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Chair

Mr. Barry Devolin

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● (1530)

[*English*]

The Chair (Mr. Barry Devolin (Haliburton—Kawartha Lakes—Brock, CPC)): Good afternoon, and welcome to the 23rd meeting of the Standing Committee on Aboriginal Affairs and Northern Development.

Today we are continuing with our hearings on Bill C-30, an act to establish the Specific Claims Tribunal and to make consequential amendments to other acts.

I have a couple of quick housekeeping notes. As I've said a couple of times recently, we have a few meetings this month with only a couple of witnesses and a couple of meetings with many witnesses. Today we're going to have many witnesses and many presentations, so we're going to need to move along briskly in order to get done.

We have two panels. There will be three presentations from each panel. The presentations will be severely limited to ten minutes. In fact, I'll give you a one-minute warning. So at some point I'll chime in and just say “one minute”. You don't need to stop, but that's just to let you know, and that is because we have one hour, and we need to get through three of these presentations. We'll have time for only one round of questioning, and I'm thinking that five minutes for each questioner will be all we will be able to do. That's because we have bells at 5:30 today for votes, and we have many votes tonight, so I'm going to try to get through both of these panels in one hour each.

With that, I'd like to welcome our guests here today: Christopher Devlin from the Canadian Bar Association, Kathleen Lickers from the Indigenous Bar Association, and Alan Pratt from the Alan Pratt law firm.

As I said, you could give us a presentation of ten minutes or less, following which we will do a round of questions, and the individual members will be able to direct their questions to whichever of you they wish.

I'd like to begin with Mr. Devlin. Welcome. You have ten minutes.

Mr. Christopher Devlin (Former Chair, National Aboriginal Law Section, Canadian Bar Association): Thank you very much.

Good afternoon, members of the committee.

I'm here on behalf of the Canadian Bar Association National Aboriginal Law Section. We're pleased to be here to present our views on Bill C-30.

The CBA is a national association of over 37,000 law students, lawyers and notaries, and legal academics. One of the aspects of the CBA's mandate is improvement in the law and the administration of justice. It's under that objective that we're appearing before you today.

I understand that the committee has had several hearings already on this bill. I don't intend to do any background information on Bill C-30. I've read some of the evidence summaries, and it's been quite extensive.

The CBA is making nine recommendations to this committee, and I intend just to touch on them very briefly in these opening comments.

First of all, the CBA National Aboriginal Law Section supports Bill C-30 generally. It's a long-overdue law reform to the existing specific claims process; however, in the interests of law reform, we think there are a few areas that need to be improved. We'd like to present recommendations concerning these to the committee today.

Our first recommendation deals with the power of the Specific Claims Tribunal to issue final and conclusive decisions for compensation respecting claims. I'm referring to sections 14, 17, 20, and 34. Subsection 34(2) is a very strong privative clause. Section 34(1) allows decisions of the tribunal to be subject to judicial review, but then subsection 34(2) is this strong privative clause.

Other witnesses before you have raised a concern with the inability to appeal decisions of a tribunal panel. What the CBA is recommending is that as with other specialized administrative tribunals there be some kind of internal review process. The judicial review function is important, but certainly, as some of us know, judicial review is subject to a much higher threshold for overturning the decision being reviewed. What we're recommending is that, not unlike the Immigration and Refugee Board or like provincial worker compensation boards, the tribunal have some second level of review, internal to the tribunal, so that if there are errors of a particular judge they can be caught internally, and then, of course, there would be a judicial review.

The second recommendation we have really goes to the limits of jurisdiction. We have three recommendations under that heading.

We have three concerns with the proposed limits on the jurisdiction of the tribunal. The first is that the tribunal is only limited to awarding financial or monetary compensation. You've heard extensive evidence on this already. I'm not going to belabour the point.

The specific concern we have with respect to not allowing the tribunal to consider issues of land and to make determinations on land is that there is certainly at least one whole category of specific claims, treaty land entitlements, that are all about land. At the negotiating table—when Canada is negotiating with first nations on treaty land entitlement claims, as an example—land and cash is always on the table. You've heard some witnesses, particularly out of Saskatchewan, say that rarely is land on the table, that it's always cash, but in other provinces—certainly the ones I'm familiar with, Alberta and British Columbia—there's always a land portion and a compensation portion.

The tribunal is supposed to be making final determinations of these specific claims, so the CBA believes the tribunal should have jurisdiction to, in the very least, make declarations respecting the land quantum that Canada should provide or that is the lawful obligation Canada has to the first nation, and also about the nature of those lands, what kind of lands the first nations would be entitled to. That would play into the determination of any compensation Canada would provide to the first nation and is definitely something that should be within the tribunal's jurisdiction.

● (1535)

We note that although Canada has not adopted the UN Declaration on the Rights of Indigenous Peoples, compensation can take the form of land and is properly within the spectrum of indigenous rights. We feel that this also should be within the tribunal's purview.

Our second concern, on the limits of jurisdiction, is with respect to harvesting rights or land-use rights, and that's under paragraph 15(1)(g). This provision appears to be directed at treaty rights, such as hunting, fishing, and trapping. While the CBA is not suggesting that present use-of-land rights be subject to the Specific Claims Tribunal, there are historical grievances that should properly be specific claims that the tribunal can hear. The example of that is the imposition of provincial trapline registration systems back in the 1920s and 1930s, which essentially obliterated the traditional traplines of first nations. Of course, the traditional traplines of the first nations were protected as treaty rights under their respective treaties. So those sorts of historic grievances related to rights should fall under the jurisdiction of the tribunal. We have that as our second recommendation under this section.

The third one is a very specific one, and it refers to paragraph 14(1)(c), and that refers, with respect to Canada's obligations on reserve lands, to unilateral undertakings that give rise to fiduciary obligation in law. The CBA aboriginal law section notes that often there's a dispute among first nations in Canada as to what constitutes a fiduciary obligation. Sometimes there may well be a legal obligation there, but it's a difference of opinion as to whether it meets that higher threshold of being a fiduciary obligation. In that respect, we would recommend that the word "fiduciary" be deleted from that paragraph so that what we're talking about are obligations in law.

The committee has heard extensive evidence on limits to the tribunal's monetary jurisdiction. The CBA would like to add to that the concern about the arbitrariness of that monetary limit. However, the specific concern is this: relatively straightforward claims that, but for the passage of time, would pass that $150-million threshold should be subject to the tribunal's jurisdiction.

What I mean by that is referenced to the recent Whitefish Lake First Nation decision of the Ontario Court of Appeal. When we're talking about the application of arithmetic, of equitable compensation that allows compensation to first nations to bring the loss-of-use forward from the late 1800s to the early 21st century, if it's an otherwise straightforward claim—it's not complex, it's not a bundled claim—the tribunal really should have jurisdiction over it. It's not a huge issue of law. It's only by virtue of the application of arithmetic that you'd see the actual compensation exceed the $150-million mark. We say that there should be a provisional cap of $150 million but that the tribunal can assess the complexity of the claim and whether it has jurisdiction. If it's just a simple arithmetic calculation that causes it to be exceeded, the tribunal should have jurisdiction.

In clause 35, under the release provision, the CBA recommends that it's unfair to require a release of all the rights that may flow to the first nation from a particular set of facts. If Canada wants a release on a particular cause of action, on a particular claim, then that's all it should get. It shouldn't get an open-ended release such that on the same facts there could have been an Indian agent who took certain actions that resulted in several specific claims. If only one of those claims is before the tribunal, then Canada should only get a release on that one claim.

● (1540)

I'll go to the last recommendation, because I want to highlight this. This is on the minimum requirements to be included in a claim. The minister referred to this in his submissions before the committee. We said the minimum standard of what constitutes a reasonable application should be set out in the legislation—at least the bare bones—and we give some suggested minimum standards there in our final recommendation.

Thank you.

The Chair: Thank you, Mr. Devlin. That was great.

Ms. Lickers, you have ten minutes.

Mrs. Kathleen Lickers (Secretary-Treasurer, Indigenous Bar Association): Good afternoon.

I appear before you today on behalf of the Indigenous Bar Association.

You have a copy of our brief. I don't intend to read that brief; rather, it is my intention to speak more directly—from my heart, I suppose—and to encapsulate certain of our views towards the need to reform the process.

I am a Seneca from Six Nations. I am intimately familiar with Canada's land claims process. I have been commission counsel for a number of years to the previous Indian Claims Commission, and I was also counsel to the Ipperwash inquiry, so I know first-hand what it looks like for the specific claims process to fail on the ground.

In my view, every legislative attempt of this country since the 1960s that has sought to address the matter of specific claims has sought a recognition that these matters do call for justice to be done, but our failure as a country to come to grips with these issues is what leads us here today to ask if it is this bill, Bill C-30, that gets us there. Is it what's needed?

I believe it was Canada's failure as a country to balance what was needed in 1974, when it was asked, in striking the office of native claims. It was foreshadowed by Supreme Court of Canada Judge La Forest even then, when he said that the fundamental objectives of "finality and independence" screamed out to this country on these issues.

In fact, if you go back to the Hansard debates on the original recommendation for an independent claims tribunal of the first nations witnesses to the first parliamentary committee, the predecessor to this committee, who joined with the Senate.... Incidentally, my grandfather, Norman Lickers, was the commission counsel too. If you read the Hansard debates from that time period, you will see in that record the representations of first nations across this country. In words far more articulate than mine, they explained why there is outstanding treaty business and what needed to be done.

Until now, Canada as a country has asked first nations to find justice in a process that it has single-handedly designed—and not only did it design it, but it also delivered it from within the walls of the very department whose actions were to be impugned.

Then you ask the question the rest of the country poses to us: why can't this be solved? Why do these issues remain? But to the first nations you ask, "Should we change this?" The answer is a resounding yes.

After you have heard from many experienced first nation Canadian witnesses who have brought to you very technical and heartfelt representations, I believe the question left with you as a committee is whether Bill C-30 and all the proposed amendments get us far enough, and whether the amendments being asked of you are such that they can be addressed within the mechanisms that the bill sets out.

Within the mechanisms of the bill, you have a five-year legislative review. Within the mechanisms of the bill, you have the capacity to strike advisory committees. You have the capacity to address the call for elders' councils. You have the capacity, by its structuring of its rules—designed with the expertise of lay people and legally trained people throughout the country—for it to design its process.

You also have an oversight committee within the terms of this bill, and I say to you, as I conclude further on in my remarks, that I do believe there is a role for this committee.

But let me get to my very substantive remarks on this bill.

● (1545)

The Indigenous Bar Association supports this bill. We come here making no recommendations for amendment. We do take caution in a few areas, but let me start with why we support this bill.

First, it is a matter of establishing the independence of the process from outside the walls of the Department of Indian Affairs—and frankly, from outside the Department of Justice, whose advice is called upon repeatedly.

We also take the opportunity to note that the striking of a tribunal represents another opportunity for Canada to ensure that the justices who make up that tribunal include aboriginal justices and that you take the opportunity to appoint further aboriginal justices to the superior courts of this country, and by doing so draw a larger pool of people to the process by which it is being designed.

There is a greater levelling of the playing field for first nations in this bill, and it comes clearly and squarely in the form of timelines. Without this bill, the status quo remains, and the status quo would have every first nation claimant band waiting and waiting.

Bill C-30 creates a remedial step to level the playing field and puts into the hands of first nations a remedy to hold the Government of Canada to account for its failure to respond in a timely manner. That might seem trite to anyone unfamiliar with the claims process, but to anyone familiar with the claims process that is an enormous change.

The subject of oral history is one that I personally hold dear, having been commission counsel to the Indian Claims Commission for a number of years. It is the only post-Oka institutional improvement to the claims process in this country, for one thing. But second, it was the first institution in this country that sought as a matter of its process to include oral history in the evidentiary formation of the claim.

There is a body of work this tribunal can draw from; there is a body of work for protocol. There is also a role for this tribunal to strike an elders council. That's within the purview of the bill. That does not require amendment.

On the subject of land-based specific claims and why the IBA takes a position not to make a recommendation for amendment on this point, we accept the fact with some notable objection that $150 million is the financial cap. That has to do with cabinet mandate. That does not have to do with the subject matter of that section of the bill.

On the point of the land, its inability to award land compensation, there is a fundamental need for a tribunal outside the Department of Justice to render findings on land-based specific claims that are called treaty land entitlements. The reason is that having the experience and body of work from the Indian Claims Commission, there's a role for justices to make determinations of land quantity and land quality.

What does it mean for a first nation to say that all the lands to which they were entitled under treaty were not provided to them, either because not enough Indians showed up on the day the treaty commissioner took the pay-list analysis or that the land to which they were originally assigned was swamp?

I speak in very stark terms, but those are the realities of the claims that come before the process.

In my final minute, I suggest a further role for this committee that goes beyond the clause-by-clause review, and it is this: there is too much responsibility to be placed on Bill C-30 if we believe it is the only answer, that everything about the specific claims process will be improved by Bill C-30.

The answer to that is shaped by the political agreement. All the elements that go to ensure a fairer process don't all exist within this bill. I put it to you that there is a role for this committee to ensure that what is outside the bill but finds itself in that political agreement is overseen by you.

● (1550)

Thank you.

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

Mr. Pratt, you have ten minutes, sir.

Mr. Alan Pratt (Lawyer, Alan Pratt Law Firm): Thank you, Mr. Chairman.

I'd like to do something that is probably a very bad idea, which is to begin by apologizing to the committee. I had every intention of getting a submission into the hands of the committee before today, but unfortunately you don't have one. The committee does have a submission, but it hasn't yet been translated, so I will be making reference to a document that you'll have to perhaps wait a few days for.

Oh, you have it. Okay.

The Chair: The members do have a submission.

[*Translation*]

Mr. Marc Lemay (Abitibi—Témiscamingue, BQ): You can safely assume that we have read it.

[*English*]

Mr. Alan Pratt: Excellent. Thank you.

In the limited time, I'm going to indicate that I am here as a private citizen, unlike my colleagues, but I am a legal practitioner. I've worked in the field of specific claims since about 1985.

Ms. Lickers mentioned the Indian Claims Commission. I was actually counsel with Mr. Winogron, who is in the room here, on opposite sides at the very first claim that went to the Indian Claims Commission in the early 1990s.

My reaction to the bill is mixed. It is clearly an advance over what we've had before. It's an advance over the Specific Claims Resolution Act, but I believe it is lacking in a number of quite important ways.

I have made eight recommendations, and since you have seen my submission you've seen that I've not only made recommendations but undertaken the task of drafting clauses that might remedy the deficiencies I've identified in the bill.

I do want to say, as I mentioned in my submission, that in 1963 Parliament considered a bill to introduce a specific claims commission. That bill failed. It's an interesting historical footnote, perhaps. But part of the exercise was an evaluation at the time of the overall amount of money it would take to settle all claims. The total estimated in 1963 to settle all specific claims was about $6 million. I think that's off by a factor of a thousand, and if you correct it for inflation it's still a major underestimation.

I start by saying that because if this bill is not the answer or does not lead to something that will be the answer, this amount of money that is owing as a debt of the Canadian state will simply continue to increase at an alarming rate. So it is very important to our long-term future that we fix the problem you've heard about.

My first recommendation relates to the reconciliation function of the tribunal. The bill in its preamble notes correctly that reconciliation is one of the outcomes of settling land claims. But the tribunal is not a reconciliation body. It's an adjudication body.

So I have made a recommendation that there be a mandatory pre-hearing conference involving mediation so that, even after all the steps are taken, once you're in the tribunal there must be a mandatory hearing in the nature of mediation before it goes to a formal hearing, and that the member or members of the tribunal conducting the mediation not be involved in the hearing.

The second recommendation also relates to reconciliation. Like the CBA, represented here by Mr. Devlin, I believe that the tribunal should have the authority to make certain declaratory orders. He mentioned the declaration of rights respecting land.

I have recommended three other types of declaratory orders that the tribunal be authorized to make. One is to recognize that a crown breach has caused a non-pecuniary loss, which means a social or cultural loss to a first nation. That's a very important recognition in the healing process of claims.

Second, in some situations the crown should be told by the tribunal that it should apologize to a first nation.

And third, the tribunal should have the authority to make a declaration that if a first nation chooses to accept something less than it is fully entitled to, by accepting that the first nation is making a generous gesture in favour of the people of Canada.

Some of those points have arisen out of the practice in New Zealand, and I think the committee may benefit from hearing more about that.

A third recommendation relates to a confusion in the bill, and this relates to clause 11 of the bill primarily. The bill makes it clear that when a claim that has been accepted is in negotiations for three years unsuccessfully, then the tribunal has jurisdiction. It doesn't make it clear that the claim continues to be regarded as valid. It opens up the question that the first nation may have to re-prove the validity of its claim. I don't think that's the intention, but it is not clear that the tribunal's jurisdiction in that situation is only about compensation.

● (1555)

My second point under this heading is that the first nation should have the right, in my view, to seek to put the validity of a claim before the tribunal, and then, if it is successful, have an opportunity to negotiate it before the compensation ruling is made.

I think my suggested amendments open up and make more flexible and partly make more clear what the intention is with regard to the first point, and in the second point they give the first nations more flexibility and foster negotiations.

My next point relates to costs. The tribunal is basically asked to create a costs regime that's consistent with the Federal Court rules. That means it is likely that first nations will be penalized in costs if they are not successful.

I have recommended two changes. One is providing for advance costs to be awarded by the tribunal so that first nations going into a hearing will be able to afford to appear—that's consistent with the current practice. The second is that at the end of the hearing, the tribunal should have discretion regarding costs, but unless there's some exceptional factor, like bad faith on the part of a first nation, a first nation should not be compelled to pay the costs of the crown.

My next one is the definition of “claim”. I'll touch on some of the rest of these very quickly. There should be, I believe, in paragraph 14 (1)(d), reference to an illegal or improvident lease. The clause at the moment talks about an illegal lease or disposition. I believe it leaves out a possible source of claims, which is a disposition or a lease that is legal in the sense that it has been validly granted but is improvident in the sense that the consideration is inadequate. The addition of those words would remedy that, and it's consistent with case law I have referred to in my brief.

Next is something quite important: exclusion of certain relief. I think it is a very grave problem with the bill that the tribunal is not permitted to grant punitive damages or non-pecuniary damages, even if a court would make such an award, given the circumstances of a case. I think it is entirely improper for the crown to ask for a first nation to set aside a type of relief that a court might well award. I'm not saying it would award it, but it should be an issue to be resolved through the evolution of case law and through the tribunal's decisions. I've recommended an amendment that reaffirms in fact the jurisdiction of the tribunal to grant those types of relief.

My second-to-last point relates to claims in which there's reserve land involved. You've heard already some concerns about the breadth of the release clause. In my opinion, if the subject matter involves releasing the rights to a reserve, the first nation in question should have the opportunity to decide whether it is prepared to accept an award of the tribunal in exchange for an absolute surrender of its reserve land.

● (1600)

The Chair: One minute.

Mr. Alan Pratt: Thank you.

It may or may not agree that a surrender in exchange for the compensation awarded is proper.

One of the difficulties with this bill is that it isn't clear how a first nation is mandated by its members to initiate a proceeding in the tribunal. It's quite possible that a majority of a chief and council, without any further mandate from their members, could initiate a proceeding that would lead to the extinguishment of rights to reserve land, without ever consulting with or seeking the informed consent of the members. I have suggested amendments to deal with that.

My final point echoes one of Ms. Lickers' points, and that is, in the bill, the Minister of Indian Affairs and Northern Development is listed as the responsible minister for purposes of the Financial Administration Act. This reaffirms the connection between that minister, his department, and the administration of the specific claims system. In my submission, that should be terminated.

Thank you.

The Chair: Thank you, Mr. Pratt.

Our three witnesses have set an excellent example for committee members, in terms of staying on the clock.

We have five minutes each. I would ask you to not have a very long preamble, followed by four questions, leaving only 30 seconds for answers.

We will begin the first round of five minutes with Ms. Keeper, from the Liberal Party.

Ms. Tina Keeper (Churchill, Lib.): No, Mr. Russell is going first.

The Chair: Oh, pardon me.

Mr. Russell.

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

Thank you, each of you, for your presentations.

Ms. Lickers, I certainly heard your impassioned plea to pass this piece of legislation without amendment, and that the committee probably has more to do with how this piece of legislation is wrapped within the political accord, and other factors. I would just argue that I think we have more to say about this particular piece of legislation and that we can make more changes to this particular piece of legislation on our table now than to some of the other political nuances that may surround it—but that's a debatable point.

I want to raise two issues.

On the issue of land, Mr. Devlin, and the fact that the tribunal cannot award land, or really make any declarations regarding the awarding of land arising from its decisions, you had suggested that we should at the least expand it to make declarations respecting land quantum and about the nature of such lands owned by Canada.

What would that do in a practical sense if we included that amendment? Each of you can comment on that. What does it do in a practical sense? Does it maybe force more open negotiations or force people to negotiate a settlement? What does it do in a practical sense?

And then my second question is about the release, because these issues have been raised before by me and by my colleagues. I remember the Indian residential schools debate. When the crown was going to make certain awards to individuals or survivors of Indian residential schools, they would not compensate them for loss of language and culture—this was a huge issue—but wanted the survivors to release all claims against the government for any loss of language and culture. This was a hugely emotional issue, affecting individuals and communities, and one of the real stumbling blocks, I think, to any type of process, until we had this Indian residential schools agreement. I see this being resurrected somewhat here in the release provisions.

So I just want you to comment on those two aspects: the land declarations, and what they do practically; and on the release provisions again.

● (1605)

Mr. Christopher Devlin: I'll be as quick as I can.

On the land issue, I think it raises two sub-issues. One of them follows from what my colleagues have spoken about, the need for the tribunal to have flexible rules. Under the legislation right now, there's an opportunity for case management before the hearing. I think that whatever rules the tribunal adopts, it should also have the opportunity to bring preliminary motions.

The reason I'm suggesting that's a partial answer to your question is that if there's a stumbling block at the negotiating table, where the crown and the first nation just can't seem to agree and there's a huge gulf between their two positions, if the tribunal were able to make a binding decision on that issue as a preliminary motion, but not as the final determination, it may actually facilitate the successful negotiation of the claim.

We don't have the rules of the tribunal in front of us—we have some guidelines in the legislation for what can be there—and I haven't seen Mr. Pratt's suggested amendments, but under the kinds of rules the tribunal can adopt for its own procedures, maybe this will fall under case management, or maybe it will be an independent ability to hear preliminary motions on specific issues.

So, on the land quantum issue, for example—and this leads to the second sub-issue—very often a province is involved. It's not all the time, as sometimes the federal government has some very nice pieces of land that first nations would like to have as part of their settlement, and which can be made available. The recent Musqueam case in Vancouver comes to mind, with that block of downtown Vancouver being set aside for their treaty negotiations. That aside, the province often has the good real estate.

If there's a declaration as to how much land is owed by Canada, that may actually facilitate the trilateral negotiations with the province. The province might say, oh, that's how much we have to cough up? Well, now we can quantify that; now we know for certain.

On the release issue and the loss of culture and language, I was in front of the committee for that hearing as well, and my recollection is that Canada backed off on that and stopped requiring a release on loss of culture and language, and said okay, we're only going to require a release on the physical and sexual assaults. I think Canada should do the same thing in this bill and say this is what you're getting compensated for, so this is what we're asking the release for —as opposed to it being too broad.

The Chair: Thank you very much.

Monsieur Lemay, from the Bloc; you have five minutes.

[*Translation*]

Mr. Marc Lemay: I have several questions that I would like to ask. I would have liked to focus in on some very specific issues, but I will not have enough time to do that. I know that those of us who are lawyers like to talk too much. However, you can safely assume that we have read your submissions.

Once legislation is adopted by Parliament, care must be taken not to come back to Parliament seeking an amendment to that particular act. Does this provision not satisfy most of your demands? If persons coming before the tribunal were required to follow a given set of procedural rules, would that not address most of your concerns? Would this approach not be preferable to amending the bill as you, especially Mr. Pratt, are suggesting we do?

As it so happens, I did read your brief very carefully, Mr. Lickers, and there is something I would like to say. It would in fact be preferable to have more aboriginal judges, but until that happens, it would be even better if superior court judges were more aware of aboriginal issues. Right now, this is the major problem when it comes to implementing Bill C-30. Please feel free to comment.

My next question is directed to the Canadian Bar Association. Among other things, you recommend “an internal administrative appeal process in addition to judicial review by the Federal Court.” I disagree with your recommendation and you will be hard pressed to change my mind. As I have told everyone, we want to avoid a situation where the federal government will use this bill as an excuse to delay the settlement of specific claims. If the federal government is able to resort to an internal administrative appeal process in addition to having the judicial review by the Federal Court, do you not think there is a possibility that the settlement process will be delayed even further?

● (1610)

[*English*]

Mr. Alan Pratt: All right, I'll be very brief.

Monsieur Lemay, I believe that clause 12 is procedural. I think a colleague of mine mentioned that one of the unfortunate realities is that we do not know how the tribunal will seek to apply its power to make rules.

And, yes, it might work much better if there were good rules than if there were bad rules; but, in answer to your question, I do not believe that making good rules would overcome my objections to the bill.

Mrs. Kathleen Lickers: I would just like to respond by saying, absolutely, I think that jurists in every court in this country could be more sensitized and aware. This is not to be disrespectful to any member of the jurist community serving in this country, but to be consistent with the position of the IBA when we appeared before the committee with the CBA in November 2005 to call for the appointment of further aboriginal justices in this country.

Mr. Christopher Devlin: On your third question, there was great debate within our section about whether or not there should be a true right of appeal or whether the judicial review was a sufficient mechanism for decisions that seemed out of line with the jurisprudence or with the particular facts of a case. Both within the section and within the evidence before this committee it's raised time and time again that there is no appeal. Let's suppose you just have one judge, and for whatever reason the law is simply applied incorrectly. Surely there should be recourse to that.

The threshold is very high on a judicial review, on administrative review, notwithstanding the Supreme Court's recent clarification of administrative law last week. Still, it's a high threshold. The CBA's suggestion is simply to try to strike a balance of having a sober second thought without a true appeal function from the tribunal to the Federal Court. It's not a true appeal to the Federal Court. It's only a judicial review, but there is an internal review. We already have mechanisms like that set up in Canada, including the Immigration and Refugee Board. Those sorts of internal review or second review processes already exist in other federal administrative tribunals, and we're suggesting that would meet this perceived problem with the act as it is currently structured.

● (1615)

The Chair: Thank you very much.

Ms. Crowder, you have five minutes.

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

Thank you for coming before the committee and for your very detailed briefs.

I want to specifically address paragraph 16(2)(a) and clauses 42 and 43 around the transitional procedures. The reasonable minimum standards, in my mind, relate to clauses 42 and 43. I don't have time to go over the details of the case, but we have a very detailed briefing from Snuneymuxw First Nation, which is from my riding. They've laid out a number of concerns around the transitional provisions. They have waited for over ten years and have now been in four years of negotiation. It is unlikely it will be at a stage that would be acceptable by December 31, 2008, such that it will be concluded. In their view, they will be disadvantaged, in that they've been going through this lengthy process. Once the bill comes into force, there are a number of questions around even reasonable minimum standards.

I just wonder why none of you addressed the transitional procedures in your briefs, or if you think they are fine as they stand.

Mrs. Kathleen Lickers: To the extent that the IBA referred to the fact that the Indian Claims Commission's mandate has by order in council been amended to expire December 31, 2008, which puts an added environmental pressure on the need for there to be a resolution on this bill and whether or not it will be proclaimed, what I missed in your question was whether or not this first nation is at a negotiation table now.

Ms. Jean Crowder: Yes, they are.

Mrs. Kathleen Lickers: Are they being assisted by any third party?

Ms. Jean Crowder: I don't have that level of detail, but they set out a good case that if they were not able to conclude by December 31, they would, in effect, go back to being in the lineup, and their claim and the other 800 claims that are currently there will be at the same stages, unless they've already been rejected by the minister.

I know Mr. Pratt probably has some comments on that.

Mr. Alan Pratt: Yes, thank you.

The way the transitional provisions work, as I understand it, is that everything begins on the day the act comes into force. For example, I'm in a number of specific claim negotiations with clients now, some of which have been in negotiations for five or six years, as of now, but as you say, if we were unsuccessful and wanted to take a claim to the tribunal, we'd have to put in another three years, as I understand it, which is wrong. That is an example of where perhaps the committee could grandfather the acceptances of certain claims for the purposes of that clause. Where the crown has agreed to negotiate a claim, it shouldn't matter whether that agreement took place before or after this bill came into force, and the first nation shouldn't be compelled to put in another three years of unsuccessful negotiations if it already has put in its three years.

You're right. I haven't addressed that situation, but it merits a closer look. It is an unfair result.

Mr. Christopher Devlin: The CVA—you're right—didn't take an official position on the transition provisions, but in the first few pages of our paper we alluded to the political agreement that was reached. Like Mr. Pratt, I sit at negotiation tables and I have specific claims, on behalf of clients, that are in the queue and haven't been accepted yet.

If the political agreement and the financial commitment of the government and of Canada continues, the CVA supports the bill. It thinks it remedies not all but a lot of the mischief of the current process, which is policy-driven, and provides a real impetus for the government to get cracking and get serious about reviewing and negotiating claims.

It's not perfect. I've been at a table that has been negotiating also for six years, and this means that there's up to three more years to go. But the fact of the matter is that the federal negotiators are telling us they now have the resources and the commitment behind them to actually get these things done, so it might be wrapped up in less than three years.

● (1620)

The Chair: Thank you very much, Mr. Devlin.

Now we have the last turn from the Conservative Party, with Mr. Bruinooge for five minutes.

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

I appreciate all of the testimony today. Of course you all come here with the best intentions to assist us in delivering the best product for Canada.

As a parliamentarian, when I was elected my biggest interest was systemic reform. Madam Lickers, as you presented your opinion on this matter, I tend to agree wholeheartedly that when the federal government was judge, jury, and also the entity that had to pay out settlements and could choose not to, that was a situation that treated first nations very poorly. This bill, I feel, is a fantastic systemic reform that is going to, in many people's opinion, bring a whole new era to the way specific claims are dealt with.

My first question to Madam Lickers would be in relation to the situation we find ourselves in as a Parliament. Of course we can't necessarily count on our time here being long, in light of our minority circumstances, and Mr. Russell is chiming in that he'd like to see the government thrown out as soon as possible. In that sense, because we have an opposition that is perhaps suggesting an election soon, which of course would kill this bill, do you have a recommendation to expedite our work—and not only that, for I know we have some senators in the room, but perhaps that the Senate should also consider this in short order?

Mrs. Kathleen Lickers: I think you have the opportunity, upon reflection of the witnesses who have appeared before you, to ask whether or not the amendments that are being called for can be addressed within the confines of the bill through the creation of the tribunal's rules, which have yet to be determined; by the striking of any advisory committees and councils that are required in the development of its work; the role for an oversight committee, which has been agreed to in the political accord; and frankly, the role of this committee and the Senate committee, which have the ability to study any subject they desire. Taken together as an environmental context, this bill really causes Canada to stand at a precipice, saying to the first nations of this country: we hear you; we get it; this isn't perfect, but we are prepared to go this far.

Mr. Rod Bruinooge: I tend to agree with that.

Before I move on into questions, I'd like to clarify a few points. I think there was some opinion put forward that first nations bringing forward claims would in fact be out of pocket, should their claim not be successful. I want to put on the record that this is actually not the case. Any first nation that is in the tribunal process and has their case heard won't be out of pocket for their expenses. Only the Government of Canada will be.

Moving on to one part of the presentation put forward by the Canadian Bar Association. Mr. Devlin, you spoke about some other claims that might be brought forward but that you thought perhaps couldn't be under the existing bill, in relation, I believe you mentioned, to trap lines.

Would you agree that the unilateral undertakings clause could perhaps incorporate, dependent on the opinion of the judge, some of these other claims that might exist?

Mr. Christopher Devlin: Sorry, which section is the unilateral undertakings in, so I know what you're referring to?

Mr. Rod Bruinooge: It's in paragraph 14(1)(c).

There was some opinion expressed by the negotiator for the AFN that the justices would be able to have a broad mandate to incorporate such things as you're suggesting. I'm wondering if you agree with that.

Mr. Christopher Devlin: I guess there's more specific language in paragraph 15(1)(g), where the first nation may not file a claim that is based on treaty rights related to an activity of an ongoing and variable nature, such as harvesting rights. That's really where you get your hunting, fishing, and trapping rights, and I think that specific language may trump the more general language of unilateral undertakings.

That's why we raised the concern there about historical grievances with respect to those harvesting rights. So it's not the ongoing exercise of the rights now; for example, it's the imposition of provincial trapline registration regulations on those treaty rights and the resulting breach of the lawful obligation by Canada to honour the treaty rights to harvest.

● (1625)

The Chair: Thank you very much.

That concludes our questioning for today.

I'd like to thank the three witnesses for being here. I'm sure all of my colleagues would agree that we wish we had more time. I'm sure there are many more questions. But we will review your briefs and take those into consideration when we consider this bill.

We will suspend for a few minutes to change witnesses. I ask my colleagues not to stray too far.

● (1625)

(Pause)

● (1630)

The Chair: Order.

There is a little housekeeping to do before we begin with our witnesses. Next week, which is the last week before our constituency week, we have committee meetings on Monday and Wednesday. We also have a subcommittee meeting scheduled for Tuesday. So if committee members have any questions about process, you can have them ready for Tuesday.

The schedule essentially is that we will conclude with Grand Chief Fontaine one week from today, we will have a constituency week, and when we return we will begin with clause-by-clause. That constituency week will give us an opportunity to get ready for clause-by-clause.

I'd like to welcome our second panel here today. For those of you who were not in the room at the beginning of our meeting an hour ago, we have many witnesses we want to hear from today, unfortunately with limited time. The bells are going to ring at 5:30 for us to vote, and I believe we have five different votes today. We must end at 5:30.

There will be three presentations. I will require you to keep those to less than ten minutes. I will give you a one-minute warning when we're at nine minutes, and that way you can complete your time. If two of you are going to speak, I can give you five minutes each. That will be followed by one round of questions of either five or six minutes—we'll see when we get to that point.

First today we're going to hear from Mr. Allan Donovan and Chief Fabian Alexis from Donovan & Company. They are here together and will be making one presentation of ten minutes or less. Second will be Mr. Tom Waller and Raymond Chaboyer from Olive Waller Zinkhan & Waller. They will be splitting ten minutes. Finally will be Chief Rosalind Callihoo and Doris McDonald from Ackroyd. You will also have ten minutes to make a presentation.

I'd like to begin with Mr. Donovan. Will it be just you speaking, or will you be splitting your time?

Chief Fabian Alexis (Okanagan Indian Band, Donovan & Company): We'll be splitting our time.

The Chair: Okay, I'll give you a five-minute warning.

Welcome. The floor is yours.

Chief Fabian Alexis: Thank you, Mr. Chairman.

I'd just like to thank everyone for allowing the Okanagan Indian Band to come before the committee with our representative, Allan Donovan.

I won't take up too much of your time. I understand there have been many witnesses who came before the committee and spoke on many changes and amendments here and there. I'll just say the Okanagan Band is very familiar with the specific claims process. We have settled two claims in the past. We have five awaiting at the Department of Justice.

One of our claims that I'd like to share with you that we were in negotiations on is called the commonage claim. Just recently we received a letter from the minister formally withdrawing from those claims, and we were kind of taken aback, because we are following the new Bill C-30, the tribunal bill, and we had some questions we were wondering about.

Anyway, we're here to talk about two amendments to the bill that we're going to propose. One is about the reserve creation process, and that's around specific claims.

In British Columbia there was some debate going back to when reserves were created at law, and recently there was a Supreme Court decision that looked at this; it's called Wewaykum. In that case, it was concluded that two reserves that were set apart by the Indian Reserve Commission in the 1880s weren't created at law until 1938.

Our claim is a little bit different. The Okanagan reserve was set apart in the 1870s by the Joint Reserve Commission, and I must differentiate that it's not the reserve commission at issue in Wewaykum. Canada purported to relinquish our commonage reserve back in 1889.

I must say that when Canada eliminated that reserve, they didn't tell us. Also, they didn't pay any compensation when they breached their legal duty to the Okanagan Indian Band in that respect. Our legal position is that our reserve was in full existence when it was set apart, and we also rely on the statement by the Supreme Court of Canada in Wewaykum that Canada owed a fiduciary duty to aboriginal nations during the reserve creation process, which in British Columbia stretched over a number of decades.

Bill C-30 includes some language that was meant to track this law set out by the Supreme Court of Canada. One of the parts that we are kind of uncertain about in the bill is paragraph 14(1)(c); that talks a little bit about reserves, but it does not use the words “reserve creation process”.

Also, I'd like to share with you that B.C. AFN Regional Chief Shawn Alteo had written a letter to the minister regarding the reserve creation process, and the minister wrote a comfort letter back to Regional Chief Alteo, ensuring him that claims relating to the creation of reserve lands are admissible. We are not comforted by this letter. As I mentioned earlier, we did get a letter from the minister, with Canada formally withdrawing from the negotiations of our commonage specific claim.

We relied on the minister when the Minister of Indian Affairs accepted our commonage claim for negotiations. The letter accepting our claim for negotiation, however, was ripped up by the future minister.

We need more than a comfort letter from the minister, and one that we're hoping will help us interpret Bill C-30 better. If Canada's intention is to address these breaches of obligation during the reserve creation process, then Canada should say so in the legislation. That's what we are proposing, and we have done that in a clear way on page 4 of the written submission we've provided.

The next area I'd like to speak about is regarding claims over $150 million. Right now, with the claims definition, we need to get away from past differences as to the validity of a specific claim. When Canada brought forward this legislation, its goal was to change Canada's existing role as judge, jury, and—the word I didn't hear from one of the MPs earlier—executioner for specific claims.

● (1635)

That goal is achieved in part by the creation of this tribunal. But what we're proposing also is that, where we're at right now, our access to a tribunal will be changed and will dramatically impair us, because if we were to go before them, we would have to lessen our claim by 80%, down to $150 million. We've had our claim valued at $750 million by an appraiser. So we're hoping we can change some of the laws around the $150 million and then go from there.

I'll just turn over the next few minutes to Mr. Donovan.

Mr. Allan Donovan (Lawyer, Donovan & Company): Thank you very much, Chief Alexis.

Thank you, committee.

Having tagged off, I will just turn quickly to the two issues that Chief Alexis has brought forward and comment on them briefly.

The first issue is the wording of paragraph 14(1)(c). The minister says in his comfort letter that this section is meant to deal with claims relating to the reserve creation process, like the Supreme Court of Canada said in Wewaykum. The committee members at various times have said that's how you understand that as well. Your expert witness, Bryan Schwartz, has said that was the intention of the drafters. So all we're saying there is, why not make it clear? Why not use that language, so there's no possible doubt after the fact?

I know many of you might think, how can a lawyer possibly argue that this wasn't what was intended? Believe me, lawyers are willing to try any kind of argument on for size, and I wouldn't be surprised at all if a Department of Justice lawyer, three years from now or five years from now, says, “So what if the committee on aboriginal peoples thought that's what it meant? It's doesn't use those words, so they must have meant something different.”

We're saying track what everyone knows this section is meant to say. We've provided draft wording, and that can be examined, but let's do what we're intending to do and this should be an easy amendment. It shouldn't be something that takes any time at all. We're just doing what the minister says and what everyone says this section is meant to say. It would bring a lot more comfort than a comfort letter, that's for sure.

On the $150 million cap, I've had the privilege to read through the transcripts of your hearings to date, and I must compliment you on your careful analysis of this legislation. The honourable member for Winnipeg South has asked almost every witness the rhetorical question, wouldn't it free up a lot of time and resources for the government to deal with the big claims, now that we're going to be able to deal with the little claims? There's a lot of sense to that. The trouble is that's not what is happening on the ground.

Canada right now is dealing with the little claims. In B.C. last year, they dealt with about 15 or 16 little claims, some of them less than $100,000. That's good. Those are important claims in their own right. But has that freed up the time and resources of the government to deal with the big claims? Not in Okanagan's case.

In Okanagan's case, they've submitted a 70-page legal opinion, and the government's response has been that they'll pull out of negotiations, after agreeing to negotiate. The Okanagan sends in a supplementary legal opinion, and the government provides a second opinion: “No, we won't negotiate.” And there's no appeal; there's no appeal process. They can't go to the Indian Claims Commission, because that route has been shut down, and they can't go to the tribunal because of the cap.

We hear there's going to be a new process, the cabinet process, but can we get into that? Well, no, the choice is the minister's, and the minister is the one who has closed the door. So it's like Alice in Wonderland. There's jam yesterday and jam tomorrow, but never jam today. That puts Minister Strahl into the role of the Queen of Hearts, and I'm sure he doesn't want to sit in that role.

If we can either eliminate the cap and have claims paid out according to what they're worth, or have the tribunal simply look at the claim and tell the government, “It's valid, and you should go to the negotiating table”.... It's the second-best solution, but it's a whole lot better than closing every door that's available to a first nation to have its claims heard on legal principles.

● (1640)

The Chair: Thank you very much, Mr. Donovan, and thank you again for your timeliness.

Next we'll go to Mr. Waller and Mr. Chaboyer. I'll tell you when it's five minutes and one minute.

Mr. Tom Waller (Lawyer, Olive Waller Zinkhan & Waller LLP): Mr. Chairman, I'll be doing the speaking on behalf of my client. I appear here today as legal counsel on behalf of the Cumberland House Cree Nation. I've been asked to speak, although Councillor Raymond Chaboyer, a member of the Cumberland House Cree Nation Council, is present. Chief Walter Sewap had planned to appear, but a death in the community has prevented him from attending in person.

In terms of my background, I have more than 35 years in the practice of law representing first nations on claims work. My experience pre-dates the existing specific claims policy. I was legal counsel for the Assiniboine people in the negotiation of what is known as the White Bear/Pheasant Rump/Ocean Man claim, possibly the first specific claim settlement in western Canada. I've represented several first nations in Saskatchewan on treaty land entitlement claims and served as a consultant legal counsel to the FSIN when the framework agreement was negotiated.

I've appeared in a number of Indian Claims Commission inquiries on behalf of first nations. Three of those have involved full inquiries with the release of extensive reports: the Cumberland House Cree Nation claim, which is what we'll discuss today; the claim of the Carry the Kettle First Nation to a reserve in the Cypress Hills; and a claim by the Peepeekisis First Nation arising out of what is known as the File Hills Colony experiment.

We understand the practice of the committee is to have a presentation of approximately five minutes, and we'll try to stay fairly close to that.

Cumberland House has filed a brief, and we do not intend to read the brief. Generally, Cumberland House is supportive of the proposed bill. We believe it deals with several key issues that need to be addressed. However, the legislation is only a start, and in our view the committee needs to understand this.

In the brief we've identified three areas where we would suggest the committee should focus its attention. The first of those is the issue of delay. Under INAC's existing policy, a first nation is required to file its specific claim and the documentation submitted is then taken by INAC and Justice Canada for review and opinion, and it literally disappears for years. In my experience, that's often more than a decade. At some point Canada appears with an answer. If the answer is positive in the sense that Canada is willing to negotiate a claim, often the basis of the settlement is much narrower than the claim as originally submitted. By way of example, oftentimes when a first nation submits a claim based on an improper surrender, Canada will purport to validate the claim, but it will do so on the basis of an improper sale or improper compensation. That's essentially what happened with the Cumberland House claim.

If a claim is rejected, first nations have had the option of requesting that the Indian Claims Commission conduct an inquiry. That process takes some time. It has had the advantage, however, of being the only forum in which Canada was required to share its work product and defend its position. However the ICC process itself involves a considerable period of time. Then, if the Indian Claims Commission report is positive, the first nations are left for a number of years while Canada considers its response.

In the three claims I mentioned before, the Cumberland House claim was originally submitted to Canada in March of 1986. There was a revised complaint submitted in September of 1988. Canada's preliminary response was in December of 1997. It was referred to the Indian Claims Commission in February of 2000. The ICC report was released in May of 2005. And Canada's response, after a mere 34-month period, has not yet been provided. We met with Indian Affairs earlier today, and it estimates it will be several more months before we hear.

The Peepeekisis First Nation claim was submitted in 1986. The request for the ICC inquiry was made in April of 2001. The ICC report was released in May 2004. After 24 months, Canada rejected that recommendation.

● (1645)

The Carry the Kettle claim was submitted in 1992. It was referred to the Indian Claims Commission for an inquiry in 1996. The Indian Claims Commission reported in July 2000, essentially telling Canada that it did not have to negotiate, and that report was accepted by Canada in something approximating five months.

An individual from Cumberland House who was born in the year in which the claim was submitted to Canada for review under its policy is now 22 years of age and we still haven't received an answer.

There is a well-recognized legal principle that says that justice delayed is justice denied, and I think that in the specific claims area this is something that has come to pass. But that issue is, in our view, addressed in the bill.

The second area mentioned in our brief is the need for an independent review process. You've heard a number of witnesses provide comment on that. At the present time Canada controls all aspects of the claim system, and this is problematic. Whatever the reality, the perception is that the system is not fair, and from our perspective, the bill is an improvement.

The third area identified in our submission deals with the issue of the need to have the process recognize the unique nature of the relationship between Canada and first nations. While under the bill a committee comprised of members of the tribunal will determine rules on process and procedures, we believe it is important in setting those rules that Canada and members of the tribunal do not lose sight of the unique nature of the claims and the relationship that exists between Canada and its first nations people. If all the tribunal is intended to do is duplicate the role of courts, you could accomplish this by simply amending Canada's Crown Liability and Proceedings Act by adding a provision similar to clause 19 from the bill.

The final point that we want to emphasize here today is that while Bill C-30 represents a start, there are some claims excluded from the process, and as noted in the brief, some key issues in the resolution of claims have been excluded from the jurisdiction of the tribunal.

We have identified in the brief the need to have some effective mechanism that will allow first nations to ensure that land can be added to reserves as part of a settlement. And this is particularly important to the Cumberland House Cree Nation, since its existing reserve land, in a modern context, is of poor quality and cannot support economic development for the first nation.

The fact that the proposed process will not apply to claims above $150 million also has particular impact on Cumberland House. Following the clear recommendations of the Indian Claims Commission and applying the quantum of dollars that have been offered by Canada on other claims within Saskatchewan, the Cumberland House claim arising out of the Cumberland 100A Reserve could exceed $250 million.

As is outlined in the brief, Cumberland House is most concerned that its claim and other large claims will be lost as Canada focuses on the process that is outlined in the bill. While process is important, in the end it is the outcome that is most important for Cumberland House and for all nations.

We think the passage of the bill before you is preferable to holding it up. The situation that currently exists is that there is no recourse to the Indian Claims Commission. You've essentially started down a path and we think you must finish it. The bill isn't perfect, but it's an improvement over things as they exist today.

Thank you.

● (1650)

The Chair: Next we will hear from Chief Rosalind Callihoo and Doris McDonald. You will both be speaking, so I will give you an indication at the five-minute point.

Chief Rosalind Callihoo (Michel First Nation, Ackroyd LLP): Thank you, Mr. Chair.

Good afternoon.

I am the great-great-granddaughter of Michel Callihoo, who signed treaty in 1878 by an adhesion to Treaty No. 6. I'm here today on behalf of over 700 members of the Michel First Nation who were reinstated under Bill C-31.

I would like to present to the committee today the issue of discrimination throughout the Michel history. The whole band was enfranchised in 1958 under section 112 of the Indian Act, which was later repealed because it was deemed to be discriminatory.

Bill C-31 was also discriminatory. I stated that 700-plus members have been reinstated. However, there are probably approximately the same number who were not reinstated because they were enfranchised under the band enfranchisement. Bill C-31 did not address that. They only addressed individual enfranchisement.

My third comment regarding discrimination is the specific claims policy and access to it. In 1998 we had concluded an inquiry from the Indian Claims Commission. That inquiry made a recommendation to Canada that Canada should grant the Michel First Nation special standing to file a specific claim. In 2002, after four years, the Minister of Indian Affairs of the day refused to give us that special standing, and the recommendation was not adopted.

Our sole recommendation here today to this committee is to propose an amendment to the definition of first nation in Bill C-30. In order to bring a claim before the Specific Claims Tribunal, a first nation must meet the first nation definition under section 2 of the Indian Act. This defines first nation to mean a band as defined under the act. This definition needs to be expanded to include the Michel First Nation, which would be a first nation if not for Canada's breach of lawful obligation, because Canada's breach goes directly to the status of the Michel First Nation.

The Indian Claims Commission did note that Canada should not benefit because of a technicality. In our case, Canada is still benefiting from its own wrongful act; it points to its own discrimination as the justification for not granting us status as standing under the policy. Parliament would continue this wrong by enacting Bill C-30 without the requested amendment.

One of the purposes of Bill C-30, and the reason why it was endorsed by the Assembly of First Nations, is that it removes the non-binding status of recommendations under the former Indian Claims Commission. Bill C-30 is a positive step, and we endorse it. However, the benefits of Bill C-30, as it is currently drafted, exclude us because of the catch-22 position we are in. We are not recognized as a band, but we say we should be a band. We can't argue that we should be a band.

The basic principles and values of Canadian society are reflected in the constitutional provisions designed to protect the rights of aboriginal peoples, to abolish discrimination. These basic principles and values need to be applied to our situation. We have the same issues before us as all the other first nations in Canada; however, we have no platform to bring them forward.

We respectfully urge the committee to recommend that Bill C-30 be amended so we may have equal access to the legal processes that Bill C-30 set out.

Thank you to the committee for allowing us to attend today.

● (1655)

The Chair: Thank you, Chief Callihoo.

Now, Ms. McDonald.

Ms. Doris McDonald (Aseniwuche Winewak Nation of Canada, Ackroyd LLP): Thank you.

I'm Doris McDonald. I'm the vice-president of the Aseniwuche Winewak Nation. Aseniwuche Winewak in Cree means the Rocky Mountain People.

Our community emerged as a distinct society in the first two decades of the 1700s when Iroquois men from the Six Nations migrated to the Rocky Mountains. They intermarried with other indigenous peoples of Beaver, Sekani, Cree, and other nations and settled in the Athabasca River Valley in what is now known as Jasper National Park. Our ancestors were expelled from Jasper National Park when it was created.

At the time we were advised by the federal government that we could move wherever we wanted and not be bothered again. Our ancestors chose to relocate to the remote area of Grande Cache, and here we lived undisturbed for almost 60 years, until coal was discovered and a mine developed at Grande Cache. The town of Grande Cache was built on our settlement, and our hayfields and pasture lands were bulldozed to build the town.

At the time that the Dominion government made its first preparations for Treaty 8 in the early 1800s, it identified our people at Jasper House as one of the groups it would enter treaty with. However, when the treaty commissioners traversed northern Alberta in 1889 and took adhesions to Treaty 8, they did not travel to Jasper House. We have never adhered to a treaty or been offered the opportunity to do so.

Some of our ancestors entered into Treaty 6. Chief Michel, one of the descendants of the original Iroquois settlers in Jasper House, and his family migrated to Lac Ste. Anne outside of Edmonton. He and his extended family and followers signed an adhesion to Treaty 6 in 1878.

The historical records show that some of our ancestors applied for Métis scrip, which they were denied on the basis that they were Indians. The Government of Alberta has recognized that we have an aboriginal right to hunt, fish, and trap. In the early 1990s Alberta researched our history and concluded that we were Indians within the meaning of the Indian Act, because we are entitled to be registered as Indians. Unfortunately, Canada has not shared this opinion and has refused to register our members as Indians.

We currently have approximately 400 members living on four cooperatives and two enterprises near the town of Grand Cache, Alberta. These cooperatives and enterprises were created to hold land communally, land which was set aside by Alberta for us in the early 1970s.

What we are seeking is recognition by Canada that we are a first nation and an Indian band within the meaning of the Indian Act. We are seeking an adhesion to Treaty 8.

Today we are striving to maintain a standard of living for our people comparable to that of other Albertans. It has been a struggle for our people to adjust to the loss of their traditional livelihoods and way of life, and to adjust to the values of mainstream society.

We welcome this opportunity to present our concerns about Bill C-30. Our concern is that it's limited to the definition of first nation in clause 2 of the bill. The definition is limited to bands as defined by the Indian Act or nations that have entered into comprehensive land claim agreements or self-government agreements. We request that the definition be expanded to include first nations who qualify to be bands under the Indian Act but for Canada’s breach of its lawful obligation. Bill C-30 excludes from the jurisdiction of the specific claims tribunal those first nations, like the AWN, whose claim is based on a breach of a lawful obligation, which directly relates to their status under the Indian Act. Currently there is no policy or tribunal available to the Aseniwuche Winewak Nation to pursue its claim, outside of the courts.

We are seeking an adhesion to Treaty 8 and recognition of our status as Indians under the Indian Act. We believe that Canada has breached its obligation to us in two ways: first, by failing to treat with us; and secondly, by failing to register our members as Indians.

Under paragraph 14(1)(c) of Bill C-30, a first nation can bring a claim for failure to provide reserve lands, including unilateral undertakings that give rise to fiduciary responsibilities at law. We believe this applies to us.

We understand that the Supreme Court of Canada has held several times that the honour of the crown is at stake and it must deal honourably with the legitimate claims of first nations.

We ask for this committee's support to help achieve justice and dignity for our people, and we thank the committee for its consideration.

● (1700)

The Chair: Thank you very much.

We'll have time for one round of questions. We can do a six-minute round. If the bells start or the white lights start flashing, we'll complete that fourth questioner.

I'd like to begin with the Liberal Party. Ms. Neville, you have six minutes.

Hon. Anita Neville (Winnipeg South Centre, Lib.): Thank you very much.

I'm just going to take a very few minutes, and my colleague Ms. Keeper will follow up.

My question is directed to Chief Alexis and Mr. Donovan.

Your issue and your arrival here today have been heralded by many. We've heard about the issues that the Okanagan community is facing. You made the proposal that a claim over $150 million be heard by a tribunal with reference to cabinet. Do you have any other suggestions as to how these claims over $150 million might be dealt with?

Chief Fabian Alexis: It's a suggestion, right? It may not be the best suggestion, but we're hoping that we could have the tribunal look at the validity of claims. Right now we're kind of in limbo because we don't quite fall within the definition of the specific claim, because, as I said earlier, our land has been appraised at over $750 million. We could fall within the tribunal if we agreed to knock our claim down to the $150 million cap, but we're not willing to do so just yet. We can negotiate that.

I'll just pass it over to Mr. Donovan to add any of his suggestions on that point.

Mr. Allan Donovan: Essentially, up until very recently we could have done exactly what Chief Alexis suggested by going to the Indian Claims Commission and getting a non-binding ruling. That avenue had its drawbacks, but it was better than nothing. Canada eliminated that access to the Indian Claims Commission and then, following quickly after that, withdrew from negotiations of the $750 million claim.

The cleanest way is to just let the tribunal rule according to law and have the first nations obligations be determined by the same legal principles that would apply to any other Canadian, not singling them out for second-class treatment. If that's not on the table, then at least have the tribunal tell the Government of Canada, “They are right. This is a valid claim. Go and negotiate it. We're not going to value it, but we're telling you there is a lawful obligation that was breached when you took away a 28,000-acre reserve for nothing.” We would hope that with that in hand, Minister Strahl would be able to turn to his Department of Justice colleague and say, “Look, there is a legal obligation, and we are going to negotiate here.”

● (1705)

Hon. Anita Neville: Thank you.

Ms. Tina Keeper: Thank you to our presenters.

I have a couple of questions.

My concern is similar to what has been raised. As you said, this has been represented as a process that would be in place to respond to the fact that there were only non-binding recommendations through the previous commission, and yet, as you said, there is this kind of Alice in Wonderland type of atmosphere or sense about it. That's where we all want assurances.

Mr. Waller might want to respond to this as well.

My fear as well is this issue of the process whereby only certain claims move through. Aside from the large claims, as Mr. Waller mentioned in his presentation, the limitation represents a challenge for many claim settlements, and first nations may not be as interested in the dollar amount of the compensation as in the ability to acquire reserve land. If it even goes into negotiations, the process is that if it's deemed rejected, or is rejected, the only avenue then is the tribunal process, which can award only monetary compensation.

I'd like to talk about whether you feel that the political agreement has within it any assurances to deal with these concerns.

The Chair: You have about a minute and a half.

Mr. Allan Donovan: The political agreement does have assurances. The question is whether those assurances will be complied with. In a sense, it seems like a gentlemen's agreement, which has been described as something that is not an agreement and is not made between gentlemen. The plain fact is that political agreements in the past have been broken. The residential schools political agreement said that anyone who attended residential school would be eligible for the ten-and-three compensation. That was changed and the legislation said that anyone who resided at residential school would be eligible, so what Chief Fontaine signed his name to was not followed through. It's in the political agreement, and it's still there.

There's a promise of a process for claims over $150 million in this political agreement, but what the minister has suggested is that the minister himself will be the guardian of the gate. If we could have a process that would comply with legal principles and would allow us to make our case—that's all the Okanagan have been asking for.

The Chair: Thank you.

Mr. Waller.

Mr. Tom Waller: I think I would answer in this way. First of all, Cumberland House is one of those first nations that are included within the Federation of Saskatchewan Indian Nations, and they therefore support the legislation.

We recognize it isn't perfect. The political agreement is another agreement that, in my view, puts the honour of the crown at stake. The crown has committed to a process that will solve both of the issues you've identified: the large claims and the addition to reserve of land.

One could sit here and note that in most first nation claims what you're arguing about is a breach by the crown of the honour of the crown already. At this point in time certainly my client is prepared to take that chance once again.

● (1710)

The Chair: Thank you, Mr. Waller.

Monsieur Lévesque.

[*Translation*]

Mr. Yvon Lévesque (Abitibi—Baie-James—Nunavik—Eeyou, BQ): Thank you, Mr. Chairman. I will be sharing my time with my colleague. I will try to be as brief as possible, to allow him time to put his questions.

The bill raises a number of concerns, including the fact that the province can opt to be a part of the tribunal hearing [*Editor's note: inaudible*], the fact that compensation is inadequate and the fact that the bill is not perfect.

My question is for all of you. If you had but one thing to recommend to improve the bill, what would that be?

[*English*]

The Chair: Who would like to go first?

Go ahead.

Mr. Allan Donovan: If I had one recommendation, I would say addressing the $150-million cap through removing it or through establishing a process; and Chief Alexis would say fix up clause 14.

The Chair: Mr. Waller.

Mr. Tom Waller: I think from our perspective we'd say simply remove the cap.

The Chair: Chief Calihoo.

Chief Rosalind Callihoo: My recommendation would be as I spoke to, to amend the definition to include a clause that would allow first nation groups to file a specific claim.

The Chair: Okay.

Ms. McDonald, did you want to say something?

Ms. Doris McDonald: I would agree with Rosalind Calihoo, to insert the definition of "first nation" in clause 2 of the bill, because it's limited to bands, as defined by the Indian Act, and that excludes our community. So mine is the same as Chief Calihoo's.

The Chair: Thank you.

Monsieur Lemay, you have about three and a half minutes.

[*Translation*]

Mr. Marc Lemay: I will try to keep it brief. Earlier, mention was made of paragraph 15(1)(g). This provision is clear to me, but it may not be clear to you. It reads as follows:

> 15. (1) A First Nation may not file with the Tribunal a claim that
>
> (g) is based on treaty rights related to activities of an ongoing and variable nature, such as harvesting rights.

Is your understanding of this provision clear?

[*English*]

Mr. Allan Donovan: No, it's clear to me what paragraph 15(1)(g) is getting at. They're saying there are certain treaty rights that the government would see as specific claims if they breach them, and others, if they breach them, they would say aren't specific claims.

In our submission for the Semiahmoo First Nation, we said that this distinction wasn't, in our view, a proper one, because if you breach a treaty right, you breach a treaty right, and you should act accordingly and compensate.

[*Translation*]

Mr. Marc Lemay: I will end with a question of a general nature. Are all of you in favour of having a tribunal that makes binding decisions that cannot be appealed?

[*English*]

The Chair: We'll start with Mr. Donovan, maybe.

Mr. Allan Donovan: We focused on the two issues we focused on because those are the most important ones to the Okanagan.

The question you posed, sir, is highly important, and it could go both ways. The difficulty in having an appeal to the courts is that Canada could then run a financially exhausted first nation through the court system. Unless there's funding, and Canada generally does not fund first nations in the courts, they'd be able to beat them by attrition rather than on the merits. You'd like to think that there would be some mechanism to make a correction. On the other hand, if there was something evidently wrong, as an earlier witness suggested, there could be a layer of internal review.

The Chair: Chief Alexis, did you have anything to add to that?

Chief Fabian Alexis: I concur with Mr. Donovan on his point. I'm not quite familiar with the whole bill. My focus was on the two points we raised. I won't comment more on that.

● (1715)

The Chair: Do you want to answer, Mr. Waller?

Mr. Tom Waller: I would answer the question in this way. Bill C-30 is the product of a set of negotiations, and it represents compromise. In a perfect world, the tribunal wouldn't have the final say, but we live in an imperfect world. As I've indicated before, the first nations in Saskatchewan have adopted a resolution to support the bill. We think what's in the bill is better than not having the bill go forward.

The Chair: Chief Callihoo.

Chief Rosalind Callihoo: I would like to speak to the courts. We are currently before the courts, and because we've been denied access to the specific claims policy, we're finding that we're faced with the statute of limitations in the courts of Canada. As well, our treaty rights are being confused with the Indian Act. We have never relinquished our treaty rights. Our treaty rights are forever. In our situation, it's important to have that appeal.

The Chair: Ms. McDonald, did you have anything to add?

Ms. Doris McDonald: No, because right now, as proposed, it doesn't include our community. It goes back to inclusion. That's about it.

The Chair: Thank you.

Ms. Crowder, you have six minutes.

Ms. Jean Crowder: Thanks, Mr. Chair.

I want to thank the witnesses for coming before us today.

I think Chief Callihoo and Ms. McDonald have made very clear their recommendations on what needs to change in terms of the language. I appreciate your clarity on that.

I want to address the $150-million cap. Today, when the Canadian Bar Association came before us, they specifically recommended that there not be a blanket cap on the amount the tribunal may award in compensation. Rather, Bill C-30 should contain a provisional cap of $150 million subject to the tribunal's ability to assess the complexity of a claim.

Do you think that would address some of what you're raising?

Mr. Allan Donovan: It could, Ms. Crowder. The difficulty I have with the suggestion, and I haven't read their brief, so I don't know exactly what they're saying, is how to tell whether a specific claim is simple or complex. These are judges who will be determining the answer, and I would think that they would be fully qualified to deal with any specific claim on the merits, whether it's simple or not.

The one that Chief Alexis has brought forward is the taking of a 28,000-acre reserve for nothing. It sounds simple to me, but there are some fairly complicated legal issues, perhaps about how you quantify damages. I would certainly think that other than the size of that claim, there's nothing out of the ordinary, and the tribunal ought to be able to rule. I would say that the tribunal should be able to rule on any specific claim, because I don't know how you could possibly draw a line between easy and hard specific claims.

Ms. Jean Crowder: In your view, the cap should just be dropped.

Mr. Allan Donovan: Either the cap should be dropped or there should be some mechanism, at the very least, so the tribunal can direct Canada to negotiate, even if the amount is over the cap.

Ms. Jean Crowder: I'll ask Mr. Waller.

Mr. Tom Waller: If that's a change the committee decides to recommend, I would agree with Mr. Donovan's comments.

Ms. Jean Crowder: Because our time is so limited, I want to just touch on something that I'd touched on earlier, around Snuneymuxw's.... They put together a comprehensive brief, but I want to talk specifically about the transitional procedures in clauses 42 and 43. As well, I wasn't clear enough in my question around clause 16 with regard to the requirements in filing.

I wonder if you have any comments around the fact that people could be in a specific claims process, could have been accepted for negotiation, and, with this new bill, as the requirements are laid out, could in effect not meet the new requirements—potentially. Do you have any comment on that and on how the transitional procedures could potentially disadvantage people who have been in the loop for years and years?

● (1720)

Mr. Allan Donovan: To take Okanagan as an example, the claim was filed two decades ago. It was accepted for negotiation five years ago and was rejected, or Canada withdrew, two months ago. So we would be, in the transition provisions, under clause 43. Actually, Okanagan would have to re-file its claim and wait for three years. Then it would be in the same lineup as anyone else, despite the fact they've been waiting a generation.

Our firm has filed over a hundred specific claims. Some of our clients will be lucky enough to have their claim rejected the day after the bill is. Bingo, that's great; they filed five years ago and their claim is rejected. They can go immediately to the tribunal. But while that would be good news for them, it's pretty arbitrary. Trying to address claims that have been in the system for a long time and that the first nations put a lot of time and effort into resolving, it seems pretty reasonable that you'd give them some degree of priority access.

The other problem with the transition provisions as they're worded is that they deem claims in negotiation to be in negotiation starting the day after the bill. So you could have a claim that's been there for five years, two years, it doesn't matter; the day after is day one.

That has a fairness problem with it, and I think that's fairly self-evident. But it also has a practicality problem, because it means that all of the claims that are in negotiation now—and there are a lot—will come up for tribunal eligibility on the same day. That doesn't need to be the case. You could cross out that one line from clause 42, the deeming provision. This is good news, bad news. The good news is that if you've been in negotiation for three years, you can go to the tribunal. The bad news is that you're deemed to start negotiations when we say so.

That doesn't make any sense. It creates this automatic, instant backlog: add water and you have a backlog. There's no point in doing that even if you don't care about the fairness—and I'm sure everyone does.

So those transition provisions could be cleaned up by a few really simple amendments that this committee could—and should, we would say—put forward.

The Chair: There are a few seconds left. Does anyone else have a comment they want to make before we conclude this?

Mr. Tom Waller: No, not on that point.

The Chair: Thank you.

Our last questioner today will be Mr. Bruinooge, for six minutes

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

I'm going to split my time with the member for Desnethé—Missinippi—Churchill River. I like hearing that name, because I remember that before when I referred to it, a member from the other side had that riding.

Mr. Donovan, I appreciate your following the questions I've asked in previous meetings. My question for you now is in relation to the cap, as you've suggested that we remove it.

Many have lauded the fact that our government has attached $2.5 billion to the tribunal over 10 years, which would be delegated at about $250 million per year. By removing the cap, how do you think that might impact the tribunal's ability to be able to deal with the highest number of claims possible, in light of the monetary limit that's been placed upon the tribunal?

Mr. Allan Donovan: If you simply removed one cap of $150 million and you didn't remove the cap of $250 million, you'd have a potential problem with delay of settlement of the claims, because one significant claim could deal with a lot of the money.

If you opted for our second suggestion, then that problem wouldn't emerge at all. The government has said that money for the larger claims will come out of a different silo, so that wouldn't generate any additional backlog or interfere with the ability to process claims along the lines intended.

Mr. Rod Bruinooge: But you would agree that $2.5 million is a sizeable amount of money to set aside from a government budget, at least for this purpose.

Mr. Allan Donovan: From one Winnipegger to an ex-Winnipegger, that sounds like a lot of money. On the other hand, let's say I took your house and told you I wouldn't give it back, but I'd let it be decided by someone that you could have input into appointing how much I owed you. But I'm only going to pay you a quarter of what it's worth, because I have some fiscal problems paying the full value of your house.

So $2.5 million is a lot of money, but the appropriate amount of money, in our submission, is the amount of money that by legal principles is owing to first nations. That issue of justice—the minister calls it “the legal and moral imperative” in the political agreement—is to pay first nations what's legally owed to them, and not say, “We'd like to, but we can't afford justice”.

That's our submission on it.

● (1725)

Mr. Rod Bruinooge: But with the cap in place and going toward specific claims beneath $150 million, I am suggesting to this committee that the process will be able to bring forward resolution for a number of claims. As we know, a much smaller number of claims are above $150 million, so the bulk of the backlog is below the $150-million mark, at least based on the information we have.

I'm going to leave it there and hand it off to our new colleague.

The Chair: You have two minutes, Mr. Clarke.

Mr. Rob Clarke (Desnethé—Missinippi—Churchill River, CPC): Mr. Chaboyer, you're from my home riding. I recognize Cumberland House Cree Nation. My riding is very dear to me. I haven't heard you talk yet, but what are your recommendations for the Cumberland House Cree?

Mr. Raymond Chaboyer (Councillor, Cumberland House Cree Nation, Olive Waller Zinkhan & Waller LLP): Thank you, Rob. I would like to congratulate you for winning your riding of Churchill.

I restrain myself from talking too much, because I brought our legal counsel with us and he is quite well versed in all of this. But since you want my opinion, I agree with quite a bit of what's being said here around the table regarding the cap. That's going to be a problem with our first nation. We've waited over 22 years, and we still don't have any answers or resolutions to our claim.

On economic development back home in the east side of Saskatchewan, this has been a long time coming, and we've put a lot of weight on this to carry us over when it comes to economic development. This cap poses a big problem for myself, my community, and our legal counsel here. So I totally agree with the suggestion that it be removed. Our legal counsel Tom Waller suggested we support Bill C-30 but with some recommendations, and this is one we would strongly suggest.

Thank you.

The Chair: Thank you very much.

That concludes our questioning today. I'd like to thank all our witnesses for being here. I know many of you travelled a long way, and we certainly appreciate you sharing your thoughts with us.

I also want to thank my colleagues for helping me to keep the trains on time.

We stand adjourned until Monday at 3:30.

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