron from the Department of Justice, and Jean-Sébastien Rioux, the chief of staff to Minister Prentice.

I can tell you without going into details that there were times of frank and candid exchanges of opinions; it wasn't all group hugs, but it was a very positive engagement in which people were trying really hard to solve technical problems in an honest and forthright manner. I think we were very successful in that respect.

What also made it work was liaison with the highest levels of government. The Prime Minister's staff member, Bruce Carson, was involved in a joint task force committee that oversaw the technical negotiations. That meant when we got stuck on certain points and needed direction, the liaison that was needed between the technical level and the political level worked.

We had commitment at the highest levels of government, and commitment at the technocratic level of government. You need both. It's surprising, but it's a truism of political science that just because the senior levels of government want something doesn't always mean it happens; you need support from the technocrats as well. Technocrats can't make it happen without engagement from the highest political levels. Both happened here.

We had a process of partnership, not only over a few months, but all the way back to the joint task force eleven years ago. I know there's been some criticism that some first nations thought, when they saw the product, they hadn't been consulted enough. I can certainly understand that when you get a new technical bill and have only a few weeks to comment on it, of course you're going to have concerns about whether you've had adequate time to assimilate it.

In fairness, one of the reasons people couldn't see things earlier was because there was a joint agreement that negotiations would work better if they were done confidentially; that it was easier to be candid and try out ideas in a confidential fashion. The federal government has legitimate constitutional sensitivities about sharing legislation in drafting form with outside constituencies. So we had to work under some conditions of confidentiality. It wasn't out of any desire to exclude anyone; it was a necessary part of having the kind of highly detailed engagement in every aspect of the bill that has made it the success I think it is.

I haven't heard all the testimony or seen all the submissions, but it's my understanding from talking to people who have that while there are some conceptual points that people may not agree with—like the $150-million cap—considering the complexity of this bill, there have been very few if any points where people have said “this is just technically wrong”, or “this doesn't make sense”, or “this doesn't add up”.

People on the first nations side don't think there should be an individual claims cap of $150 million; they would like to see no claims cap, and that's a policy disagreement. But if you get to the technical working of a highly complex bill like this, the fact that it seems to have stood up so well to scrutiny and criticism is a real tribute to the process that preceded it.

This process gave the Assembly of First Nations not only an opportunity to vet it, but an opportunity to contribute creatively to the content of the bill.

● (1550)

You can look at the bill and see some creative, innovative features that I think have added to the feeling among first nations that on the whole, while not ideal, this is a fair and legitimate new system. The preamble of this new bill reflects an AFN creative contribution. The idea that there will be an advisory committee to the tribunal in the making of its rules is another AFN contribution.

I've read some of the testimony here. People wonder how elders get a role in this. Well, that will be one opportunity. When the tribunal adopts its own rules, there will be opportunities for all kinds of people to give the benefit of their insight and experience and expertise into contributing to the rules of this tribunal.

We've recognized all along that if all you do is cut and paste the Federal Court rules, this isn't going to work. You need rules of this tribunal that are flexible, expeditious, more informal, so that you can actually get claims settled and not spend eight or ten years litigating or getting caught up in pretrial processes.

The political agreement was a creative contribution from the Assembly of First Nations. It contemplates an ongoing liaison and oversight committee, a forum where the dialogue can continue. It will tackle some of the points on which the first nations believe the current bill is short of the ideal. It will tackle the question of claims above the cap, claims over $150 million, will begin the discussion on what to do about claimants who can't bring a claim under this system because they don't have band status, will deal with the question of additions to reserves, when bands get monetary judgment but want to buy their land back and have it recognized as a reserve.

In 1787 Benjamin Franklin emerged from a drafting convention and was asked by a citizen, “So what did you give us, a monarchy or a republic?” He said, “A republic, if you can keep it.”

The reason I cite that is that, yes, this is a tremendous bill, in my view—and in terms of what's practically achievable here now, not in terms of some kind of theoretical absolute ideal—but even a very sound bill like this will only work in practice if there's follow-up. There's no point in having a system, for example, where claimants have the theoretical ability to access the tribunal but are in no financial situation to do their research, to advocate their claim, or to appear before the tribunal. This liaison and oversight committee is supposed to look at issues such as principles and access to funding. Absent that, the whole system could turn out to be a great disappointment.

For the tribunal rules, you need commitment on both sides, the federal government and the AFN each making their own suggestions as to how these tribunal rules will work. We're hoping that perhaps we can make a joint submission to the tribunal that will contribute to the tribunal's deliberations on how this will work.

I feel a sense of urgency about passing the bill now, before anything can go awry, not because of the bill itself but just because of the macro-politics in which it's located.

The parliamentary process has contributed in a great many ways to its success, from the Senate committee report to the amendments that were made by opposition parties to bills introduced by earlier governments. I think this process has been very useful in giving people a chance to scrutinize and discuss the content of this bill.

But with the greatest respect, I would suggest that the primary and perhaps exclusive focus, unless you can find some technical errors that we made, should be on trying to move the bill through the House of Commons and the Senate stage, say by the end-of-May break, and focusing the attention on what happens next: the “republic, if you can keep it”.

What role can a parliamentary committee make to ensure that this isn't just a Potemkin village kind of statute, but one that makes a real difference? We have the agenda and the political accord. We note what kinds of issues have to be addressed in the months and years ahead: recommendations about this committee supporting the importance of those steps being addressed; supporting the need for the federal government to continue to engage and to provide whatever resources it needs to the Assembly of First Nations and other first nations partners, so that they can consult and contribute; perhaps continuing to exercise an oversight function, having hearings six months or a year from now and asking, “Is this actually working in practice?” That would be a continuation of the very positive role that the parliamentary process has played in the creation of this bill to date.

I'm sorry if I went a little over time, but that's my overview of where we are, from my perspective, on the bill.

Thank you very much.

● (1555)

The Chair: Thank you very much, Professor Schwartz. That was very enjoyable to listen to, and I look forward to questions from my colleagues.

The first round is a seven-minute time slot, followed by a five-minute round.

I'd like to begin with Mr. Russell.

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

Good afternoon, Professor Schwartz.

That was, indeed, a very clear and succinct presentation. I could have listened to more of it; that's for sure. It was certainly not all technical. It was shrouded in lots of common sense. You can have a bill that is hollow if it's not resourced properly, if other processes that feed into this particular process, once it's established, are not put in place.

I have three questions.

Would this bill be improved if there were a joint appointment process? You may have more to say about this, but I don't see anything, technically speaking, that would stop us from making that amendment to this particular bill. Maybe the political will wasn't there or people's positions were firm and fast, particularly the government's probably, and they couldn't arrive at that particular place. So we could make that. I'm not sure if that would be a do-or-die type of position for the government. I'm not sure where they are with it, but we could make that amendment. Would you see that as an improvement, and would that not invest this particular bill with establishing more trust in terms of how this could work for first nations people?

Secondly, the decision to only appoint people who are Superior Court judges limits the pool from which we can draw in terms of the tribunal members. There are constitutional experts in aboriginal law. There are professors—and maybe you are one—in aboriginal law. There are legal scholars. There are aboriginal lawyers who are quite well known and have contributed decades of time and effort who should be in that pool, but they are not Superior Court judges. In terms of enhancing the pool we could draw from, would it be a positive development in terms of Bill C-30, if something like that could be accommodated? I'd like to get a sense of where you are with that.

The other thing is about the awards. You say that prior to something being referred to the tribunal, you can engage in negotiations. You can be very creative about what types of settlements you can have. There could be land at that particular time or there may not be land. There are various forms they can take. But you also made the comment that the fact that it goes to a tribunal and you can only award cash may influence the creativity in that negotiation phase. Would the converse of that also be true, that once you hit the tribunal phase, there would be an award, and then a release that the first nation had to sign? Where would that allow for creativity afterwards, or would the pressure not come off, if you wanted to have some type of negotiation after?

I thank you.

● (1600)

Prof. Bryan Schwartz: On question one, ideally I would have preferred to see some sort of formalized statutorily established joint appointment process. And you might infer that this was a subject of candid and frank exchanges of opinion at the discussion stage. The federal government has concerns, as I understand it, because judicial appointments are a very sensitive topic. We do have very serious concerns in this country about the independence of the judiciary and maintaining the dignity of Superior Court judges, not—

Mr. Todd Russell: That's why we want joint ones.

Prof. Bryan Schwartz: The need to be discreet and confidential.... There was a good debate on both sides. Ideally, if you could work out a mechanism that would address the federal concerns and still make it statutory, that would be better. In the real world right now, I anticipate that it would be a rather daunting task. You would have to have a commitment by the federal government to the concept. You'd probably have to go to cabinet to get instructions to do it, because the Department of Justice, at last, didn't contemplate an AFN role.

To be very frank with you, I would rather see the bill passed with what we have in terms of appointment right now than face the prospect, if it's going to turn out not to be something that can be achieved by consensus or if there turns out to be a major point of contention, of having the bill held up while we try to write in a joint process and take the risk that we don't end up with a bill.

I think the commitment in the political accord—some people are more cynical than I am about it—is valuable. You have a public commitment by the federal government to engage with AFN on a discreet basis. The remedy, if that does not take place, is that the AFN will publicly complain.

If I'm the federal government and I've just achieved a new bill that is seen as a major step forward and as legitimate and sound and done in partnership, and a few months later I have my partner complaining that I'm not playing fair, I don't think that's a very comfortable situation to be in. It undermines the political legitimacy of what I've just accomplished and it even exposes me to legal challenges.

So I am fairly optimistic that the provisions in the political accord about the engagement will be carried out in good faith. If they're not, there is the remedy of at least AFN's going public—not naming names, but just saying "we were promised this and it's not happening", and the risk that the federal government will expose itself to legal challenges on the basis that the process will not seem to be providing a fair hearing as per the Canadian Bill of Rights.

With respect to the pool, there are advantages and disadvantages to going outside the pool of sitting judges. The disadvantage is, again, from the point of view of judicial independence. If I'm a Superior Court judge and I am appointed to this job, I'm not getting a new position. I'm still a Superior Court judge and I'm not being paid more than I used to be. If I'm on the outside and am appointed, I'm going to be paid a lot more doing this than I was as a university professor, or whatever else it is I'm doing, and I have a chance to be reappointed. Maybe subconsciously, or maybe in the eyes of some people, that's going to influence the way I act.

So you have a bigger talent pool if you go outside the judges, potentially; you have fewer concerns about independence and the worry that people are subconsciously, or are being seen to be, running for re-election if you're strictly staying inside the pool of sitting judges. I think reasonable people could argue both sides of it.

On the question of limiting the creativity, let's just say that a $100-million judgment has been awarded against the federal government. They could ask, "Where do you want us to send the cheque?" Or they could say: "Maybe there's a solution that works better for both of us: you might want the money, or what you might really want is for us to help you get a parcel of land that we can purchase for less than $100 million; or land for which we can find a way to get it for you and help you negotiate it; we have unoccupied crown land that we can work with you on, and we can designate it as a reserve." Or maybe there are other alternatives, such as that it would be better for us, the federal government, to engage you in some sort of joint revenue-sharing project or something, rather than pay the $100 million.

Even when an award has been made against a party, it's not necessarily the end of the discussions. It could be the beginning of a new set of discussions: "We didn't take you seriously before; we never thought you'd win. But wait a minute; now we're looking at having to pay you $100 million, so maybe we should sit down to see whether there's something else we could do."

That won't always happen. Sometimes creative solutions will not be feasible or available, and sometimes it will be "Take out the cheque book and write it". But I think there will be a number of circumstances in which there will be creative discussions, not only before the award of money damages, but afterwards.

● (1605)

Mr. Todd Russell: Thank you very much.

The Chair: Thank you.

Next is Monsieur Lemay from the Bloc, for seven minutes.

[*Translation*]

Mr. Marc Lemay (Abitibi—Témiscamingue, BQ): Good afternoon, Professor. Thank you for being here.

Did you talk about the Guerin decision? If so, I would like to know what you said, because I have heard several things about the case, about the ruling you referred to.

[*English*]

Prof. Bryan Schwartz: That was the landmark decision by the Supreme Court of Canada that decided that when the federal government mismanages first nations' lands and assets, it can give rise to a legal remedy—that is, a remedy in the courts.

You see, before then there had been a debate: While the federal government had a trustee role, was that just a political trust? If the federal government doesn't behave properly, is it a question of their remedies being purely political? Or can you actually go to court and say that they didn't do this properly, or that they sold the land under value, or that they didn't have our permission to alienate the land, and get a legal judgment.

Guerin was the big breakthrough case. It said, in effect, that a specific claim can be brought in court and lead to a binding legal judgment.

The particular aspect of the Guerin case, which took us about eleven years to sort out, was this: In the Guerin case, Justice Dickson said that a specific claim can arise from a treaty or an agreement or even from a unilateral undertaking.

So the AFN has been trying all along to make sure that for purposes of legislation, like the piece you're studying, it's very clear that all the options are on the table. If the ordinary law of Canada would say that a unilateral undertaking gives rise to a legal obligation, then that kind of specific claim can also be brought under this system. That's not to say that all unilateral undertakings give rise to legal obligations, but if they do, you should be able to access them under this tribunal no less than in the ordinary courts.

Bill C-6 was written in a way that implicitly excluded unilateral undertakings. The new Specific Claims Tribunal Act is written in a way that I think makes it very clear. How could it be clearer? It talks about unilateral undertakings. It makes it absolutely clear that if a unilateral undertaking gives rise in the ordinary law to an obligation, then a specific claim can brought under this new system.

Concern has been expressed about Wewaikum kinds of claims, which occur when the federal government has unilaterally promised to provide reserve land pursuant to a treaty commission. It's my interpretation of the statute that to the extent that the federal government has reached a legal obligation, such as is recognized by the Supreme Court in the Wewaikum case, that kind of claim can be brought before this new tribunal.

It's a very important point, because first nations in British Columbia and other places are very much concerned that their criteria not arbitrarily exclude certain kinds of specific claims.

In the discussions going back eleven years, if you look at the criticism when I was here in front of parliamentary committees criticizing Bill C-6, it was one of the points I made. It's certainly a point we try to be alert to. Just because we participate in the drafting doesn't mean we have privileged status as to how a court is going to interpret it. But for what it's worth, my interpretation, as someone who was involved in it, is that it clearly was drafted in a way that picks up on the idea expressed in the Wewaikum case, which is that if a unilateral undertaking gives rise to a legal obligation in the ordinary courts, it can also be addressed under this statute as a specific claim.

● (1610)

[*Translation*]

Mr. Marc Lemay: We won't have much time to ask questions if your answers are five minutes long. I have the greatest respect for you, but our chairman is very strict with regard to time allotted for questions. I will therefore try to ask a brief question, and I hope that your answer will be just as brief.

You and I both know about Superior Court judges. They guard their powers jealously. Subsection 12(2) of the bill refers to a committee as defined in subsection 12(1):

> 12(1) A committee of no more than six Tribunal members, appointed by the chairperson, may make general rules [...]
>
> 12(2) The committee referred to in subsection (1) may establish an advisory committee of interested parties to advise it in the development of the Tribunal's rules of practice and procedure [...]

Do you believe that this provision gives first nations the opportunity to have a say in how the deliberations will unfold before the Specific Claims Tribunal?

[*English*]

Prof. Bryan Schwartz: I'll try to be extremely brief, as you requested.

This advisory body will have no impact whatsoever on how any individual case is dealt with; it will only advise on the general rules. As far as I understand, it's not unusual when a court—whether it's the Manitoba Court of Queen's Bench or the Court of Appeal—is developing its rules, to have some sort of process of public input and comment. The final say will rest with the tribunal, so I don't see any legitimate concerns there about maintaining the independence of the judiciary. The tribunal will have the final say over its own rules.

[*Translation*]

Mr. Marc Lemay: How do you view the place of the provinces with regard to the Specific Claims Tribunal? A province which does not have standing in a case may be, I don't dare say condemned, but in part found responsible under a claim recognized by the Specific Claims Tribunal.

Should there be an amendment which would automatically make a province a party to the action if a claim affects part of its territory?

[*English*]

Mr. Bryan Schwartz: A province will not be liable to pay any award where it wasn't a participant. If the tribunal says “This was 100% the Province of Quebec's fault and 0% Canada's”, Quebec would have every legal right to say “We don't care. We weren't there. We weren't a party to the case. It doesn't apply to us.”

If a province wants to participate, it has the opportunity to do so under the express terms of the statute. It can apply to the court, and if the province is a necessary and proper party and the province wants to accept responsibility for paying an award, the province has the right to do that. No one can force a province into this process and no award against a province will be binding against that province without the province's voluntary participation.

[*Translation*]

Mr. Marc Lemay: How do you interpret subsection 22.1? It reads:

> 22(1) If the Tribunal's decision of an issue in relation to a specific claim might, in its opinion, significantly affect the interests of a province, first nation or person, the Tribunal shall so notify them. The parties may make submissions to the Tribunal as to whose interests might be affected.

Let me play devil's advocate. If a province is asked to be part of a claim, and if that province knows that it might be liable, but really doesn't give a damn, should that province not be forced by the first nation at some point to be a party in the proceedings? In your opinion, could that province be forced to be a party? Could the province not be compelled to get involved?

● (1615)

[*English*]

Mr. Bryan Schwartz: I understand the provisions about intervenors to be giving an opportunity to somebody who wants to participate, and it's the same thing for a province. I don't see any interpretation of the statute that forces a province to participate ever, or that ever makes a province liable to pay a judgment if it hasn't voluntarily participated and it hasn't voluntarily said it wanted to be bound by the judgment.

I'm trying to keep it short, so my short answer is that I see no risk to the province.

The Chair: Thank you.

Ms. Crowder, for seven minutes.

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

Thanks, Professor Schwartz, for appearing before the committee and for your very succinct presentation.

As an editorial comment, I am one of the ones who have raised concerns around the political accord, and it's no reflection on the current government in this existing political accord. My concern has always been around future governments, because we certainly have seen track records of governments, both current and former, ignoring existing political accords. That's my big concern about that.

Before you comment, I actually have a couple of questions and then I'll turn over the floor to you.

I want to come back for a minute to clause 12, around the tribunal members and this committee. I just want to be clear. Is this where you were perhaps suggesting that elders or first nations might serve as advisers to this committee in terms of looking at the tribunal rules? How might that unfold?

While you're at it, could you also talk about the fact that there are actually no deadlines for the tribunal once a case ends up in its bailiwick? I think part of the concern that we've heard raised is that unless there are substantial resources allocated, the backlog may just be shifted from one place to another.

Mr. Bryan Schwartz: There are several points of entry for elders under the statute, one of which is the stakeholders advisory committee. You could have elders as well as technocrats who have experience in this area. Another is that this advisory committee is going to make proposals on what the tribunal rules are. Those rules will deal with issues, for example, such as oral history. Oral history almost necessarily involves getting testimony from elders, so both in terms of shaping the tribunal rules and in terms of the tribunal rules giving opportunities for elders to participate in various ways, such as sharing their understanding of oral history, there is a lot of flexibility in the proposed statute for that to take place.

As with everything, just because it can happen doesn't mean it will happen, so that's why I respectfully urge this committee, and Parliament generally, to take an ongoing interest to see whether the commitment to this continues and whether the necessary thought and resources go into making a very promising system a reality.

The second question was what about transferring the backlog from the processing stage at the federal government and just piling it up in the tribunal, and the tribunal doesn't get its work done. I have several concerns in that respect, and again, they are things about why we need ongoing oversight.

The federal government has, in effect, rationed resources to this process. There's a maximum of the equivalent of six full-time judges, but will we even see the equivalent of six? It's not easy for the federal government to manage judicial resources. There's more demand on available judges than there are judges, so that's a role parliamentary oversight can play. There is a reporting requirement, which is clause 40, for regular reports to Parliament. Adequacy of judicial resources is one of them. Of course, you don't need only judges. You need the support judges need to get their job done: administrative support, travel, transcription, and whatever else they need. That is certainly a legitimate concern.

You need to have the resources, the full six judges in place. You need the appropriate staff, and you need rules that are adapted to getting business done expeditiously.

The rules talk about the rule-making committee looking to efficiencies. The preamble talks about resolving matters in a just and timely fashion. What I'm hoping will happen is that, when the people involved in the rules advisory committee get involved and the tribunal considers the recommendation, they're going to realize that we just can't allow this to happen. If you processed cases in front of this tribunal in the same way you did cases in front of the Federal Court of Canada, you'd get a big pile-up. Ordinary civil litigation is very slow, so again, to be effective the rules have to be drafted and adapted so that they are as expeditious, efficient, economical, and accessible as possible.

We want justice. This is not going to be some kind of second-rate tribunal, but we can find creative ways to get business done a lot faster than it would in ordinary civil litigation. At least in my view, that's what we should be trying to do.

● (1620)

Ms. Jean Crowder: You're probably also aware that I've raised concerns around the transition provisions in clauses 42 and 43. One of the concerns is over the numbers of claims that have actually been in the system for a lengthy period of time, with the transition provisions as outlined. I have concerns, and others have expressed concerns as well, that people who have been in the process for a number of years may be disadvantaged. I wonder if you could comment on ways that we could tighten that up or ensure that people who have been in the system for a lengthy period of time aren't disadvantaged.

Prof. Bryan Schwartz: There is provision for fast-tracking certain claims that have already gone through the Indian Claims Commission process. Beyond that, it is one of those debates about a larger roster or a smaller roster, where reasonable people can argue it both ways. Some would say to prioritize claims that have been sitting there a long time. Others say, "Well, wait a minute. These claims at least got some attention. What about my claim? I never got any attention, so why should a claim that has already received ten years of attention take priority?"

With the exception of that one fast-track route for claims that went to the ICC, the drafters of this legislation have largely left it to the tribunal to decide what the priorities will be. There is some wisdom to that, and I say that with great respect for some people who would have different priorities, but my view is that everybody has a pretty good case here, and probably the best way to decide is not to have the AFN decide or the federal government decide but leave it to the independent tribunal to decide.

Ms. Jean Crowder: That might be a tough sell for somebody whose case has been before the Department of Justice for ten years. That certainly warrants some consideration.

The other thing you talked about was alternate dispute resolution. Again, the minister and certainly any of the language we've heard about it have been relatively vague around the resources that will be applied to the mediation, and of course there is a track record of the federal government not engaging in the mediation process. I wonder if you have some recommendations on how we could make that particular piece more effective and more accessible.

Prof. Bryan Schwartz: It's one of the issues that's supposed to be discussed at the joint liaison and oversight committee. I think you very well expressed what the concern is.

I don't think mediation works very well unless you have some sort of compulsion at the end of it, such as binding adjudication, but we have that now. Having that, you need resources available for mediation at both levels, the negotiation stage and the stage in front of the tribunal.

What I would suggest, and what I've tried to make one of my themes in all things, is that while the statute is a tremendous achievement, there's a need for ongoing oversight by committees like yours to see if this is actually becoming a practical reality and that the resources are there.

Ms. Jean Crowder: I think the resources are a big issue.

Prof. Bryan Schwartz: Yes, they are.

Ms. Jean Crowder: Do I still have time?

The Chair: Be very quick.

Ms. Jean Crowder: Just really briefly, could you come back to the tribunal makeup? Do you see any option at all for having more than just judges? I don't mean "just" judges, but more than judges.

Prof. Bryan Schwartz: The joint task force report, which I was party to, recommended that it be an ordinary administrative tribunal, with people appointed for that particular purpose. It's an arguable position.

I actually do see some merit to the judges-only approach. You will thereby have people who are trained, who know how to do this, who have track records. It reduces the risk that people are going to say, well, that's just a patronage appointment and you got this gig because you're connected with this person or that person. Again, reasonable people could argue both sides of it.

Do I think that's worth potentially sidetracking this bill to go to some other model at this stage? My view is no. The judges-only model is not the only one, and maybe it's not even the theoretically best one, but it's not a bad one. In my view, if it's going to be controversial, it's not something on which the government would immediately agree to some other model.

It's just my view, and I'm not speaking on behalf of the organization, but I do have a sense of urgency and real concern that if this doesn't get passed now, because somebody has an idea about how you can make something that is already good even better, we could end up losing the whole thing.

● (1625)

The Chair: The last person in the first round is Mr. Bruinooge.

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

Thank you, Professor Schwartz.

If I were a lawyer and at trial, I might offer up the statement "case closed" after hearing your testimony. But thankfully I'm not a lawyer, and I do appreciate much of your testimony. I must say that much of what you have said we have also heard from witnesses from the AFN who took part in this negotiated agreement in drafting this bill. So your testimony has lined up well with the testimony of others who took part in this bill. Clearly you have an intimate knowledge of the drafting of this bill. I must say, you would do a better job at describing its key parts than I could, so I'm glad you're here today.

Of the few areas I wanted to touch on, I appreciate your talking about the independence of the tribunal, specifically in relation to the appointment of judges, because I know that point was raised by some of the parties involved in the drafting of the bill. The government side, of course, feels that having judges provides a key element of independence. These are individuals who have given up all partisan politics; they're individuals who endeavour to strive for pure independence. Of course, that's an ideal or utopian thought, which perhaps can't be achieved, but in theory that is what is attempted by the judiciary. In essence, I think you've stated quite correctly that this is the right approach, though you have offered the other arguments that were on the table as well.

Going to the idea of unilateral undertakings, though, you talked about your interpretation of what might be considered a unilateral undertaking. Would that interpretation be up to the Superior Court judges who are going to be appointed? And if there were a disagreement as to what a unilateral undertaking was, or should be considered to be, could another judge perhaps intervene to argue a case for a specific unilateral undertaking?

Prof. Bryan Schwartz: The initial interpretation of phrases like "unilateral undertaking" will be made—if it gets to the tribunal—by whichever judge is appointed to hear that particular case. If either side disagrees with that, they have access to judicial review. That means that a three-member panel of the Federal Court of Appeal will decide whether the interpretation made by the initial judge was unacceptable. I say "unacceptable" because there's always a debate about reviews of other people's judgments, about whether you made a decision because you agreed with it or because you just thought it was reasonable.

So I won't go into all of that detail, but suffice it to say there is access to a higher level of review, the Federal Court of Appeal, and leave from that can be obtained in the Supreme Court of Canada. In controverted cases, if you kept having problems about what unilateral undertakings mean, eventually you would get opinions not only from tribunal judges, but also from the Federal Court of Appeal and ultimately very likely from the Supreme Court of Canada.

Mr. Rod Bruinooge: Mr. Schwartz, this piece of legislation was, as I've already said, negotiated between the federal government and the AFN, something that was done privately, in confidence, up until, of course, the moment that it was announced and of course was ratified at a December meeting of chiefs here in Ottawa.

So my argument or my question to you would be whether this bill, in essence, should be able to proceed largely without any amendments to it, due to the fact that it did receive that unanimous ratification at the Assembly of First Nations and of course does have the endorsement of cabinet. To go with substantive amendments at this stage would perhaps call for further ratification by the AFN assembly and, as you've already referenced, further endorsement at a cabinet level.

I guess my question to you would be whether you see that as perhaps one of the best reasons for proceeding without any major substantive amendments.

● (1630)

Prof. Bryan Schwartz: There are a couple of points. The detailed negotiation of the bill was done on a confidential basis, with occasional reporting on the broad picture to the constituency Assembly of First Nations. But I do want to take pains to say that you have to see the bill that emerged as the result of a much larger and very public process.

This bill bears heavily the trademarks, for example, of the 1998 very public joint task force report. There have been many Assembly of First Nations resolutions supporting the creation of a specific claims tribunal, some criticizing Bill C-6 and identifying what was wrong, others urging it.

So we did have a confidential period, to some extent, but that is not to say that this whole thing suddenly emerged out of a private confab. There is a much larger and very public process into which that's placed.

The importance of the AFN being involved is in several respects. First of all, a point I've tried to make is that I think one of the reasons the bill is so sound is that—and you compare that with the unfortunately not so sound features of Bill C-6—when you have the Assembly of First Nations in the room with all of the experience and knowledge and legitimacy that it has, it's not only a question of going ahead and signing it because two parties agreed. One of the reasons it is a good bill in the first place is that the AFN is very substantially involved. There is a real partnership, because it was not only vetting federal proposals but creatively contributing to it.

The second point is that if you have people negotiating and making trade-offs, then there's a certain element of fairness to saying okay, this has come out of here, and you can't go back and try to re-argue the points where you already made compromises. But that's AFN and the federal government. I wouldn't say all of a sudden it's out of bounds for anybody in the country or any first nation to say they have a different view and we missed something, and that this is fundamentally wrong and they don't agree.

I think it would be overstating it to say that the mere fact that two parties agree somehow makes it absolutely immune from criticism or that you could never conceive of an amendment. It is possible that we might have missed something, that we made a technical error, or that some people might just say they don't agree with the philosophy of this, and they have the right to voice their opinion.

But I do think it's a factor in favour of expeditious passage that this was the product of a partnership with the AFN. I do believe—I know I work for them, I consult with them, so maybe I'm somewhat biased in that respect—that if you read the testimony and you look at its role among first nations, AFN has a high degree of legitimacy in general and on this particular file in particular. And that, as well as its intrinsic merits, gives some further credibility to the product.

Mr. Rod Bruinooge: I would agree with that wholeheartedly.

Just further to your other comments in relation to the current electoral situation that this House of Commons finds itself in, of course should there be an election, all of this work gets set aside to a future mandate, a future Parliament. Of course I know it would be a shame to see this bill die.

I want to go to another point that was mentioned.

The Chair: Do so quickly.

Mr. Rod Bruinooge: I'll be quick.

I would perhaps just want to talk a bit about the role of the elder that was contemplated by the AFN. I know you spoke a bit about that. Could you give us a little more testimony about how the AFN would envision the elder taking part in the tribunal?

Prof. Bryan Schwartz: I'm not so sure the AFN has made any specific proposals about being part of the tribunal. I don't think it has made any suggestions one way or the other on that in the sense that you would not only have a judge deciding, but somehow you would have a panel of elders being a consultative resource.

I'm not taking a position on that particular issue one way or another. I'd have to think about it. I'd have to see what the specific proposal is.

I do see a lot of more familiar points of entry for elders to be involved. One of them is with respect to oral history. The statute and the rules should provide ample opportunity for elders who want to contribute oral history to provide the evidence. It should recognize that elders are elder, and therefore, in a litigation process that may take six years, you may need methods of preserving evidence in the event that they're not there when the case finally reaches trial. If you're going to have negotiations, the ADR body can look at the importance of having elders involved when you're negotiating a claim rather than before the tribunal. The elders can be among the stakeholders who participate in the committee that advises on the rules. There are all kinds of points of entry here.

I don't have enough of a sense in my own mind of what people have in mind when they talk about elders actually being part of a panel, to have a very focused reaction to that.

● (1635)

Mr. Rod Bruinooge: Okay. Thank you.

The Chair: Thank you.

Colleagues, we do have time for a second round today. It's going to be five minutes, and I'll be a bit tighter on the time in the second round than I was in the first.

Ms. Karetak-Lindell.

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

Thank you, Professor Schwartz.

I'm going to carry on with some of the same questions that my other colleagues were asking on the one-person tribunal. I'm trying to see what the difference is.

Some of the opposition against, as you say, Bill C-6 was that the minister had unilateral decision-making on issues, and that's always the case every time we have legislation where the minister has too much power. So I'm trying to see what the difference is with a one-person tribunal making a decision, what makes that easier to swallow than one minister making a decision. But maybe that's a political question.

The more I hear about this—and I did attend the briefing and have read the material—I'm trying to see what the difference is from a core process, because it has a judge sitting there, but without the appeal process. I'm trying to see what the big difference would be in this being away from an adversarial court case. When you were doing those discussions, the confidential ones, were there any discussions on an alternative process?

When a person goes to court, I don't know much about the judicial system, but you have an option of being heard by a judge only, or a judge and jury. Would that be making it too close to a court process?

Just to go into your comments that working together makes for a better bill, I can't resist saying that's what we should have done in the process for repealing section 67. We probably wouldn't have spent so much time on it at committee.

An hon. member: Hear, hear.

Prof. Bryan Schwartz: Thank you.

Concerning the difference between Bill C-6 and this in terms of one person, the issue isn't only one person. The issue is a highly self-interested person versus an independent, impartial person.

With Bill C-6, the idea was that the minister had unilateral powers. The minister who was defending the claim had the power under the bill to hold up consideration of the claim indefinitely. That's an elected official deciding a liability claim against his or her own department. That's a very different proposition from an independent judge making the decision.

Are three heads better than one? Generally speaking, yes; the social science seems to be—

Ms. Nancy Karetak-Lindell: I guess the point I was trying to make was when is a unilateral decision easier to take? I guess it depends who that unilateral person is. That's what you're saying.

Prof. Bryan Schwartz: Yes, and the institutional setting. Are they independent? Are they impartial versus being a self-interested person? But the trade-off is that three people generally have more wisdom than one person has, just as thirty have more than three.

There is, however, a very severe counterbalancing practical consideration. If you have a three-person panel, unless you triple the resources the federal government is going to be putting into it, which is almost inconceivable.... It's hard enough to spring six full-time judges; springing the equivalent of 18 full-time judges when there are demands across the country I can't see that as a practical option. Also, you're going to move at the pace of the least accessible member of the three-person tribunal, right? If you've got one person you're working with one schedule. If you've got three people you're working with three schedules. If anybody gets sick or tied up with another trial, all of sudden you've got a problem. The deliberations will take longer because they've got to work out their concurrent judgment or somebody has to disagree and write a dissent.

So there is more collective wisdom in three than one, and there's more efficiency in one than three. But this is not absolute dictatorial power, because it is subject to judicial review and there is somebody looking over your shoulder.

● (1640)

The Chair: You've got twenty seconds if you have a really quick question.

Ms. Nancy Karetak-Lindell: I don't think I can do it.

The Chair: Thanks. We'll bank that for you.

Mr. Albrecht, you have five minutes.

Mr. Harold Albrecht (Kitchener—Conestoga, CPC): Thank you, Mr. Chair, and thank you, Professor Schwartz, for being here.

I noted your comment in your opening statement that outstanding lawful obligations should be addressed, and I think we can all agree around this table that all Canadians, both aboriginal and non-aboriginal, agree with that.

I wanted to confirm your comment about the urgency, especially considering the fact that we're in a minority Parliament, and you indicated we should try to have this through the Senate by the end of May. I think that would be great.

I would like you to comment on the potential for amendments. A number of the witnesses who have appeared here have suggested that the $150 million cap is a huge impediment. Would you encourage the committee to proceed without considering that amendment proposal?

Prof. Bryan Schwartz: Despite being an academic, I like to think I have a glancing contact with reality, and the reality is *Justice at Last* put a $150 million cap. That was the cabinet decision. It's a much higher cap than we were talking about in Bill C-6. Of course, in principle I would prefer to see no cap. I was part of the 1998 joint task force report that said no cap. The reality.... Do I see any realistic possibility that the federal government is suddenly going to say they were just kidding about the $150 million cap, and there's no limit? It would be great if that happened, but I don't see it as very likely to happen, and I would regret it if the bill were jeopardized because that was the sticking point when we knew going inthat this was the federal government's position.

I'd like to see the emphasis placed on how we are going.... In the real world there is going to be a limit; it seems inevitable. So how do we make sure that claims above the cap are dealt with fairly until it can be revisited within the next five years?

Mr. Harold Albrecht: But in all likelihood, the fact that there's a cap will expedite the resolution of claims below the $150 million, and there is still this other avenue with cabinet jurisdiction to deal with the ones above that.

Prof. Bryan Schwartz: Yes, but there are legitimate concerns, which I certainly share, about equitable treatment of claims above the cap. How do we know enough resources will be devoted to them? How do we know they won't lose out in the competition for resources with claims below the cap? Do we have enough clarity about whether the federal government will not use technical defences to defeat claims above the cap?

So this is a very serious issue from my perspective, as it is certainly from the point of view of the Assembly of First Nations and those claimants who have claims above the cap. I don't think they rest easy that not having access to the tribunal, they're in okay shape. To make sure they're in okay shape, there is going to have to be continued political energy, continued engagement with the federal government, so that in the interim, until the legislation is reviewed—and there is a review after five years—there can be reasonable assurances that large claims will be dealt with equitably and work toward the eventual elimination of the cap will be carried out.

It often happens with institutional developments that you do it incrementally. The WTO used to be advisory. Now it is legally binding. If we can get confidence that the system works with claims up to $150 million, maybe next time around we can get rid of the cap altogether, but I'm just speaking frankly. I can't see it as a realistic possibility that the cap is going to disappear this round.

Mr. Harold Albrecht: Thank you.

I want to go on to another point you made regarding the advisory committee. This has been discussed by various witnesses as well.

You indicated that the advisory committee would have input to the tribunal as it adopts its rules, and then you made a statement to the effect that there will be an informal set of rules, possibly adapted, and I haven't often heard “informal” and “rules” in the same sentence. Could you clarify how that will work? Is that going to deal with some of the cultural, spiritual, and traditional values that might be part of settling these claims?

Prof. Bryan Schwartz: What I'm talking about are the formal rules of the tribunal that permit procedural informality.

For example, one way you can have evidence is to have everybody physically present in the room at the same time. Another way you can get evidence is to videotape it. If you have elders who might not be around in a number of years, videotape the element, cross-examine them in a respectful way now, and preserve it. You can have evidence by teleconference, you can have evidence by telephone, you can have affidavits. You don't have to sit regular court hours. You can sit longer hours. You can do evenings, you can do weekends. You don't necessarily have to have the exhaustive pretrial process that you have in formal litigation.

So by informal, I certainly don't mean unfair or irresponsible. When arbitrators decide cases—and I do some arbitration myself—rather than the courts, there are a lot of ways in which we try to speed things up and make them quicker and more economical when compared with formal court processes.

● (1645)

Mr. Harold Albrecht: Thank you.

The Chair: Thank you.

Monsieur Lemay.

[*Translation*]

Mr. Marc Lemay: I have two questions. The first one is very short. Do you believe that the bill should be amended in one or several places to make it better?

[*English*]

Prof. Bryan Schwartz: No. There are a lot of amendments I'd like to see, but there are no amendments that I would consider necessary for us to come out of this and say that this was a landmark achievement.

[*Translation*]

Mr. Marc Lemay: Fine.

In Quebec, Superior Court judges have established rules of procedure. We call them rules of practice. Lawyers must follow the rules of practice to file... I think it's the same in Manitoba and elsewhere in Canada.

I think there should be something else in the bill. Should there not be a mandatory mediation process? I believe my colleague mentioned this. I was just wondering. Under this process, elders could be consulted and an advisory group could be created before a claim is brought before the judge.

So would it not be a good idea to have a mediation process before the final hearing of a claim?

[*English*]

Prof. Bryan Schwartz: Mediation can be extremely useful. The bill provides for it at the initial filing stage and provides the opportunity for it at the tribunal stage.

If the question is mandatory, there are different views. I'm of the school that says mediation should never be made mandatory, because it doesn't work if somebody is being forced into it. Other people have a different view, but I really don't see how a process, if it's based on goodwill and working together, can work if somebody is dragged in kicking and screaming and doesn't want to be there.

[*Translation*]

Mr. Marc Lemay: I was present at the hearings on bill C-31 regarding the appointment of additional Superior Court judges. At that time, I asked the Minister of Justice whether selection criteria for Superior Court judges should include a knowledge of aboriginal issues or claims, not necessarily for inclusion in that bill, but in future legislation. Lawyers wishing to serve on the Superior Court should at least have some basic knowledge of aboriginal affairs. The current judges who will enforce Bill C-30 don't have any knowledge of native issues.

I would like to know what you think about that.

[*English*]

Prof. Bryan Schwartz: I think an effective judiciary means that you have a strong team. You need people who know a lot about business law. You need some people who know a lot about aboriginal law.

Should everybody know about aboriginal law? Not necessarily. But if you have enough people on each provincial bench to whom you can assign cases, then that's an extremely important asset for every team to have.

[*Translation*]

Mr. Marc Lemay: Thank you.

[*English*]

The Chair: Thank you very much.

Mr. Storseth, you're next, please.

● (1650)

Mr. Brian Storseth (Westlock—St. Paul, CPC): Thank you very much, Mr. Chair. You will get my name right yet, Mr. Devolin.

Mr. Schwartz, I want to thank you very much for coming forward today. This is by far and away some of the most concise testimony we have received. You've done an excellent job answering a number of questions, so I will keep my questions relatively short.

First of all, I would like to start with the political agreement and I guess maybe just a comment by myself. What I've heard from first nations chiefs from Saskatchewan to Alberta and all over this country is that this is one of the highest-level agreements they've seen between the Government of Canada and first nations communities. I think that's something that definitely needs to be recognized in here.

An hon. member: Hear, hear!

Mr. Brian Storseth: There's been a number of questions that have come forward in this committee. You've addressed a little bit of it today already, but I want to set it out clearly. It's been said a number of times and I'd like your answer on it. A number of times there have been questions or even comments made around this table that this process will set the clock back to zero for all these claims and that everybody is going to have to start over again, and that's one of the big reasons we need to make sure we don't go forward with this. What are your comments to that?

Prof. Bryan Schwartz: It doesn't set anybody's claim back as though it had never been filed. It is true that, for the purposes of the three-year clock, even if they've been in the system for ten years, some of them are going to have to wait for the full three-year clock to run out.

The difficulty with any kind of prioritization is inherent in the concept of prioritization. Suppose we had made a collective decision, first come, first served, that the oldest claims get considered first. Other people would have said, “The oldest claims got the most funding and the most attention already, and some of them were rejected. Why do they get priority over somebody who has never had their day in court?” There was no value-free way of determining how to prioritize it.

We selected one particular category, which was claims that went before the Indian Claims Commission, recommended positively but rejected by the federal government. They get fast-tracked. But for the rest of them, different people will have a different normative sense of who should get priority, so we basically left it to the tribunal.

Maybe I'm missing something here. Offhand I'm not aware of anybody who is actually in worse shape than they were before. You can have people saying “I wish I was in better shape. I've waited for twenty years; why should I have to wait maybe one, two, or three more years?” You could say this could be better. But are those people worse off than they were before? Under this bill I don't see that. People with large claims can say “I don't have access to the ICC any more and I did before, and that's going to disappear in a year”. Again, that's a reason to pay special attention in the political agreement to making sure the large claims are dealt with, largely. There's a difference between saying “I wish this gave me more priority” versus saying “I'm actually cast backwards”. I don't see people being cast backwards.

Mr. Brian Storseth: You talk about the prioritization of this. Are you comfortable with the framework that's been set forward with that?

Prof. Bryan Schwartz: Different people have different views. My own view is that leaving it the independent body to determine the prioritization was the appropriate way to go. Otherwise, without having everybody in the room, you've got AFN and the federal government deciding it's oldest claim first, or the biggest size claim first, or representative claim first. It would seem to me problematic to have prioritization done by AFN or the federal government rather than by the independent tribunal figuring out its own priorities.

Mr. Brian Storseth: Thus removing the conflict of interest.

Thank you very much. That's as good as I could have asked for.

The Chair: Thank you very much.

We have two more questioners in this round, Ms. Crowder followed by Mr. Warkentin.

Ms. Crowder, five minutes.

Ms. Jean Crowder: Thank you. Actually my questions will be relatively brief.

I wonder if there has been any analysis that you're aware of around the numbers of claims that could be impacted if the provinces decide not to come to the table. I'm from the province of British Columbia, and up until fairly recent years the province of British Columbia had refused to come to the table, up until the early 1990s. I just wondered, because that could have a significant impact on the claims.

The other one is more of a philosophical issue. Mr. Penikett, who came before the committee the other day, didn't specifically mention this when he was at the committee, but he's written a book called *Reconciliation*, where he recommended that the use of alternative dispute resolution techniques and bringing mediators to treaty tables should be encouraged. He also suggested that first nations be allowed to litigate disputes when necessary, and it shouldn't necessarily pull them out of the process. I wonder if you could comment on that. I know there are times when it's important to get a court decision on a particular aspect of a negotiation, but it doesn't hinder the rest of the negotiation going forward. But that really hasn't been the way it's been handled.

● (1655)

Prof. Bryan Schwartz: I haven't seen the statistics on the provinces, and I don't know whether anybody has actually compiled them. I believe there will be many cases in which claimants will not be able to get full satisfaction of their injustice because the province wasn't there.

However, no federal government to date has been willing to entertain the prospect of forcing provinces against their will into participating in the process. It's another respect in which you could say that by some standard of transcendental perfection "it would be better if". It would be better if all the provinces agreed they were going to be there for all the claims, but that's not the real world.

I think the fact that you've seen every federal government take the same view about taking a restrained approach to trying to force provinces into the forum means that this is the nature of the constitutional and political reality we're working with.

It will have a significant impact, but in many cases it won't; in some cases, at least the band will get partial satisfaction, if not complete.

Ms. Jean Crowder: Let me say on the record, I'm not at all suggesting that the federal government force provinces. I just wondered how many applicants could be impacted if the province weren't coming to the table. I just want to be clear about that.

Prof. Bryan Schwartz: In terms of whether negotiations should be interrupted if you want to get a specific point resolved, just as a philosophical matter that seems pretty sensible to me: you can have twenty issues on the table but one is the sticking point; should you have to hold up everything or have everything stop while you get that sorted out? That doesn't seem like a very sensible way to process. Usually parallel processing gets things done faster than moving at the speed of the slowest obstacle.

To the extent that people are involved, whether in compensation claims, specific claims, or resource management litigation, if there are ways we can devise such that well-confined individual points can be referred to courts and resolved quickly, that seems like a pretty solid, practical idea.

Ms. Jean Crowder: Doing that could be a recommendation that this committee could make. There are many cases, of course, where once the first nation decides to litigate, all other negotiations cease.

Prof. Bryan Schwartz: As described, this philosophical concept seems perfectly sound to me.

Ms. Jean Crowder: Thank you. That's all.

The Chair: Thank you very much, Ms. Crowder.

Mr. Warkentin.

Mr. Chris Warkentin (Peace River, CPC): I appreciate Mr. Schwartz's testimony this afternoon. I think most of the questions have been answered. Your information has been helpful for us.

Could you contrast this piece of legislation with Bill C-6, which the Liberals had been bringing forward to address some of these same concerns? I'm wondering whether you have the ability to contrast this piece of legislation with that.

Prof. Bryan Schwartz: Very quickly, on the question of independence, Bill C-6 was fundamentally flawed. It was actually statutorily biased in favour of the federal government. It gave the minister a say in appointments and gave no say to the AFN.

With respect to delay, Bill C-6 actually statutorily protected the right of the minister to indefinitely delay consideration of the bill. That's a kind of negative way of looking at it. It wasn't as if they were saying they wanted to block claims indefinitely; it actually said that you can never go beyond consideration, if a minister has said he's still considering it. The delay issue was not adequately addressed in Bill C-6, and there were no time checkpoints such as we see now.

In terms of criteria, the problem with Bill C-6 is that it didn't deal adequately with the problem of unilateral undertakings. And there were some questions of a very technical nature dealing with whether it adequately dealt with pre-Confederation claims.

As to monetary jurisdiction, we were talking about $7 million to $10 million with Bill C-6; we're talking about $150 million now.

So if you look at the big-ticket items, Bill C-6.... I'm on record with an opinion I wrote in 2002 that was very negative about Bill C-6. You can see my opinion about this one. I'm not enthusiastic about this bill because I'm an easy sell; I think the merits of this bill are much stronger than those of Bill C-6.

Maybe, with the wisdom of history, Bill C-6 was a necessary exercise to go through to finally get to the right decision, just as there are sometimes false starts before you get there. I'm not trying to be unduly critical of earlier efforts. Whatever intentions were, it didn't work.

This one has learned some lessons—everybody learned something from the Bill C-6 experience—including those shown in the amendments that were put forward at the time, and now I think we actually have a solid product.

Mr. Chris Warkentin: I appreciate that. My concern, at least, and I know I share it with my colleagues around the table, is that at the end of the day we get faster action and actually get some of these claims resolved. So often, as we travel our constituencies or into aboriginal communities, we hear that there have been ongoing negotiations or ongoing problems for generations. Quite frankly, as we see the numbers continue to escalate, it's important that we see a resolution.

So I appreciate your sense that this will indeed speed up or at least that there will be some movement of these cases forward.

We've talked about this at some point this afternoon, but I'm wondering what your feelings are with regard to whether taking up and resolving these issues that fit within the specific claims legislation will free up departmental resources for the larger claims. There's been some concern that it doesn't include all claims, but I'm wondering what your feeling is about the ramifications or the impact it will have on some of the larger cases, if in fact this new framework deals with anything that's specified under the specific claim provisions.

● (1700)

Prof. Bryan Schwartz: With respect, I don't think this bill is going to free up resources to be used for other things. I think you need an aggregate increase in resources. What this bill will do is put demands on the justice department and INAC that they never had before. They have to turn around and decide claims within three years or face having it go to the tribunal. So there has to be an increase in resources.

There can also be better systems management. You don't always double efficiency by doubling resources. Sometimes you can work smarter rather than just increasing the resources.

I don't see this as quickly freeing up resources to focus on comprehensive claims and other things. I think what you need is more resources. I know everybody always thinks their interests should get more resources, but this has certainly been a neglected area. We do have a backlog of a thousand claims. The comprehensive claims process also tends to be mired.

I do think this will be an investment. If the investment is there, if there's follow-up, I do think it will produce results, and we will see significant progress toward stopping the backlog from increasing and eventually reducing it. There was a process lesson learned here actually, about how people could cooperate to produce a potentially very effective system that could be applied to other areas, including treaties, including comprehensive claims.

Mr. Chris Warkentin: Thank you very much.

The Chair: Thank you.

Before folks jump up, we're a couple of minutes ahead of schedule. Ms. Keeper has one question she'd like to ask as well.

Ms. Tina Keeper (Churchill, Lib.): Thank you.

This is a question on adequate resourcing. You just mentioned that if a claim is filed and the minister has three years to accept or reject it, and if the first nation does not hear back from the minister, then it is deemed rejected, right?

Prof. Bryan Schwartz: You're allowed to go to the next stage, yes. It's constructive rejection.

Ms. Tina Keeper: Right. So has the resourcing of that move to the next stage been adequately addressed, in your mind?

Prof. Bryan Schwartz: No, I don't think the question of whether there will be adequate budgets for any of these stages has been worked out yet. Now, I don't know what's going on in the inner recesses of the federal government. Maybe the game plan is there, and the money is there. I'm just saying from what I know to date, there are going to be very serious resources needed. There's going to have to be an engagement with the Assembly of First Nations and oversight to make sure those resources are available.

Where I am is that this bill is a landmark achievement. Whether it will succeed or not depends on whether there continues to be the intellectual energy and the bureaucratic commitment and the political will and the financial resources to make it happen, and I'm not confident about that point. The potential for a great success is here, but we could end up with....

I've been on a tour of a major university where someone has said "See that building? It's empty, because donors like to contribute the building. They want the building. They want their name on it. But try to get donors to pay for the operating costs." That's the situation we're in. We have this magnificent new building. It could be even better. It could be ten stories rather than seven, but it's an impressive achievement. Whether this building is actually going to have activity and operate and be successful depends on this further commitment of all kinds of resources, ideas, bureaucratic attention, political attention, and money.

The Chair: Thank you, Professor Schwartz.

I began today's meeting by offering apologies to my colleagues that our scheduling is a little lumpy this month, but in hindsight, I think having just the one witness here today and having some time to actually explore some things in detail has been enlightening for all of us.

Ms. Crowder.

Ms. Jean Crowder: Just really quickly, I noticed in our schedule.... I think there's a subcommittee coming up, and this may be more appropriate there, but I just wondered if there'd been any thought given to scheduling the department to come back as well at some point. It would seem after all of this testimony that it would be a good idea to hear back from them for some technical questions that we might have.

● (1705)

The Chair: I would be happy to talk to you about that. It hasn't been considered. We have our meetings scheduled from now until the break. The logic was to try to finish the witness testimony before the break, ending with Chief Fontaine, so that if members wanted to work on amendments during the break, they could, and we could come back to clause-by-clause.

Ms. Jean Crowder: Towards the end, when we have the AFN, if there were a meeting in which we had only one witness, it might be possible to have them come in for the other half of the meeting, then. I think there are some technical issues that have arisen that the department would—

The Chair: I'm not saying yes or no. I'm saying it may be possible.

Mr. Brian Storseth: Mr. Chair, as you know, we at this committee have gone through the clause-by-clause period before. The department comes before us and are open to any questions we have during the clause-by-clause process, so they will be available at that point in time.

The Chair: Thank you. I appreciate your reminding me of that.

The meeting is adjourned.

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