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Chair

Mr. Bruce Stanton

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● (1105)

[*Translation*]

The Chair (Mr. Bruce Stanton (Simcoe North, CPC)): Good morning, committee members, witnesses and guests. We are starting the 41st meeting of the Standing Committee on Aboriginal Affairs and Northern Development. On the agenda, we have the findings of the Correctional Investigator's Report Regarding the Incarceration of Aboriginal Women.

This morning, we welcome Ms. Kim Pate, Executive Director of the Canadian Association of Elizabeth Fry Societies.

[*English*]

Ms. Pate is here to represent the Canadian Association of Elizabeth Fry Societies.

Members, you'll know that we have one hour for this session, and then we will be resuming our consideration on the study of the honour of the crown.

Ms. Pate, we allow ten minutes for the opening presentation, and then we will go directly to questions from members.

Please go ahead with your presentation.

Ms. Kim Pate (Executive Director, Canadian Association of Elizabeth Fry Societies): Thank you very much, and thank you, Mr. Chair, for inviting us here. I bring regrets from my president, Lucie Joncas, who was planning to attend with me but is tied up in some other matter.

Given that it's the first time in a while that we've been before this committee I thought I would outline a bit about the organization and then comment on some of the issues pertaining particularly to aboriginal women prisoners.

Some of you are aware that I've been doing this work now for about 26 years, starting first with young people, many of whom were aboriginal as well because I started in Alberta, and then I worked at the national level with men. For the last 18 years I've worked with women in the federal prison system predominantly, but also I've done work internationally as well.

Our organization has 25 members across the country. As many of you are aware, they are voluntary non-governmental organizations. We have a complement of about 582 staff, about half of whom are part time and half of whom are full time, across the country in those 25 societies, and in excess of 1,200 volunteers. The count last year was 1,243 volunteers doing that work. So we have a sound community base, and we rely on that community base to direct policy and practical work that we do out of the national office.

We have been working with aboriginal women in this context for 25 years, since the organization began, and 70 years since our first Elizabeth Fry Society started in British Columbia. One of the issues that are very key for us is the fact that women are the fastest growing prison population in this country as well as in other parts of the world. In particular, we're seeing that growth astronomically when we talk about aboriginal women in a more focused way.

There are the reports of the correctional investigator, but also successive reports over the years in my history with this organization, starting with the Task Force on Federally Sentenced Women in 1990, the Louise Arbour commission report in 1996, the Canadian Human Rights Commission report in 2004, and several United Nations documents. In fact, last week I was in at United Nations meetings looking at the very issue of the treatment of women prisoners in particular around the world, and the issue of overrepresentation of indigenous women is an issue for more than just Canada. There are also the reports that you're considering, in particular the Mann report and the annual report of the correctional investigator. All of those reports document very clearly a discriminatory impact, systemic discrimination as well as some of the discriminatory effect of policies that are discriminatory in other ways, whether it's by gender or by disability, particularly for women with mental health issues, for instance.

So I don't think I need t go over that. I did distribute in advance so you would have in that material some of the fact sheets that we use. We distribute those fact sheets the first week of May every year. We always have a National Elizabeth Fry Week preceding Mother's Day to draw attention to the number of women in prison who are mothers.

I'm most interested in trying to answer any of the questions you may have, but suffice it to say that one of the trends we're seeing, which you have probably already heard about from the correctional investigator and the Correctional Service of Canada, is that we see aboriginal women in particular, and men as well and young people, but in particular we're seeing this overrepresentation in the prison system. We're seeing it in terms of the charging practices, the remanding practices, the conviction practices, and sentencing practices; and then, once individuals are in prison, the over-classification, the more limited access to programs, the greater difficulty in gaining access to conditional release, and for individuals who do manage to be released on conditional release, the increased likelihood of that being revoked and their being returned to prison.

● (1110)

Those are some of the impacts we're seeing. We have particular focus—and I understand you have an interest in this also—on the management protocol, which is a peculiarity for women prisoners. I say that because the impact of the management protocol has created such incredible discriminatory effect for those women who have been subjected to it that I'm very pleased this committee is looking at it. We have flagged it since its inception. The first policy round we saw was in 2003. We flagged right away some of the very issues that have unfortunately unfolded—we would rather have been wrong on this—that we would likely see more people in more isolated conditions for longer periods of time with less access to programs, less access to services, and in fact conditions of confinement that are likely to increase rather than decrease the very behaviour that the management protocol was ostensibly established to address.

As I sit here today, all four of the women on the management protocol are aboriginal. There was one woman released recently who was taken off the management protocol. It's the second time someone has succeeded in being taken off the management protocol. The first woman was one who, everybody argued, including many Corrections staff, should never have been placed on it. The second one was one who was placed on it based on information that came from the provincial system while she was remanded in custody. It was later found to be erroneous, and it still took almost six months for that information to be corrected and for her to be taken off the management protocol.

The seventh woman who was on the management protocol was actually released directly from prison, from being shackled when she was being moved out of her cell, cuffed to the back in a security gown, with two to three—anywhere up to five—security staff with her, into the community. That woman has not gone on to commit the heinous crimes that everybody predicted she would, based on the fact that she was placed on the management protocol. I think it is this, as well as the number of cases we were in the midst of developing, as well as the correctional investigator's looking at this and making some recommendations about ending the protocol, that has now led to a review by the Correctional Service of Canada.

Our concern is that it may only be replaced by something equally egregious, and so I am very pleased that the committee is looking at this and that we can make some very strong recommendations about how we try to remedy it.

We continue to call for external accountability and, in particular, judicial oversight of corrections. This situation of aboriginal women, aboriginal women with mental health issues, speaks all the more clearly to this need, because although there is a deputy commissioner for women, that deputy commissioner does not have line authority or the ability to actually change the decisions. And while we generally support the recommendations of the correctional investigator and support the recommendation for a deputy commissioner for aboriginal issues, our concern is that it could be a role just as *functus* as the one we currently have for the women's portfolio.

So I caution you in that respect. Really, what we need to see is greater accountability mechanisms, an ability to trigger reviews—and, we would argue, judicial reviews, reviews that can cause the courts to look at these matters in the way that Louise Arbour recommended when she looked at what happened at the Prison for Women in 1994.

Those are my preliminary comments. I'm happy to try to answer any questions you have and, if there is additional information we can provide, to try to provide that as well. Thank you.

The Chair: Thank you, Ms. Pate.

Now we'll go to questions from members. This is a seven-minute round, and for your benefit, it's seven minutes for both the questions and the answers.

We'll begin the first round. I don't have anybody on the list yet.

Mr. Russell is going to take the first question.

You have seven minutes. Go ahead.

Mr. Todd Russell (Labrador, Lib.): I'm going to share my time with Mr. Bagnell.

Thank you for appearing before us. Certainly it's timely, given that everybody is talking about violence against women during the next week or so leading up to the anniversary of the massacre in Montreal.

I asked this question to Mr. Sapers and I'll ask it to you as well. We know the facts. They're unacceptable. Something must be done. It's almost like a revictimization, if you come back to the fact that a lot of aboriginal people end up in prison because of societal circumstances or historical understandings and happenings and things of that nature. If there's systemic discrimination in the system, which may be somewhat reflective of society itself, will things change? As the commissioner came before us and said, we now have these directorates—these CDOs, I think they're called—that now bring in a new accountability framework. If there is systemic discrimination, will just doing this help things, or does the architecture of CSC itself have to change?

I hope you understand what I'm getting at. You're saying that we keep the same architecture in place, but we have external accountability or judicial oversight or both, and you're saying that you have some misgivings about putting a commissioner in charge of aboriginal affairs. So I'm asking, what more needs to be done if there is systemic discrimination and the architecture itself is infested with it?

● (1115)

Ms. Kim Pate: Thank you very much for the question.

If I wasn't clear.... We certainly wouldn't say that the system staying the same and just having a few accountability measures would change it. Absolutely not. So thank you for giving me the opportunity to clarify.

There are a number of recommendations we have made. In fact, the Canadian Human Rights Commission report came about as a result of a complaint we filed in conjunction with the Native Women's Association of Canada, Amnesty International, and about 24 other national and international groups, talking about the systemic nature of discrimination against women, particularly racialized women—especially aboriginal women—as well as women with mental health issues and women generally.

That complaint was not just about Correctional Services. It was about the fact that, as we've seen cuts to social services, health care, education, and all the areas whose services those who are most marginalized tend to rely more on, as we've seen those services dissipated—demolished in some areas, basically the ground and the rug pulled out from under people—it's not a big surprise that those individuals who are most marginalized, most victimized, and therefore most reliant on those services have ended up increasingly in prison. Again, worldwide, that's seen as the single biggest factor contributing to why women are the fastest growing prison population. It's not because of criminality. It's not that there's a crime wave involving women anywhere, particularly among indigenous women.

As you pointed out—and I'm wearing the Sisters in Spirit pin—many of the women who have disappeared and are presumed dead, who have gone missing and have been murdered, are women who have also known the criminal justice context. It's not acceptable that we rely on prisons to try to mop that up.

Having said that, however, I think there are things that can be done within the prison context. We know that women generally, and in particular aboriginal women, are more likely to plead guilty, so they're often charged high. I've heard different people within Corrections talk about women getting shorter sentences, particularly aboriginal women, but that's if you look only at the charge, only at the sentence, not at the context. In most other contexts, those charges would have been pled down to something lesser. The sentence looks low only if you look at the charge alone. If you look at the context, the sentence actually often looks very high.

The Chair: We have to leave a bit of time here for Mr. Bagnell to get in. There are only about two minutes left.

Ms. Kim Pate: Okay. I would say we need to be looking at alternatives before people end up in prison, and those involve shoring up the community. We need to be looking at greater opportunities for release from prison, and we need to be fundamentally changing some of those systemic barriers like the classification systems and the manner in which people are examined and identified when they come into the system. Right now, if you start out poor, without housing, with family members who have been in trouble, and not having had an education, you're likely to have a higher security classification. Those issues do not necessarily mean you're a risk to the public.

The Chair: Go ahead, Mr. Bagnell.

Hon. Larry Bagnell (Yukon, Lib.): I looked at the testimony from our last meeting on this. I just have two questions.

One is, the correctional investigator said he had proposed a lot of things that would make a difference, but they weren't implemented. It was like banging his head against a wall.

The second thing I'd like to comment on is that the commissioner of corrections outlined a broad array of things they were actually doing, although they haven't changed the statistics yet. But they were in progress. Do you think all these initiatives are good? Will they solve the problem?

● (1120)

Ms. Kim Pate: I think there are initiatives commenced from time to time that are very good. The question you need to ask and the question I always ask when I go into the prisons—I go to all the federal penitentiaries where women are serving sentences on a regular basis, and we also have regional advocates going in regularly—is this: how often are those programs or services offered, to how many women, and for what length of time? Unfortunately, as you know from the statistics provided by the correctional investigator, by us, and by others, that the overrepresentation of women and men at the higher security levels is not accidental. It's part of the systemic discrimination. But it also means that at that level you have less access to programs and services.

I would say there have been some new initiatives. Whether or not all aboriginal prisoners have access is the main question. Certainly in our experience that wouldn't be the case. We're looking at only 18% of the federally sentenced women being at a low enough security level to be able to access those services. The higher security level means they aren't able to. For instance, a healing lodge was designed and set up for the very women who at that time were at the Prison for Women in Kingston at all security levels. It was intended to be a multi-level institution. It has never taken maximum security women. It often doesn't even take medium security women.

The Chair: We'll have to leave it there.

Thank you, Ms. Pate.

[*Translation*]

We'll now continue with Mr. Lemay.

Mr. Marc Lemay (Abitibi—Témiscamingue, BQ): I'm going to let my colleague ask questions, Mr. Chairman.

I know the Elizabeth Fry Society well and the remarkable work it does. I wanted to emphasize that and to thank you for being with us today. My colleague has some very interesting questions for you.

Mr. Yvon Lévesque (Abitibi—Baie-James—Nunavik—Eeyou, BQ): Thank you for coming, Ms. Pate. Last week, the committee heard from the Commissioner. In his view, repentance is virtually non-existent among the first nations after more or less lengthy incarceration. That very often prevents parole.

Do you know why as many men as women tend to isolate themselves when they are incarcerated? It may depend on the lack of staff, support or listening in penitentiaries or correctional facilities? Or do they isolate themselves because they feel they are not understood?

[*English*]

Ms. Kim Pate: I would say it isn't my experience that people are unreceptive to opportunities to engage in programs or services or interaction. In fact, it's quite the opposite. It's usually that the programs and services are not set up to engage the individuals. And it's not just aboriginal people, but it's people with mental health issues as well.

When we're talking about individuals, many of whom have experienced abuse in the past, when we're talking about aboriginal women alone in the federal prison system, the task force is the last very complete review, and it has found that 90% to 91% of the aboriginal women had histories of abuse. When you compound that with histories of residential schools, family members with history in residential schools, and social service involvement, there's a high degree of distrust for the system. So to engage, the most effective methods we've found—in fact, we're doing a project that came out of the human rights process, recommended by many of the aboriginal women—was a process of providing them with the skills to advocate on their own behalf.

The most effective programs anywhere are usually programs that involve the individuals themselves in peer-related activities. So individuals have come through, come back in, and provide some support. And those are the most effective, in our experience, with aboriginal women and men.

You can imagine what it's like if you don't see someone who looks like you in terms of your life experience, your class, your education level. Many people in Canada have never even been to a reserve and so have no idea that we have living conditions in those areas that are lower than those in most developed countries—no running water, not clean water, not adequate utilities, any of those sorts of things. So coming into the system, you come in with a lack of understanding of how to negotiate that system, and it's not a very friendly system for engaging you in that process. Those are the starting points.

Then you have a classification system that is based on, if you'll forgive me, a very white, male, middle-class model of what society is like. So if you don't have a bank account before you come in, if you haven't had a job, if you don't have other family members or some of the social conditions that you cannot change, if those are your social conditions that predetermine that, you're going to be at a higher classification to start with. If you then have a history of violence, whether you're the perpetrator of the violence or the victim of the violence, the points get ratcheted up as well.

We've documented this quite well in our submissions to the Canadian Human Rights Commission back in 2001 to 2003. I'm happy to provide those, if they would be useful, because they go through some ways that you could actually turn that around. And we talked about capacity-building models. We said, instead of allocating resources that only identify risk—taking needs and translating them into risk factors—we should be looking at allocating resources according to those needs that you identify and building up the supports, so that individuals are both supervised in a structured environment and then supported to be able to survive.

A good example is that last night I was up until the wee hours doing a submission to the National Parole Board for a woman I've known for 18 years, an aboriginal woman who's doing very well in the community. She might be seen as a statistic of someone who has not done well—quite the opposite. But here is the paperwork of her life: abandoned on a bus at the age of six months; cycled through the system; lived on the street; had to learn how to fight to protect herself, so had assault charges; pleaded guilty to every charge that she did; only pleaded not guilty to the ones she wasn't responsible for and was acquitted on most of them. But as you know, those follow you through the system, nevertheless. On paper, she looks like a danger. In reality, almost every one of those situations has been a response to her being attacked. It doesn't excuse her having to use violence—

● (1125)

[*Translation*]

Mr. Yvon Lévesque: I'm going to interrupt you because a very important question has just come to mind. Have you conducted an evaluation of the representation these clients receive from counsel? Are the counsel who represent them really aware of the culture or way of life of these people and mainly of their way of thinking? Have you conducted a study on the ability of counsel to represent most of their clients?

[*English*]

Ms. Kim Pate: Two pieces of information might be useful. We have a syllabus. I co-teach a course at the University of Ottawa law school on defending battered women on trial. There is a whole section on aboriginal women that talks about exactly that, the lack of understanding by the police, by prosecutors, by defence counsel, by judges, by the prison system. And we go through, for instance, the Gladue case and talk about how the Gladue case looks like an attempt to fix a problem earlier on in the system, where Jamie Gladue was described as having a jealous rage and killing her common-law husband. In fact, when you read the preliminary inquiry transcripts, which we get the law students to do, you realize, no, her sister had just been raped by him. He had just beaten her up and she was trying to get away, and it was in that context. Yet they only listened to the white, non-aboriginal witnesses. Most of the aboriginal witnesses were asked what beer they drank, so you already see a bias, not just a systemic bias but a very individual racialized bias against those individuals. When you read the Gladue sentencing decision, you realize it's probably an attempt to rectify the discriminatory treatment at the stage of the trial.

We have also tried to intervene with the Native Women's Association of Canada. Those of you who are lawyers know that is not usual—

[*Translation*]

The Chair: Thank you, Mr. Lévesque.

[*English*]

Ms. Kim Pate: I'm happy to provide that information. There's a paper by—

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

Now we will go to Ms. Crowder for seven minutes.

Go ahead, Ms. Crowder.

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

In the context of the numbers, that 32% of women in federal prisons are aboriginal, that aboriginal women's incarceration rate has increased by 151% between 1997 and 2007, and that 45% of the maximum security federally sentenced women are aboriginal and so on, the numbers are pretty shocking.

Mr. Chair, in that context, it is important that this committee report back to the House on this matter so that we can keep it on the radar that the committee has taken it under consideration.

There are three questions I'd like you to address. You mentioned in the management protocol that a process was being done. First, has there been a consultation process with organizations like Elizabeth Fry, the Native Women's Association of Canada, and other organizations around this management protocol and how it adversely affects women?

Second, you indicated that you thought it would be important to have an external accountability process. What would that look like? If I have time, I'll come back.

Third, what is the single most important thing you think this committee can recommend?

I'll let you just go to it.

● (1130)

Ms. Kim Pate: In terms of consultation, I'm very pleased the committee is doing this work, because it seems to coincide with the combination of this committee focusing on this area and the correctional investigator issuing his report.

Corrections is currently doing a consultation on the management protocol. It started two weeks ago, I believe it was, and prior to that there was a consultation on the proposed policy that evolved to be the management protocol. It's interesting that the first time I ever saw the management protocol as a proposal, it was on union letterhead. It was something that had been proposed by the Union of Canadian Correctional Officers for the treatment of women who were posing management problems. We had proposed some very different approaches and we had proposed that, in fact, there'd be more intervention with elders, more supports from the aboriginal communities the women came from, more access to their children, more of the interventions that we saw would actually link into the women they were and encourage them to want to move out and get back into the community as opposed to putting them in more and more isolation, with less and less stimulation. In fact, unfortunately, it has gone to the complete opposite—isolation cells, security, no human contact, even to the point where I'm sometimes not even allowed access to segregation to go in and see these women. That's been since the death of Ashley Smith. We're still negotiating access.

So yes, some consultation has been started.

In terms of external accountability, I think the best recommendations I and our organization have seen so far are the recommendations that Louise Arbour made. Rather than trying to replicate or restate them, I will just summarize them.

She said if there is correctional interference with the administration of a sentence, there should be an ability to go back and review that sentence. For instance, some of the women on the management protocol.... One woman started on a three-year sentence and has now accumulated over 20 years, all within prison. This is a phenomenon that, when I started this work, when the commissioner started his work, when the correctional investigator started his work, we did not see. In fact, I was just at the United Nations, and a number of the European countries were horrified to hear that you could actually accumulate charges and sentences that way in a context that everybody recognizes happens in a prison setting because sometimes staff are tired, or sometimes they are inexperienced, and often you're dealing with people who are there because they've had huge challenges. Instead of racking up more and more charges and longer sentences, the presumption is that you should take a different approach, and those should be seen as administrative breaches, which they are as well, because usually those individuals get punished in the prison setting and also get additional sentences.

I think many other things will flow from having the kind of external accountability and judicial oversight that Louise Arbour talked about: things like the changing of the overall environment that I was asked about earlier, things like ensuring that people have an understanding of aboriginal issues, things like developing the appropriate programs at the appropriate times for individuals.

We are being asked increasingly now, more than we have been in the last two years, by very senior people in Corrections as well as people in the front line in the institutions working as correctional officers, to intervene in situations. I would never have dreamed when I started this work that we'd be asked to sue Corrections, or we'd be asked to bring more human rights complaints, or we'd be asked to put more pressure on from the outside to change things because people are feeling so impotent inside the institutions. I think there is a vital need for external oversight to provide a way to start to change that environment, because inside there is increasingly a bunker mentality. People feel unsafe, which then creates unsafe working conditions. It creates unsafe situations for prisoners as well. Ultimately, it creates greater risk to the public when people are coming out if in fact we haven't dealt with the very issues that precipitated people being in the system to start with.

The Chair: You have one minute left there, Ms. Crowder.

Ms. Jean Crowder: I know there are some challenges with the way statistics are gathered. My understanding, from what the Correctional Service people have said, for example, is that they really didn't have a good handle on how many of the prison population were FASD, for example. I wonder if you have any sense of the percentage of women offenders who have had a history of mental health, substance abuse, FASD. Is there any kind of tracking? That, of course, directly relates to the impact on people's lives.

● (1135)

Ms. Kim Pate: There was some work done. It depends, often, on what's being looked at. At one point at the Prison for Women, I know that the Correctional Service of Canada looked at all diagnoses that would fit within the DSM-IV, for instance, or DSM-III, I think it was at the time. It was determined that depending on what definition you used, anywhere up to 90% to 99% of the women could have been identified as having mental health issues. If you talk about clinical depression, well, who wouldn't be depressed going into prison and leaving their children and all of those sorts of things?

The Chair: Thank you very much. That will have to end it.

We'll now move on to the next question and Mr. Duncan. We'll have time for two five-minute questions after that, and those will start with Mr. Russell.

Go ahead, Mr. Duncan, for seven minutes.

Mr. John Duncan (Vancouver Island North, CPC): Good morning, and thank you for being here.

I'm quite aware of the Elizabeth Fry Society, which in my books is a B.C. success story. You mentioned that it started in 1939; there were visits through the war years into the prisons, and it grew across the country. I think it's very important to note that there's no international equivalent, as far as I know. It's a Canadian icon and an institution.

Through the first 30 years of its existence, the Elizabeth Fry Society received no government funding. In 1969, they received their first federal moneys. The caveat was that they had to form a national umbrella organization, which is basically the roots of the organization that you represent today.

I grew up in a house full of Elizabeth Fry people. My mother was involved. She joined in 1959, and this year she received her 50-year certificate, with your name on it. You were one of the signatories. She was very active in visiting prisons early on and then in building up the Vancouver-based society. She was president on two occasions, and they were 20 years apart, I might add.

They had some real firsts. They were the first to receive CMHC funding for charitable housing and they had the first group home for women. That occurred in 1965. Those are reminiscences that I've had with my mother, knowing that you were coming.

She recalls what an unpopular cause it was in 1959. She separated what she called the “do-gooders” from those who did good. This crazy activity that she was involved in was very much criticized within her circle of acquaintances, but it's a very good cause.

There is a very good book for source material on 50 years of Elizabeth Fry in British Columbia. It's called *Women Volunteer to Go to Prison: A History of the Elizabeth Fry Society of British Columbia, 1939-1989*, by Lee Stewart. The inside cover says, “This book is dedicated to the memory of the remarkable women, the founders of the Elizabeth Fry, who took up an unpopular cause when they first volunteered to go to prison”. I want to enter that as a little bit of background.

When I looked at your web page, one of the principles stuck out at me. I was never aware of this before, and I think it would concern a lot of people. Your third principle states, “Women who are criminalized should not be imprisoned”. What does that mean?

● (1140)

Ms. Kim Pate: Thank you for raising the point about your mother. She has done remarkable work and has been an inspiration to many of us over the years. We have a commemorative pin that we wanted to give her this year, so I think I'll talk to you afterwards about how to get in touch directly.

As to that principle, it came up about 20 years ago when we started to see increasing numbers of women going into the prison system. It's interesting that you asked about that today, because I just returned from a United Nations meeting last week in which we were looking at the development of minimum standard rules for the treatment of women prisoners. Two things were determined: one, that alternatives to prison need to be developed; and two, that there is a worldwide plan to get rid of prisons for women. This is because the majority of those who end up in prison are there largely because of the responses they've had to various situations.

It doesn't mean that there aren't people who need to be separated from society for a time, either for their own protection or the protection of others. What we're talking about is not having the prison system, which was developed to protect the community from men who may have committed violent acts. We should be focusing on the needs that women have.

That's how this developed. It came about after the task force work, which found that even the most progressive penal reform experiments in the world had not had the impact that was anticipated. I mentioned the healing lodge earlier. In all of the new prisons that were developed across the country, there was uniform agreement that women should be in minimum security settings, recognizing that most women are not a risk to the community. Every successive report—the Arbour report, the human rights report, UN documents, the correctional investigator's reports—has repeated that message. They were supposed to provide opportunities for women to go into the community. So in fact, programs offered in the prisons were initially supposed to be offered in the community, not in the prison setting, and women were supposed to be going out into the community as much as possible.

Last week when I was talking to people from European jurisdictions, they were talking about that very model. In some of these jurisdictions, they have housing units in the community. Women go out to care for their children, they go to school, and they go to work and come back only to sleep in the prison at night. That was the model being examined. The physical prison setting was based on a model out of Minnesota, the Shakopee Prison. It's interesting that the prison still exists without a fence around it. Recently, the prison system was going to build a fence around it, and the community rose up and said that for a hundred years it had existed and the community had grown up around it. We haven't flexed our thinking to figure out how we can keep people in the community in ways that are more constructive for them and for others.

The Chair: We'll have to leave it at that, Ms. Pate.

Thank you, Mr. Duncan.

Mr. Russell.

Mr. Todd Russell: Thank you. It's good to speak with you again.

I want to follow up on what one of my colleagues was getting at with respect to mental health issues. Can you give us a sense of what a woman would go through when she's charged? Is there any kind of mental health support during this process? What is going on? Some of the evidence seems to suggest that a huge percentage of the people have some sort of mental health issue—FASD particularly, some people would say—in aboriginal communities. As I understand it, there's very little screening for this, few supports, and very little diagnosis. I'd like you to comment on that.

The correctional investigator wrote in the report:

> There are further increases in incarceration of Aboriginal peoples expected related to recent amendments to the Criminal Code regarding weapons, gang affiliated offences, dangerous offender designations, impaired driving and mandatory minimum sentencing.

We have a flawed system now, a broken system. What is it? What are all of these changes to the Criminal Code going to do? Are they going to exacerbate the situation?

● (1145)

Ms. Kim Pate: Thank you.

In terms of mental health, the correctional system employs the greatest number of psychologists and psychiatrists, probably, than any other system. I think it was in the Kirby report. Senator Kirby, as he then was, identified that when they looked at the situation a few years ago. The reality is that, unfortunately, most are put in place to do things like assessments. There are assessments for risk, assessments using the instruments that we've already talked about that have been shown to be flawed in that area by various groups far more experienced and expert than I.

The other thing is this. In terms of identifying FAS in particular, we know that the focus on FAS as an issue for aboriginal people is also flawed and it's discriminatory in nature. There are some really good decisions made by Mary Ellen Turpel-Lafond. She's now the children's advocate in British Columbia. When she was sitting as a judge in Saskatchewan, based on submissions from Corrections, child welfare, and others, she identified that if in fact the diagnosis that was being applied to individuals meant there was no treatment possible, which has been one of the reasons used for not providing any kind of programming to individuals identified as having FAS, then there needed to be a program developed in the community where she could send these individuals and not send them to prison. If sending them to prison was going to mean they were just going to end up in a segregation cell, what would be the point of that?

I'm conscious of time, so is that good?

Mr. Todd Russell: No, you still have two minutes, but I want to get your thoughts on the second question, around changes to the Criminal Code.

Ms. Kim Pate: Yes, we're already seeing those changes. As I understand it, a number of committees have asked for the details on the costing. I think we should be concerned about not only the fiscal costing, because the numbers are going to be greater, but also the social costs and human costs that these new measures are going to create. As we put more and more people in prison, even with the investment of more resources into the institutions for programming, whether it's for aboriginal initiatives or mental health initiatives, as you see more and more people coming in, it will be those individuals who are easiest to manage, who don't have some of the more complex needs. Whether it's health and issues around their experiences as aboriginal or indigenous peoples or their experiences of having abuse, I think they're less likely to get access to those programs. So we're likely to see increased numbers of people in for longer periods of time.

I mentioned earlier the woman whose case I was working on last night, who today is going to be considered by the National Parole Board. Here's someone who, without some interventions, without that ability to have human contact with people who actually talk to her and determine what might best assist her, is likely just to get identified on paper in a certain way that will predispose her to not having access to programs, not having access to conditional release, to being more likely to be breached earlier if she misses a curfew or can't figure out the bus system because she can't read, or whatever the issue is.

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

Now let's go to Mr. Clarke for five minutes, and that will wrap it up.

Mr. Clarke, go ahead.

Mr. Rob Clarke (Desnethé—Missinippi—Churchill River, CPC): Thank you, Mr. Chair.

I'd like to thank the witness for coming in today.

You mentioned the correctional system as being discriminatory, but you mentioned you've been on reserve. Are you first nations?

Ms. Kim Pate: No.

Mr. Rob Clarke: Okay. I'm first nations; that's why I'm just wondering.

Are you aboriginal? No? Okay. Because I can see you're very passionate on these issues of, basically, the aboriginals who are incarcerated.

In my past life before politics, I was in the RCMP for 18 years. I've lived and worked on a reserve. What I've seen, just from that aspect of trying to protect a community, most people here probably wouldn't comprehend or understand.

Now, we always talk about statistics and everything like that. I'm wondering if you have the statistics on hand. What is the population of reserves? The population.

Ms. Kim Pate: I don't know that information, I'm sorry.

Mr. Rob Clarke: Okay.

And we've seen the crime rate increase on first nations reserves and in aboriginal communities as well. For instance, at the RCMP station on Onion Lake, back in 1995, I believe, we had about 743 complaints come in. When the phone and the infrastructure was brought into the first nations communities, the crime rate tripled.

Communities want to be protected. They demanded a client service, and policing was one of the mandates. But the first nation communities demand it.

Now, I have two questions here, or actually maybe three.

For violent offenders, in the federal system...because you don't deal with the provincial system, do you?

● (1150)

Ms. Kim Pate: We do. We're in the midst of developing some of the human rights stuff on the provincial side, and our local societies do.

Mr. Rob Clarke: Of the offenders who are incarcerated, how many offended against aboriginal victims? Do you know that number?

Ms. Kim Pate: I don't know the number. I do know that the research that came out of Statistics Canada last year showed that generally it's the people who are closest to you from whom you are most at risk.

Mr. Rob Clarke: How many of the offenders committed physical crimes against a person?

Ms. Kim Pate: In the federal system, at least half of the women serving federal sentences are in for what are termed “crimes of personal violence”. What isn't disaggregated, though, is whether they were responding to violence. It might have been defensive, perhaps excessive defensive action.

Mr. Rob Clarke: What I have seen, from my background, is the victims and the turmoil they went through. I was reading one of your statements. You don't believe in the victim impact statements.

Do you not believe in the victims and what they have to say?

Ms. Kim Pate: It's quite the opposite. I'm raising my daughter without a grandfather because he was murdered, and I worked with the RCMP when I was younger.

The reality is, to take a system that is not premised on victim involvement from the beginning, that doesn't start with supporting people as they've been victimized....

Up in the north, the last time I was in Iqaluit, women and children were in jail for their own protection because there was no other place for them to go. We're talking about not making the police the first people to have to deal with mental health issues and all of those areas. As we've cut all those other services, we're asking the police to do things that they really shouldn't be doing.

The victim impact statements are telling people that they can have a say, creating a sense that they'll have a say, when in fact it's not a system that presumes their entitlement.

Mr. Rob Clarke: You talked about families and women being in jail for their own protection. So how do you feel about matrimonial real property in that new legislation coming out?

Ms. Kim Pate: We haven't worked on that. I know that the Native Women's Association has done a lot of work on it, and I suspect they'd be better equipped to speak about that issue. We would basically respect their position. They would have more expertise in that area.

We would agree that victims need to have their needs met. Most of the women we work with are victimized before they end up criminalized. The fact that their needs aren't met is often very much key to how they end up in the system. Saying that there will be victim impact statements—being able to have a say after the fact—and then creating the expectation that you'll actually have your needs met is the reason we've taken that position. It's not that we are against victims having their needs met at all; it's quite the opposite.

Mr. Rob Clarke: Mr. Chair, I wonder whether Ms. Pate would be able to provide us some type of statistical data in regard to offenders and victims, as to their ratio.

The Chair: Perhaps you can take that up with her after we suspend.

Thank you, Mr. Clarke and Ms. Pate.

That will conclude our first hour.

Madam Crowder, do you have a point of order?

Ms. Jean Crowder: Yes. In my questioning I asked that the committee.... I guess I have to do it more formally.

I move that the committee report that it considered the Office of the Correctional Investigator report *Good Intentions, Disappointing Results*, and that it report it to the House.

The Chair: You're moving this in the form of a motion. Perhaps we could entertain that under committee business in the next hour, if there's time. It's a valid motion, because it is on today's business. But perhaps, if we have some time at the end of the next hour, we'll deal with it.

We need to switch over. We didn't have time for committee business today, but that's a question that can come before the committee, just as you've expressed it today, for their consideration.

We're going to suspend, and we'll welcome our next witness at twelve o'clock.

● _____ (Pause) _____

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● (1200)

The Chair: Members, thank you very much.

We're back on our orders of the day today, where we are resuming our consideration—and in fact a "briefing" would probably be the better word for it—on the subject of the important issue of honour of the crown.

Members will recall that when we first considered this item of business before the committee, we invited the author Timothy McCabe. At the time we considered this back in late October—I believe it was, or mid-October—Mr. McCabe was unable to join us. We were able to work out our schedules to have him join us today, and so we welcome Mr. McCabe.

As you are probably aware, Mr. McCabe, we open up with an initial presentation of up to ten minutes. That is followed by questions from members, and then we proceed through that order in the normal course of our routine motions. At this point, we'll hand the floor over to you for up to ten minutes.

Mr. McCabe, go ahead.

Mr. Timothy McCabe (As an Individual): Thank you, Mr. Chair.

I hope I can be of assistance in some way, though I'm sure that others who will appear before you will have much more than I to say about the actual working out of this doctrine of the honour of the crown, and also about their aspirations as to how they would like to see it evolve in the future.

I've read the transcript of your proceedings on October 8, and I see that you had a very good short introduction to the subject, courtesy of Mr. Pryce, from the federal Department of Justice.

It seems to me that the best thing I could do in just a few minutes is present a brief summary of the development and the role of the doctrine of the honour of the crown as it has been worked out by the Supreme Court of Canada.

It's important to appreciate, I think, that the doctrine as it applies to aboriginal peoples is very much the creation of the Supreme Court of Canada, and mostly in the last ten years or so. The little note that I sent to the clerk, which I expect you have, is a kind of running account of the court's shaping of the law through the cases, eventually settling on the doctrine of the honour of the crown as a key doctrine and then working out some of the important effects of the doctrine in the cases.

What I'd like to do is take a couple of minutes to take you through that document, if you have it. It begins with what the court has said about the pre-1982 circumstance in Canada. You can see that there are three short excerpts from cases in the document.

From the Sparrow case, there can't be much doubt that over the years the rights of the Indians were often honoured in the breach. We cannot recount with much pride the treatment, and so forth.

In the Marshall case, in 1999—this is the case from Nova Scotia that had to do with the taking of eels by Mr. Marshall and some of his colleagues—Justice Binnie, who wrote the majority reasons in that case, pointed out that until the enactment of the Constitution Act, 1982, the rights of the aboriginal peoples in Canada could be overridden in the same way the rights of any of us can be by competent legislation.

Then there is the Mitchell case in 2001, along the same lines: that aboriginal rights and treaty rights were vulnerable to actions essentially by Parliament, in delegated legislation, until 1982.

Then we have the Constitution Act, 1982, section 35, which is really the watershed event when we're speaking of the law of aboriginal peoples, aboriginal rights, and treaty rights in Canada. In 1982, as part of the patriation that occurred, we have our new constitutional instrument. Subsection 35(1) says:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

The court was of course faced with the question, what does that mean in practice? I think it's important to recognize that at the time many people said things such as: "That's all very nice. The court will acknowledge that the Constitution now says that the rights of the aboriginal peoples are now recognized and affirmed and will carry on business as usual." Some of you will recall that essentially this happened with the Bill of Rights many years ago.

But the Supreme Court didn't take that tack at all. Beginning with the Sparrow case in 1990, the court told us that it was going to apply what it called a "purposive analysis" to section 35. That means it has a purpose. It isn't just those innocuous words on the page, "the rights...are hereby recognized and affirmed", and that's the end of it. This has a purpose; it's supposed to take us somewhere. They told us that in Sparrow.

● (1205)

Turning to the next item, on the second page, the Supreme Court revealed in the course of time what that purpose is. It turns out that it is reconciliation. Our law in this area is purposive, and the purpose is reconciliation. You can read those excerpts there from Van der Peet, the reconciliation of the fact that the aboriginal peoples were here before the Europeans, before other people came to these shores, so there is a need to reconcile that presence and the fact that there were existing societies and existing laws at that time with the sovereignty of the crown and with the rights and interests and aspirations of the rest of Canadian society, of which the aboriginal peoples are part.

So it's reconciliation. When you come to the Mikisew case in 2005, Justice Binnie, writing the reasons for the court, starts off with this first sentence:

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests, and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding.

Beginning shortly after 1982, with the Nowegijick case in 1983, the Supreme Court begins to equip themselves and the rest of the Canadian judiciary with a series of doctrines, which in the course of time will be the means by which this reconciliation—which is the purpose of the law—is going to be achieved. They tell us that in the interpretation of treaty rights, of statues having to do with aboriginal peoples, the interpretation of the Constitution itself, we need to apply a principle of generous interpretation.

Secondly, aboriginal and treaty rights were extinguished prior to 1982. And when you just read the bare text of the constitutional provision, you wonder about all that went before. The court says that there was extinguishment of aboriginal and treaty rights only if that intention of the crown in the legislation, or whatever, was abundantly clear and plain. This is illustrated, for example, in the game and fish realm. Over the years, of course, the rights of aboriginal peoples in Canada to take game and fish had been regulated in many different ways, in terms of bag limits or seasons or means by which the fish and wildlife can be taken. There was an argument that what the Constitution recognizes and affirms are the existing aboriginal rights of the aboriginal peoples must mean existing as of April 17, 1982, with all of these attendant regulatory impingements that had occurred over the years.

The court said no, that these rights continue in their pristine form, and the fact that this regulation took place doesn't mean anything in that respect. If there had been extinguishment, we'd have to be persuaded that the intention of the crown was clear and plain in working that extinguishment.

In other doctrines, aboriginal peoples retain significant autonomy, and the federal Indian Act seeks to strike a balance between protection on the one hand, and autonomy on the other hand. Then both the aboriginal peoples' perspective on their rights and that of the common law must be accorded weight. Again, we're working through these doctrines that the court has propounded.

I have listed here that the crown has fiduciary duties judicially enforceable by private-law remedies, such as compensation, or injunction where that's important, where the crown's activity engages specific cognizable—as they say—legal interest of an aboriginal people. It's basically land interests, money interests. The crown is first cousin to a trustee. That's a cognizable Indian interest, and the crown could have fiduciary duties enforceable by private-law measures in that circumstance.

Justice Binnie helpfully adds, I think it's in the Wewaykum case, that a quasi-proprietary interest, for example reserve land, is a cognizable legal interest that there might be a fiduciary duty in relation to, but a government benefits program is not. That is not the kind of thing the government has a fiduciary duty to in relation to the aboriginal peoples.

● (1210)

The last two are very important. Aboriginal rights and treaty rights are*sui generis*, unique. That means that the court is in a position to shape those rights, to explain what they mean, to examine all of their permutations and combinations, and create law as it goes along. I don't mean to be cynical. I don't have any intention at all about being cynical, because it is in a worthy cause, by and large, but if a right is *sui generis* that means just wait; we're going to tell you what it means. The court has put itself in a position where it can define the nature of these rights. They are *sui generis*.

Then the last one, the one this committee is interested in at the moment, is the doctrine of the honour of the crown. The honour of the crown is always at stake in its dealings with aboriginal peoples, the courts have told us, and therefore the courts require that the crown act in accordance with courts' assessments of what constitutes honour in the specific circumstances of particular cases.

These last two doctrines clearly have the most potential to be worked out and expanded and shaped, the *sui generis* nature of aboriginal treaty rights and the honour of the crown.

On the honour of the crown, I have tried to identify here in the last page or so of this document five important ways in which the honour of the crown has been put to work as a means to achieve reconciliation.

● (1215)

The Chair: May I interrupt you there for a moment, Mr. McCabe?

We're at the 12-minute mark now. You have a couple of pages left here.

Is it the wish of the committee that we continue through? We only have one witness here. Shall we proceed for up to 15 minutes, or even—

[*Translation*]

Mr. Marc Lemay: We could shorten the question period because I think it's important for Professor McCabe to complete his presentation.

[*English*]

The Chair: If that is the wish, we will do that.

Go ahead, Mr. McCabe, and finish up.

Mr. Timothy McCabe: Thank you, Mr. Chair.

I'll go through these five cases quickly. The first is the justificatory framework. This is the Sparrow case in 1990. This applies where there has already been an infringement. That is, the law of the Fisheries Act or what have you allegedly infringes upon an aboriginal or treaty right. The court has established this justificatory framework. They say that Parliament, the delegated legislators, are not impotent. These things can still have an effect with respect to the rights, but you have to satisfy us, the court, that this infringement is justifiable or justified. In the course of working that out, the court makes use of this concept of the honour of the crown.

Second, the court has said that it is willing to supply the deficiencies of treaties. Many of these treaties are very informal. The later ones—the modern treaties, beginning in Quebec and going into the 1990s and beyond—obviously are not. Those things are anything but simple or informal. But many of the earlier ones are. The court has said that in order to make honourable sense of these treaties, in order that the honour of the crown be complied with, we, the court, are going to supply the deficiencies of the treaties. This is the first Marshall case, the Nova Scotia case from 1999.

Third, where no treaties yet exist, the crown has a legal duty to negotiate them. It isn't just good policy; the crown has a legal duty. The court has told us, especially since the Haida Nation case in 2004 in B.C., that this is indeed a legal duty. As you know, there are many places in Canada where there are no treaties. This is becoming less of a truism, because we have a number of recent treaties in the north and so forth. But in most of mainland British Columbia and elsewhere, that's been the case until recently.

It's often said that the very land on which we're situated right now is the subject of a land claim. There was no treaty of surrender with respect to the watershed of the Ottawa River east of Mattawa, on either side of the river. The Algonquin of Quebec and Ontario take the view that they have aboriginal title, an aboriginal rights claim. There was never any treaty with those people. There's a legal duty, a constitutional duty, one might say, to negotiate treaties in those circumstances.

The last two really go together and are about consultation. The honour of the crown requires that where activity is proposed by the crown or through the permission of the crown—it might be a grant to a private party—that might adversely impact the exercise of an aboriginal right, treaty right, or aboriginal title, the crown needs to consult with the aboriginal people affected. That's true both where the right is established, as it was in the Mikisew case—you had a treaty right that was an issue—or where the rights are not yet established, as in the Haida case, in the various B.C. cases, and in the north. They haven't been proven in court. They are not the subject of a treaty. Yet there is some proposal for mining or lumber development or what have you. During the period during which the claim is outstanding and is being negotiated, the crown has a duty to consult with the aboriginal people affected.

The last aspect of that is that in the course of consultation, the consultation will be directed toward what accommodation, if any, needs to be made in relation to the right that's asserted.

I could continue all day.

● (1220)

The Chair: You'll have a chance to expound on those thoughts a little further during the questions.

Let's go to the first round of questions. We'll begin with Monsieur Bélanger *pour sept minutes*.

Hon. Mauril Bélanger (Ottawa—Vanier, Lib.): Thank you, Mr. Chairman.

Professor McCabe, you've given me the desire to consider going back to school.

Mr. Timothy McCabe: I can't claim to be a professor.

Hon. Mauril Bélanger: Well, you may want to consider that.

This is a very good framework from which we can better understand the concept and perhaps its evolution. I'm a little intrigued about its origin. Right off the top you said that essentially.... I'm not quoting you, but you almost intimated that this was a creature of the courts, especially in the last ten years. Yet I've read some of the other documentation that's been provided to us, and I'm quoting here from a document you don't have but our researchers will recognize, “the concept should not be considered a judicial creation”.

That's the first area I'd like to explore briefly, because I have others. I certainly get the impression from Mr. Pryce, who appeared before us on October 8, that he too is of the view that this was a creature of the judiciary.

Would you accept another interpretation, that this has existed throughout the history of our land, yet what's recent is the interpretation the courts are giving it, that it doesn't take root in the courts itself, but in past treaties, past agreements, past law?

Mr. Timothy McCabe: There is the Royal Proclamation of 1763. There is a long history of treaties. The problem is that through most of our history, until 1982, these things were honoured in the breach, as the courts said in Sparrow. These things were vulnerable to legislation and they were regularly affected, we'll say. If not extinguished, they were regularly affected by regulatory and other sorts of legislation.

Hon. Mauril Bélanger: I understand that, and there's no disagreement that the watershed is the 1982 Charter of Rights and Freedoms, section 35. That is not a creature of the courts; that is a creature of the Parliament of Canada.

Mr. Timothy McCabe: The Constitution is, yes.

Hon. Mauril Bélanger: Yes, so I re-ask in that light, would you agree that what's flowed, what's happened in the last few years is an interpretation of law from the tribunals, from the judiciary?

Mr. Timothy McCabe: Again, in 1982 the court was faced with a very general statement, and there was a lot of discussion in 1982 as to what this would mean. In fact, there was a cynical view that it wouldn't amount to a whole lot. The court was required to put some flesh on that skeleton, as it were, and that is indeed what the court has done.

I think it is fair to say, though, that these various doctrines the court has propounded since 1982, notably the honour of the crown, is its creation. We see references to the honour of the crown much earlier in English law, for example. We're told the court will look at a crown grant, and to ensure the honour of the crown is upheld, it will carry it out in accordance with the intention of the crown.

There are threads of these things in our past legal history, but the court drew them together to meet the need it was faced with.

● (1225)

Hon. Mauril Bélanger: All right. In the implementation of the doctrines, you mentioned there are five ways these can be implemented. The fourth one is the obligation between a period when a claim is made and is settled. I want to see if I understand some practical applications of that.

For instance, recently there was a desire from the government to sell a series of properties, nine of them, and then lease them back. Two of these were in British Columbia, I believe in Vancouver. Because of an intervention by an aboriginal community, those two properties were removed from the list of sales even though an agreement of sale had been reached. Are you familiar with that?

Mr. Timothy McCabe: No, not the specifics of the case.

Hon. Mauril Bélanger: My question is—well, you may not be able to answer it then—would that have been a practical application of that doctrine?

Mr. Timothy McCabe: Again, I don't know the specifics of the case, but I would expect that the crown, knowing what the law is, would know that it would have to go through the process of consultation and, if warranted, accommodation. I'm sure that as these things work themselves out, on occasion the crown will decide the game isn't worth the candle in particular circumstances and will just postpone that until resolution of the claim, or won't do it at all. I'm sure that sort of thing will happen as these doctrines are worked out.

The Chair: One minute.

Hon. Mauril Bélanger: An open-ended question, and perhaps other colleagues will pick it up or I'll have another chance. How do you see this evolving?

Mr. Timothy McCabe: It is an open-ended question. I think the most important way we're seeing it evolving is in the two things. First of all, everyone knows now that this legacy from our past, the lack of these treaty relationships between the crown and aboriginal peoples, needs to be rectified. We're seeing it in the territories. There have been a number of achievements in Labrador, and great attempts are being made to have a similar sort of achievement in British Columbia. So there's that. Then there is this vexed problem of outstanding claims, because, as you know, they go on for a very long period of time quite often. Now there is at least a regime whereby the legitimate aspirations and interest in claims of the aboriginal peoples can be dealt with.

Hon. Mauril Bélanger: They're being negotiated.

[*Translation*]

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

Now we'll continue with Mr. Lemay.

Mr. Lemay, you have seven minutes.

Mr. Marc Lemay: Mr. McCabe, I attentively listened to the presentation you made to us. I read the documents. We're arguing over the Crown's obligation to consult, and we're really discussing it a lot.

I understand that the Supreme Court decisions in Sparrow, Badger, Marshall or others have probably addressed the various aspects of the issue. In any case, we have good guidelines.

How far does the Crown's duty to consult go? On what basis does the Crown have a duty to consult the aboriginal peoples? What are the limits of that duty to consult?

● (1230)

[*English*]

Mr. Timothy McCabe: There is authority for the proposition that the duty to consult exists when section 35 rights are an issue. In other words, there has to be a showing of an existing aboriginal or treaty right. Also, we have in the cases the idea that there are reciprocal obligations of the aboriginal peoples. We have statements like "The duty to consult exists where there are serious negotiations going on." In other words, the court, and lower courts as well, has been at pains, I think, to paint the picture that the aboriginal peoples can't just have a pocket veto of a proposal for development. There has to be good faith efforts on that side of the table as well. There can't be foot dragging. I think that's germane to your question about what the limits are. It's when there is a serious effort at negotiation of a section 35 right.

[*Translation*]

Mr. Marc Lemay: Pardon me, I don't want to interrupt your answer, which I find valid. However, if I want to argue the Crown's duty to consult, I must first show that I have an aboriginal right or treaty right. I see you don't agree with me.

[*English*]

Mr. Timothy McCabe: No. That's the Haida case. You see, the British Columbia government said this right that you're asserting hasn't been proven. The court said there's sufficient grounding for the claim of a right to engage this obligation to consult. That I think is one of the main points of that Haida case in 2004. The main issue in that case was what about the interim period before the right is proven or before the right is the subject of a treaty? The court said you have to consult where there's a proposal that might adversely impact the claimed right.

[*Translation*]

Mr. Marc Lemay: I'll review what you've just told me. I'm not challenging your remarks, of course. I would simply like to understand.

Let's take this assumption: the Algonquin peoples received the Proclamation of 1763 and they are part of it. So everything north of the Ottawa River belongs to them. However, if works were to be carried out in that area, not necessarily hydroelectric works, but works such as mining exploration, logging, hunting and fishing regulations, would you go so far as to say that the Haida decision applies and that, consequently, the Algonquin aboriginal peoples should be consulted?

[*English*]

Mr. Timothy McCabe: Yes, I think that's the lesson of the Haida case. If there is a proposal, if there's going to be activity for some change in the landscape, we'll say, then the duty belongs to the crown, not to the proponent of the proposal, but the proponent will inevitably become involved in it in some way. Yes, it needs to consult. It's a two-way street, the consultation. If a sufficient case can be made that there is going to be substantial impact on this claimed right, then accommodation measures would be proposed and negotiated and so forth.

● (1235)

[*Translation*]

The Chair: You have 30 seconds left.

Mr. Marc Lemay: On what basis would the Crown not be required to consult the aboriginal peoples?

[*English*]

Mr. Timothy McCabe: As I said a moment ago, there's authority for the proposition that if the right claimed or the right established is not a section 35 right—that is, it's not aboriginal title, it's not aboriginal rights, it's not a treaty right, it's just some other interest or aspiration that the aboriginal party has—in those circumstances, the crown needn't consult.

The Chair: We'll have to leave it at that, Mr. McCabe. Thank you very much.

Merci, Monsieur Lemay.

Now we'll go to Madam Crowder. Go ahead, please.

Ms. Jean Crowder: Thank you, Mr. Chair, and thank you, Mr. McCabe.

I'm actually going to pick up the line of questioning from Monsieur Lemay around rights. For us non-lawyers here, you refer, and section 35 refers, to aboriginal rights and titles. I think what's at issue here is how we define aboriginal rights. One of the arguments that we hear fairly consistently as members of this committee is that aboriginal rights, from a first nations perspective, is much more broadly defined than treaty or land claim or development, or those kinds of things. In fact, we've heard it fairly clearly around who gets to determine who is a citizen of a nation. It's going to come up again in terms of the duty to consult around the McIvor decision, which is going to come before this committee at some point, but it certainly has come up around matrimonial real property. The nations talk about the crown having a duty to consult—the honour of the crown is at stake—when it looks at human rights, whether it's matrimonial real property or whether it's determining the right of citizenship.

Can you comment on that duty to consult in the context of rights outside of land claims and treaties?

Mr. Timothy McCabe: Probably not very helpfully. I think we're probably going to have a very long period in which the Supreme Court of Canada is explaining what is encompassed within the concept of aboriginal rights. As you know from the B.C. cases—the trilogy of cases in 1996, Van der Peet, Gladstone, and the other one that came out of B.C.—the definition of an aboriginal right has to do with practices of aboriginal peoples that go to the very definition of who they are as a people. That's open-ended. What the court is ultimately going to do with that I think remains to be seen. No doubt it's going to be tested. No doubt there will be good attempts made to push that envelope.

Ms. Jean Crowder: As you know, it is a challenge for us, when we're looking at duty to consult, about how broadly that consultation needs to happen.

I want to come back to when you were responding to the question about how it's evolving. You talked about the lack of treaties. I'm from British Columbia, where there are few treaties and where we're now seeing some of the nations withdraw from the treaty process because it is so costly and cumbersome. There's a table of sixty-some-odd nations that has developed a protocol for the government. Again, this isn't partisan because this has been going on since 1993. They're simply not seeing the kind of movement one would expect given the amount of money that's been spent. In terms of the honour of the crown and in that kind of process where there aren't the appropriate people with the appropriate mandate at the table, do you see an avenue for them to invoke honour of the crown on this?

● (1240)

Mr. Timothy McCabe: I don't think I can comment very helpfully on the working out of the B.C. treaty process and the B.C. treaty commission, and so forth. I think the Government of Canada and the Government of British Columbia read these cases; they know there is a duty on the crown to negotiate treaties where they don't yet exist. How that works out in practice and where the fault lies, I'm really not in a position to help.

Ms. Jean Crowder: It was rather more than where the fault lies. This isn't about assessing blame; it's about the fact that there's a process that simply isn't working. It would seem, given the court decisions that are out there, that honour of the crown would be an important aspect of attempting to move those treaties forward. I just wondered if you had seen something that might be helpful to those nations to poke both federal and provincial governments.

Mr. Timothy McCabe: The honour of the crown is at the heart of it. That's why the crown must be at the table.

Ms. Jean Crowder: But how the crown is at the table isn't defined. What's happening on some of those treaty tables in British Columbia is the federal government, in particular, has junior negotiators at the table. Again, this is not a current government problem; it's a long-standing problem. You can pay lip service to having somebody at the table and not have any meaningful progress.

Mr. Timothy McCabe: Yes, well that's a task for your committee, I suppose: to hold their feet to the fire.

Ms. Jean Crowder: Can I ask you to explain further the concept of *sui generis*? You said it's to be defined. Does that mean we need more court decisions?

Mr. Timothy McCabe: What *sui generis* means is “unique”. So what the court is saying is when we look at these rights—these aboriginal rights, treaty rights—don't have in mind common law, or civil law property rights, or contract rights, or torts, or anything we've known before. This is a new ball game. We've discovered these new rights, and it's up to our generation and beyond to define what they are. I think that's the importance of this idea of *sui generis*. That's why the court goes out of its way to call them *sui generis* rights, because it becomes a kind of tool that it can use to shape it.

A moment ago you asked about human rights, having to do with matrimonial property. Could that be part of aboriginal rights? Well, the court has equipped itself to answer those kinds of questions by explaining to us that these are *sui generis* rights and we're going to be developing that.

The Chair: We'll leave it at that.

Thank you, Ms. Crowder.

We'll now go to Mr. Rickford for seven minutes. Go ahead, Mr. Rickford.

Mr. Greg Rickford (Kenora, CPC): Thank you, Mr. Chair.

Thank you, Mr. McCabe, for coming here today.

I've had a chance to go through your book and these briefing notes, and it poses certain challenges for me as a lawyer who has worked to some extent on a variety of issues.

I might comment that the cases you cite in your briefing note, and indeed a number of others, actually are quite rich in terms of what they're practically dealing with, whether it's traditional practices and the use of resources on land and/or in water versus a rightfully growing concern we have about the need to include first nations communities in major economic development in regions or around a resource. Indeed, it's particularly relevant that a person of your stature and authority, if you will, on the judicial piece to this whole discussion could benefit.

So I'm going to try to go down the economic road consistent with some of the things that our study is looking at, but it is building a little on Ms. Crowder's important question at the end with respect to economic developments. Because the fact of the matter is that we can't always wait for the Supreme Court of Canada for these decisions.

I'm not going to talk so much about aboriginal rights on a right-to-right basis. Again, I want to focus on the economic development. I may ask you to do some practical translations of some of the great legal work that you've done in these areas.

Historically we've looked at fiduciary relationships and obligations. Of course, the Royal Commission on Aboriginal Peoples recognized that there was a balancing of rights going on here. Wewaykum, which you quote on page 3 of your brief in a slightly different context from what I'm raising here, identified that the crown is no ordinary fiduciary. Depending on the context, they have to regard the interests of several different parties. Importantly, I think, they're not restricted to section 35 rights.

That's important, because what I want to ask you is a very open question. We have land claim agreements settled. Some are in the process of being ratified. They deal with a number of issues, which include, *inter alia*, issues around MRP, matrimonial rights property, resource utilization, and participation in the economic benefits it has.

To that extent—let's try to flip this over—what are the challenges for the court in view of some of the emerging regulatory frameworks and some of the land claim settlements that have occurred? Some are in the process of occurring that many first nations are quite excited about getting done because they have become an integral part of an economic strategy in a particular region, or perhaps nationally.

● (1245)

Mr. Timothy McCabe: I should probably get out more, because I'm not sure about the specific proposals and documents you're talking about.

Clearly the concept of the honour of the crown and this duty of consultation and accommodation opens up a rich avenue for aboriginal peoples when there is a proposal to develop land in the vicinity, the traditional lands of aboriginal peoples. One of the side effects, one of the indirect effects, is that governments are going to produce policies.... I noticed there was a discussion about policy at the last meeting of the committee. But governments are going to produce policies, they're going to change their ways, they're going to change practices, and also non-aboriginal proponents of developments, really, throughout Canada. It's going to be part of the way of doing business.

One of the things that's going to have to be taken into account, and is being taken into account now, I think, by any proponent who knows what they're doing, is the interest of the aboriginal peoples and dealing with the aboriginal peoples, which often means partnership with the aboriginal peoples. That's part of the furniture now. It just will be, inevitably, for the foreseeable future and probably for the rest of our history.

Mr. Greg Rickford: My concern is that in our attempts at reconciliation—and you lay that out quite nicely in your brief—there's a real challenge for any party not to stifle, if you will, real progress.

We've talked about the issue of the Supreme Court of Canada being a particularly effective way to look at how certain cases in the lower courts have evolved to deal with rights. We also recognized, in fairness to a comprehensive discussion, this idea of pocket veto and foot-dragging. Although having been in the practical dimensions of some major agreements with respect to first nations and things like forestry resources, which also raises the important issue of the two crowns, in a sense—the constitutional jurisdictions of the province over certain resources and the federal government, which keep lawyers in business for a very long time—and this concern about not wanting to create a new class of lawyers to differentiate these subsets of rights.... My concern is that it's important that the justificatory framework that you describe here, starting from Sparrow, and in the other—

● (1250)

The Chair: You're just about out of time.

Mr. Greg Rickford: Sorry.

With the five important ways that reconciliation occurs, I think it's important for us to understand some of the great things happening in the context of economic development right now and what role the court could play in helping to facilitate that, if in fact it can.

The Chair: We have time for a very brief comment on that statement, but that's about it. We'll have to move on.

Go ahead, Mr. McCabe.

Mr. Timothy McCabe: The court will deal with cases as they come before it, and many of these are going to have to do with economic development. That's exactly what was going on in Haida and Take River, even.

The Chair: We'll have to leave it at that.

I think we have time, just barely, for two remaining questions. This will be four minutes. It will be four minutes to Mr. Bélanger, followed by Mr. Duncan.

Go ahead, Mr. Bélanger.

Hon. Mauril Bélanger: I have a couple of things.

I want to go back to this notion of the origins of this. You referred to a case, Mikisew. Our notes we received from the library refer to the same case, in particular to Justice Gwynne, who roots the honour of the crown back to 1895. Are you familiar with that?

Mr. Timothy McCabe: Yes.

Hon. Mauril Bélanger: Do you have any disagreement with that?

Mr. Timothy McCabe: The references we had to the honour of the crown in Canadian cases having to do with aboriginal peoples prior to 1982 were in dissenting reasons. Actually, in 1982, in the Ontario Court of Appeal, the Taylor and Williams case—

Hon. Mauril Bélanger: Yes, but the majority did not challenge the dissenting view in terms of the rooting of honour of the crown.

Mr. Timothy McCabe: I think if you analyze that case you'll see that the approach of Justice Gwynne was rejected by the majority. He did, along the way, say that the honour of the crown is engaged in respective treaties. It was a treaties case. It was a fight between Canada and Ontario.

Hon. Mauril Bélanger: I'll read that one in detail.

For this to materialize, for the watershed to take effect, will take years, decades, generations—hopefully not too many generations. It will take a long time.

Bringing it back to the discussion on creating either guidelines or policies, perhaps eventually law that gives a body to this concept, will it require that, in your view?

Mr. Timothy McCabe: The establishment of policy by—

Hon. Mauril Bélanger: Well, you have laws, and then regulations and policies and guidelines. It seems to me that on this one we're going the other way around; we're starting with guidelines. I'm wondering if there will be policy, perhaps eventually regulation, and who knows, maybe someday law.

Mr. Timothy McCabe: The federal government and all governments in Canada are going to be constantly responding to what the Supreme Court of Canada hands down. In the course of carrying out its regular activities, I think it's almost inevitable with the federal government—again, the discussion you had on October 8—that across the various departments, notably in aboriginal affairs and northern development, there are going to be policies and then more detailed practices.

Hon. Mauril Bélanger: Thank you. My time is probably up.

The Chair: We have one minute left there.

Hon. Mauril Bélanger: Mr. Chair, there won't be enough time on that.

I wanted to remind you about the suggestion I had made, and I have no idea if it has been followed up on. Regarding looking into the concept of the honour of the crown and its evolution, it would perhaps be useful to hear from the interested parties also, the aboriginal communities. When I had made that suggestion originally, there was a lot of nodding of heads around the table, so I'm just reminding you and the clerk of that for down the road.

● (1255)

The Chair: Okay. It's a topic for consideration by the subcommittee when it comes to our work plan.

Now we'll go to Mr. Duncan for four minutes.

Mr. John Duncan: Thank you very much.

It's a broad subject. Since 1982 there has been much movement. I've been here most of the time since 1993, so I was here through a lot of the decisions that came down, plus the Royal Commission on Aboriginal Peoples, so I have been here through the evolution, as you well described today. I think when Mauril was questioning you, you were getting to the fact that we now have a process, and you never got to complete that statement. I wondered if you maybe were about to make a comment on specific claims tribunals or something along those lines. I assume you would find that to be a positive development.

Mr. Timothy McCabe: Yes. I think I was saying that it is almost inevitable that policies will be developed. It is interesting that the court has said in the two B.C. cases from 2004—the Haida case and the Taku River case—that existing institutional arrangements, such as environmental assessment tribunals and tribunals of that sort, are quite in order as the institutional setting for consultation that would go forward.

In other words, it's not necessary, from the point of view of the law that has been handed down by the court anyway, for new institutions to be created for this to go forward. Whether that is a productive policy direction to go in is another question, and probably one I'm not especially qualified to deal with.

Mr. John Duncan: In one of our background documents there is mention of a guide on aboriginal self-government. I guess this is a federal policy guide. It states that "as Aboriginal institutions assume greater governance and responsibilities, Crown responsibilities will lessen accordingly". Is that consistent with your view based on precedent and the law?

Mr. Timothy McCabe: I wouldn't think it would be a helpful statement in a broad sense. The crown's duty to deal honourably with aboriginal people is always at stake, and will continue to be at stake. It may be true, though, at the operational level. Naturally if you have aboriginal governments, which are taking over more and more responsibilities, and the department here is going to have less to do, one would expect it.

Mr. John Duncan: We didn't talk a great deal about fiduciary responsibility or fiduciary obligations. I guess the Wewaykum decision did differentiate. Wewaykum is in my riding, by the way. The decision said—I think I'm saying this correctly—that "some Crown activities affecting Aboriginal peoples that fall within the fiduciary relationship would not necessarily give rise to legally enforceable fiduciary obligations."

Does the rationale behind that statement have to do with the fact that the crown has obligations beyond fiduciary obligations to other Canadians? Is that it?

The Chair: Give a short response, please. We're out of time. Go ahead, Mr. McCabe.

Mr. Timothy McCabe: I don't think that particular passage in Wewaykum is addressing the hats problem, that the crown wears different hats.

The Chair: Go ahead.

● (1300)

Mr. Timothy McCabe: I think it is addressing the proposition that though in a broad sense the crown may be in a fiduciary relationship with aboriginal peoples, it is only certain aspects of that relationship that give rise to fiduciary duties, notably where the crown is dealing with reserve land or the proceeds from the sale of reserve land, or other moneys of a band, for example. That's the fiduciary duty writ large, and enforceable in the courts.

Mr. John Duncan: Thank you.

The Chair: Thank you, Mr. Duncan.

Thank you, Mr. McCabe, for giving us your time here today on a very intricate topic, critical to the kinds of issues that come before this committee.

Committee members, there are a couple of very short items that we need to dispense with before we adjourn. The first is going back to Ms. Crowder's comments earlier in the meeting. We are now in receipt of a motion from her. I'm going to read that into the record. We will not deal with this item today. We will make room on the agenda for Thursday, but I'll read it into the record so you can look at it before we have this discussion on Thursday. It reads as follows:

> That the Committee has considered the 2008-2009 report of the Office of the Correctional Investigator and its supplement entitled "Good Intentions, Disappointing Results" and recommends the implementation of the Correctional Investigator's recommendations, and that the adoption of this motion be reported to the House.

That is deemed received and we will discuss it on Thursday.

There are two other short items.

For Thursday, the minister was unable, in the short period of time that we had, to make time available for the consideration of the supplementary estimates (B), so we will have officials to report, as the committee requested. We wanted to consider those estimates, and we will do that on Thursday. The witness that had been arranged for Thursday will be pushed off to a later time. That will be on Thursday. I won't say what room because I don't know it at this point.

Finally, the subcommittee met this morning and has recommended that the December 10 meeting be cancelled so that members have the opportunity on Thursday to attend a portion of the special chiefs assembly here in Ottawa. The Assembly of First Nations is here in Ottawa next week, and their last day is on Thursday morning going through to midday. That will give members an opportunity to attend on December 10, next Thursday.

That's all we have for business of the committee today.

Thank you again, Mr. McCabe.

The meeting is adjourned.

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