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Chair

Mr. Bruce Stanton

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● (1530)

[*Translation*]

The Chair (Mr. Bruce Stanton (Simcoe North, CPC)): Good afternoon, members, guests and witnesses.

Welcome to the 11th meeting of the Standing Committee on Aboriginal Affairs and Northern Development. Pursuant to the Order of Reference of Monday, March 29, 2010, we have on the agenda today consideration of Bill C-3, An Act to promote gender equity in Indian registration by responding to the Court of Appeal for British Columbia decision in McIvor v. Canada (Registrar of Indian and Northern Affairs).

[*English*]

This afternoon we welcome the Canadian Human Rights Commission. We have with us Chief Commissioner Jennifer Lynch; Deputy Chief Commissioner David Langtry; Valerie Phillips, legal counsel; and Michael Smith, senior policy analyst. I know that Mr. Smith has joined us for the last several meetings, and we appreciate the attention of the commission.

Members, we have one hour for this first section. As you saw in our notice, after our first hour, we'll be taking up further consideration of this bill.

Ms. Lynch, I know that you have probably done this before and know that we begin with a 10-minute presentation, after which we'll go to questions from members. At this committee, we do a seven-minute question-and-answer round.

Welcome to our committee. Please begin.

Ms. Jennifer Lynch (Chief Commissioner, Canadian Human Rights Commission): Thank you very much, Mr. Chair and honourable members.

I'm very pleased to have the opportunity to contribute to the committee's review of Bill C-3, an act to promote gender equality in the registration provisions of the Indian Act.

I would like to acknowledge that I meet you here today on the traditional territory of the Algonquin people.

You've already introduced my colleagues who are joining me here today. We've brought these particular colleagues because they are those who specialize in our aboriginal work and aboriginal initiatives.

[*Translation*]

Many witnesses have spoken to you concerning Bill C-3, and there appears to be consensus that the bill is a narrow legislative response to a narrow order.

In our view, the best value that the commission can bring to you as a witness is to provide you with information on the extent to which our complaint process can be used to redress allegations of discrimination under the Indian Act.

I will begin with a brief description of our role and mandate.

The Canadian Human Rights Act is 33 years old. The act established the Canadian Human Rights Commission and provides the commission with the mandate to receive and process complaints of discrimination in employment or services. The act also directs the commission to engage in any other activities that will give effect to the purpose of the act.

[*English*]

The purpose of the act is found in section 2, and the drafters showed enormous insight when they wrote this clause, which reads that the purpose of the act is to give effect to the principle that every individual should have the right, equal with others, to make for themselves the lives that they are able and wish to have, free from discrimination.

The Canadian Human Rights Commission is part of the larger Canadian human rights system. Every province and territory has its own form of a commission or tribunal. Our mandate is quite specific. There are 11 grounds of discrimination under the CHRA. The grounds most relevant to Bill C-3 and our discussion today are sex, age, marital status, including common-law, and family status.

Family status is a very broad ground, so I will provide a definition. Family status refers to the interrelationship that arises from bonds of marriage, kinship, or legal adoption, including the ancestral relationship, whether legitimate, illegitimate, or by adoption. It also includes the relationships between spouses, siblings, in-laws, uncles or aunts, nephews or nieces, and cousins.

The organizations under our mandate include all federal departments and agencies, plus corporations operating in federally regulated industries such as transportation, banking, and telecommunications. This means that anyone who feels that they have experienced discrimination on one of the enumerated grounds while working as an employee, or while receiving services from one of these organizations, can file a complaint with the commission.

The commission receives, screens, and processes complaints. We do not decide complaints beyond deciding whether to dismiss them or refer them for conciliation or to the fully independent Canadian Human Rights Tribunal for further inquiry and a hearing.

● (1535)

[*Translation*]

To give effect to the principle of section 2 of the act, the commission also works to promote and advance human rights in Canada. We perform an education and outreach function. We collaborate with workplaces to help influence a shift towards a culture of human rights, integrating human rights into daily practice. We develop research, policies and tools. And we provide advice to Parliament. An example of such advice is our 2005 special report to Parliament, A Matter of Rights, where we called for the repeal of section 67.

[*English*]

With that background, I turn now to the commission's ability to redress allegations of discrimination under the Indian Act.

For three decades, we had no such jurisdiction. That was changed upon the repeal of section 67 of the Canadian Human Rights Act in 2008. As you are all aware, section 67 restricted the ability of people living or working in communities operating under the Indian Act to file complaints of discrimination if the discrimination they were complaining about was related to that act. This section was included as a temporary measure in an effort to not disrupt discussions on reforming the Indian Act.

The repeal finally gave more than 700,000 aboriginal persons living under the Indian Act full access to human rights protection in Canada. A three-year transition period built into the repeal legislation means that complaints against first nations governments can only be filed starting in June 2011. However, the right to file complaints against the federal government came into effect with repeal.

We are now receiving complaints related to the federal government's administration of programs and services under the Indian Act. This has provided us with some early experience in dealing with such complaints.

Some testimony heard by this committee has pointed to the commission's complaint process as an available mechanism to remedy discrimination under the Indian Act, including any possible residual discrimination not covered by Bill C-3. My key message to you today is that this is by no means definite. The commission's ability to redress allegations of discrimination under the Indian Act remains uncertain.

Since the passage of the section 67 repeal, we have received challenges to the commission's jurisdiction in this area. For example, the commission has received several complaints related to Indian status. Three of these are similar to the McIvor case, in that they each involve Indian status and raise questions of residual discrimination following the passage of Bill C-31. We have referred all three complaints to the tribunal.

The Attorney General of Canada has given notice that it will be challenging the commission's jurisdiction, claiming that determination of status by the registrar is not a service under section 5 of the CHRA.

As l mentioned earlier, the Canadian Human Rights Act provides complaint processes only for discrimination based on employment or service. Therefore, if a court were to find that the determination of status is not a service, the commission would no longer have the authority to accept complaints related to Indian status.

By extension, this could raise similar questions as to whether or not the determination of band membership is a service. The commission is intervening in a current case before the tribunal, in the public interest, to put forward a legal analysis that indeed the determination of status is a service.

Of course, the commission cannot make the ultimate decision around what is within our jurisdiction, nor should my remarks be taken as indicating one outcome or another. It is to be expected that an issue of this complexity and importance could proceed from the tribunal to the Federal Court's trial and appeal divisions, and possibly to the Supreme Court of Canada.

In closing, I would like to make two other points.

The first is that the commission supports a comprehensive review of the Indian Act until an approach to governance that recognizes first nations' inherent right to self-government is in place, for a number of reasons.

● (1540)

[*Translation*]

The committee has already heard that the Indian Act has had discriminatory effects, including residual gender-based discrimination. A case-by-case, section-by-section approach to resolving discriminatory provisions of the Indian Act will be costly, confrontational and time-consuming.

Moreover, the act places the burden on complainants, who do not necessarily have access to legal resources.

[*English*]

Were it not for the courage, persistence, and resolve of people like Ms. Sharon McIvor, many of these long-standing issues would never be addressed.

This piecemeal approach has limited impact, particularly when large numbers of people are affected. The commission supports a proactive, systematic approach, one that would include full participation of aboriginal people, build upon existing knowledge, and lead to timely and effective change. The commission recognizes that this will take time.

My second and final point is that the commission is very interested in the government's announced plan for an exploratory process and looks forward to learning more about its scope and objectives. The commission is prepared to assist in any way it can within its jurisdiction and area of expertise.

I look forward to answering your questions.

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

Now we'll go directly to questions from members. We'll begin with Mr. Russell. Again, I will note that it's seven minutes for the question and response.

Mr. Russell.

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

Good afternoon to each of you. It's always good to have you in front of our committee. I thank you for the work you do on behalf of all Canadians.

Has the commission had an opportunity to look at clause 9 of Bill C-3?

Ms. Jennifer Lynch: Yes.

Mr. Todd Russell: Okay. Now, a number of witnesses have come before us and said that there is a relationship between this particular clause and, I guess, the government's position that.... First of all, as I understand it, clause 9 saves harmless the government from anybody suing or going after them for compensation or any residual discrimination that had arisen basically from 1985 until the passage of Bill C-3.

This generally seems to be what I understand that clause to do: "You can't sue us because we didn't really know what the hell was going on, and we didn't really acknowledge any residual discrimination, so you can't come back now after the fact, after we pass Bill C-3, and sue us for damages".

But the government has said that maybe they can launch a complaint with the Human Rights commission, and then the witnesses say that the government fights the jurisdiction of the Canadian Human Rights Commission to hear any such complaints, so really, there is no avenue for any individual to seek a remedy or a ruling that they have been discriminated against and that they should be compensated in some way, shape, or form.

Is that a fair assessment of the situation?

Ms. Jennifer Lynch: May I put this in a bit of context to begin with?

If Bill C-3 is passed, the commission can continue to receive complaints regarding the Indian status provision. These could include the alleged residual discrimination referenced by witnesses before this committee, due to the historical preference given to men under the Indian Act.

We have a section in our act, paragraph 41(b), that allows us to refer a matter back to a process under another act of Parliament, which in this case is the Indian Act. Therefore, if the facts of the complaint suggest that a complainant could gain status as a result of Bill C-3, the commission may require a complainant to reapply for Indian status under the new rules, as a start.

Now, if after being dealt with under the Indian Act the complainant still believes the results of the status provision are discriminatory, he or she could return to the commission. We then look... At the current time, we would expect that the Attorney General might argue that this is not a service within the meaning of the act, and if a court decides that, it would mean that complaints could not be brought to the Canadian Human Rights Commission.

Let's say that a complaint does get to the tribunal, and the tribunal is thinking of awarding a remedy. That was the lead-in part of your question—had we looked at clause 9? We do have a concern that clause 9 would likely limit persons who benefit from Bill C-3 from successfully being awarded remedies at the Canadian Human Rights Tribunal.

It would also likely limit compensation in mediated settlements, because it would be used.... You can well imagine that, wherever we can, we engage parties in dialogue to help processes of settlement. In any kind of a mediation, if there is a section such as this, no doubt the respondent would say that they're not going to agree to remedies because there's this clause 9. In law, they don't have to.

The remedies the tribunal could.... I don't know if you'd like me to tell you about the sorts of remedies the tribunal could order, but—

● (1545)

Mr. Todd Russell: What I'm getting at is that the government says we're going to save ourselves harmless from complaints or remedies that one would seek for possible discrimination. They say that maybe you can go to the Canadian Human Rights Commission. But up to now, we've seen that when any person has gone to the Canadian Human Rights Commission the government has fought the jurisdiction of the Canadian Human Rights Commission to hear the complaint.

So the government says, "Go over to the Canadian Human Rights Commission, and once you get there, we're going to fight the Canadian Human Rights Commission to hear the complaint". That's what the experience has been to date for people who have lodged such complaints.

Ms. Jennifer Lynch: Right. Well, if I may briefly say...every person or organization that's party to a human rights complaint is entitled to represent their interests in the way they feel is appropriate, and the repeal of section 67 has raised complex legal issues, so it's by necessity going to be litigious. It's going to go this way. What we really need to do is get an interpretation of what is a service.

Mr. Todd Russell: We've had lots of arguments about section 67 around this table, and a lot of debate, and the government says what a wonderful thing it is because now we'll open up this avenue for remedy for first nations people. But every time a first nations person brings a complaint against the government or the crown before the Canadian Human Rights Commission, they say the Canadian Human Rights Commission has no jurisdiction to hear that complaint against the federal government, because we don't provide a service.

So basically all the federal government has done to this point is limit the complaints against, maybe, a band. They're trying to insulate themselves against a Canadian human rights complaint and only allow people who bring that complaint to basically lodge it against a band. It seems that they're trying to do the same thing under clause 9 of Bill C-3. That's what it seems like to me.

Mr. John Duncan (Vancouver Island North, CPC): You haven't read it.

Mr. Todd Russell: Well, that's what it seems like. I'm asking somebody to clarify it. Maybe the officials will.

Mr. John Duncan: You haven't read it.

The Chair: Mr. Russell has the floor.

Mr. Todd Russell: What else can it mean? I hear that this is what's being said. Maybe that's what we're here for: to clarify it.

Ms. Jennifer Lynch: Well, in addressing—

The Chair: We're out of time.

Ms. Jennifer Lynch: In addressing clause 9, what I'm addressing that it limits—

The Chair: I'm sorry, Ms. Lynch, we're out of time. You may make a brief comment on that last point. Then we'll have to go to the next speaker.

Ms. Jennifer Lynch: To clarify my comments around clause 9, I'm talking about the inability of the tribunal, most likely, to award remedies. That would be an effect of clause 9.

● (1550)

[*Translation*]

The Chair: Thank you.

Now, Mr. Lemay, you have seven minutes.

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

I apologize. I did not mean any disrespect. I was a bit late because the Olympic athletes are here, and being involved in the Olympic movement, I wanted to greet them.

That said, thank you for being here. I have some very specific questions for you. Did you do an in-depth study of Bill C-3?

[*English*]

Ms. Jennifer Lynch: We have not performed an in-depth study of Bill C-3.

[*Translation*]

Mr. Marc Lemay: So you did not study the bill clause by clause?

[*English*]

Ms. Jennifer Lynch: No.

[*Translation*]

Mr. Marc Lemay: I am trying to understand because in your document, you wrote, “My key message to you today is that this is by no means definite”. When you say “this is by no means definite”, it means that residual discrimination not covered by Bill C-3 will continue to take place. Has someone studied that on your end?

[*English*]

Ms. Jennifer Lynch: Let me clarify that when we were called to appear we prepared by reviewing Bill C-3. We are not experts in the area, wo when you talked to me about an in-depth study, I read into it that you meant an in-depth study to develop an expertise in the area.

We're not experts. We've been following the proceedings and have seen that there's a consensus. That's what my opening remarks referred to.

[*Translation*]

Mr. Marc Lemay: Very well.

So, unless I am mistaken, even though you are not experts, after reading the bill once and reviewing it in general terms, it is clear to you that discrimination will continue if this bill is passed as is.

[*English*]

Ms. Jennifer Lynch: The answer is that the committee has heard from a number of witnesses who have highlighted areas of alleged discrimination, such as... Well, I can give you examples if you want—

Mr. Marc Lemay: *Ce n'est pas nécessaire*.

Ms. Jennifer Lynch: But there seems to be sufficient information available to this committee—that we have observed—to suggest that this bill will not fully harmonize Indian status entitlement between descendants of men and of women.

[*Translation*]

Mr. Marc Lemay: Okay, we are getting there. So discrimination will continue to take place. That is what you are saying. Is that right?

[*English*]

Ms. Jennifer Lynch: We're not—

[*Translation*]

Mr. Marc Lemay: Imagine, even Mr. Duncan understood that. It is not meant as a criticism towards you. Yes, there will be discrimination.

[*English*]

Ms. Jennifer Lynch: Well, thank you.

I think we all agree this is a very complex area. We have examined this ourselves and we have listened to your witnesses and I would agree with you—yes.

[*Translation*]

Mr. Marc Lemay: I want to read you something. I am not sure whether you are able to study this proposed amendment. The problem, and you agree with me, has to do with section 6 of the act. I do not need an answer today, but I would like one by 4 o'clock tomorrow afternoon. That should be enough time. We have to make our amendments.

It is being proposed that section 6(1)(*a*) of the Indian Act be amended by adding: “or was born prior to April 17, 1985, and was a direct descendant of such a person.” That is the first point.

As for the second point, clause 2 of Bill C-3 seeks to amend section 6. I would agree that it is complex. Subparagraph 6(3)(*c.1*)(iv) would read as follows:

> (iv) had or adopted a child, on or after September 4, 1951, with a person who was not entitled to be registered on the day on which the child was born or adopted;

If that subsection were removed, do you think it would reduce or, at the very least, eliminate a great deal of residual discrimination? That was raised in your excellent presentation, which I fully accept. I do not need an answer until 4:30 tomorrow afternoon.

● (1555)

[*English*]

Ms. Jennifer Lynch: Mr. Chairman, we're here to provide whatever information we can within our area of expertise. This is an extremely complex area.

You have before you the submissions of the Canadian Bar Association, which has gone into great depth in making this analysis and represents 37,000 lawyers, me included. I would like to defer to the Canadian Bar Association.

I don't want to be disrespectful to you, sir, but I could launch my brightest minds for the next 24 hours to give an opinion, and it wouldn't be an opinion of expertise. I'm really asking your indulgence to not require a specific answer from us on this particular question.

[*Translation*]

Mr. Marc Lemay: You made me lose a minute, that does not make sense.

The Chair: There is a document by the Barreau du Québec on the same subject, which we will send you this afternoon.

Okay?

Mr. Marc Lemay: No, but yes, since my time is up. Do not worry, I will come back to it.

[*English*]

The Chair: Okay. Let's go to Ms. Crowder for seven minutes.

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

I want to thank you for coming before the committee.

You're absolutely right: this is a very complex issue. I'm not a lawyer, and I guess from a layperson's perspective, I find it really troubling that what we have is what I'm going to say is alleged residual discrimination, which everybody seems to be well aware of. We have any number of documented cases of alleged residual discrimination, whether it's the Canadian Bar Association talking about potential family status discrimination, which you highlighted in your presentation, or the Wabanaki and sibling discrimination. We have the problems with unstated paternity, which compound the difficulty.

From a human rights perspective, I'd like to put a question to you. We have, as I think the minister indicated, 14 cases currently winding their way through the court system around varying complaints on status. You now have a number of cases before you that you've referred to the tribunal around status. Has there been anything around citizenship as well?

A voice: No.

Ms. Jean Crowder: So it's status.

So people have two options at this point with the repeal of section 67. They can go through the court system or they can file a complaint. You indicated in your presentation that we can wait for it to unroll case by case. Let's assume they win. We can piecemeal, case by case, amend the Indian Act and potentially end up with unintended consequences, as we did with Bill C-31.

Or, as you've suggested, we need to do a more comprehensive approach. Can you talk a little bit about specifics around that? Because the exploratory process you mentioned is not necessarily getting widespread support; it's not deemed as consultation. Is there something you can recommend? Again, it may be outside of your area of expertise. If you can't recommend something like that, can you talk a little bit about remedies? Because the remedy won't necessarily change legislation, right?

● (1600)

Ms. Jennifer Lynch: That's right.

Ms. Jean Crowder: So let's say there's a discriminatory practice in the Kim Arsenault case and the Wabanaki. It's a sibling rule. Because of the date of birth here—Kim Arsenault was born prior to 1985—she won't regain the same level of status as in the McIvor decision. There is a court case going on. If she should file a complaint before the commission, and they refer it to the tribunal, which determines that it was discriminatory and there's a remedy, it won't change the law—

Ms. Jennifer Lynch: It could be appealed to the Federal Court.

Ms. Jean Crowder: That could take years.

Ms. Jennifer Lynch: Yes. Exactly.

Ms. Jean Crowder: We could continue to put people through this kind of grief and trauma and all of that for years, with no change to the law.

Ms. Jennifer Lynch: That's right. Well, on the law, as you can see with the B.C. Court of Appeal, it struck down the law. These things can happen, but it is a very long process, and it is very onerous for the plaintiffs.

Ms. Jean Crowder: But we know how many years the repeal of section 67 took. It was in place for 30 years and it took a tremendous amount of effort and a lot of discussion to have that changed. We could potentially be looking at another 30 years to deal with this alleged residual discrimination.

Ms. Jennifer Lynch: Right, and this is why we're recommending that there be a complete reworking of the Indian Act. Of course, it's up to Parliament to launch such a process.

In this day and age, and especially with the culture and traditions of aboriginal peoples, dialogue and consultations can bring people together. We're making considerable progress ourselves with the implementation of section 67 because we're working through a dialogue process with all the key stakeholders.

Ms. Jean Crowder: On that item, I think you're probably aware that some first nations chiefs were here the other day, and grand chiefs, and they have had no knowledge of or contact with any kind of process around the repeal of section 67. So how far has that outreach gone?

I noticed in your annual report that you say, “The National Aboriginal Initiative—balancing individual and collective rights”, and I just wondered how far that process had filtered out to communities.

Ms. Jennifer Lynch: Right. Of course, with the repeal, we got more than 600 communities that came under our jurisdiction. We have begun an outreach program. As these things work, to begin with, we didn't get any funding for 12 months, so we've only had funding in the last year, and then on a fairly minimal basis. We've had about 50 outreach sessions. We've reached more than 100 chiefs with those sessions.

We have also begun a process of working to develop criteria or guiding principles for internal dispute resolution processes for communities, because, of course, we believe it's best if the communities themselves can resolve their own disputes. We'd go further, to say that we believe it would be better if they could create a culture of human rights internally where the disputes wouldn't arise in the first place, where there can be dialogues before they seek recourse in formal mechanisms.

But this is the kind of work we have been doing. I could go into more detail if you want, but we have been working with outreach. Just recently, just this past week, we had another one of these dialogues. I don't know if you'd like us to speak to this in more detail.

Ms. Jean Crowder: Am I out of time?

The Chair: You have 20 seconds left.

Ms. Jean Crowder: Thank you.

I'm out of time, sadly.

Ms. Jennifer Lynch: All right. Thank you for the question.

The Chair: We can come back to that.

Thank you, Ms. Crowder and Ms. Lynch.

Now let's go to Mr. Duncan for seven minutes.

Mr. John Duncan: Thank you, Mr. Chair.

I just want to inform Monsieur Lemay that I was in Témiscamingue this past weekend and you have a very nice Legion there. I met the personalities who run—

● (1605)

Mr. Marc Lemay: Did you announce a lot of money?

Mr. John Duncan: I announced no money, but I spent some money.

Mr. Marc Lemay: I hope you spent some money.

Mr. John Duncan: It's a very nice area—my compliments.

I want to go to Mr. Russell's comments about clause 9 of Bill C-3, because I think they were a mischaracterization almost in their entirety. It's a very narrow clause, which, when you read it, is quite clear.

It's talking only about monetary compensation from things that flow from Bill C-3, only in respect to membership, and it protects not just Her Majesty, but band councils. If band councils look at the ramifications of Bill C-3, they'll see that they're wide open, as open as the government, and this would be a huge concern.

In terms of this kind of prohibition of compensation, Bill C-31 had exactly the same thing. It was not controversial. It didn't pre-empt any of the legal challenges.

The legal challenges under the changes to the Indian Act proposed by Bill C-3 for the most part would still be eminently challengeable; it's only on this monetary compensation business, dating back essentially to 1985, that this is a question. I just wanted to clarify that.

In the same vein, I was struck by your testimony when you said, I think, that the jurisdiction of the Human Rights Commission was not really the issue here but the remedies available under the Canadian Human Rights Tribunal. Now, was that statement in respect to clause 9 or was that a general statement? What did you actually mean by that?

Ms. Jennifer Lynch: The greater issue for us is whether we will have jurisdiction. We've heard testimony before this committee that seems to suggest that individuals could complain about status to us. At the current time, they can. We receive the complaints and then we either dismiss them or send them to the tribunal.

The jurisdiction is being challenged at the tribunal level in the sense that.... The Attorney General is saying, for example, that the registration of Indian status is not a service and therefore it has no place in the Canadian Human Rights Commission complaint process, through to the tribunal.

My points on clause 9 are separate points that don't relate to jurisdiction but to what remedy the tribunal could order, because I'm sure that will be litigated. Right now, section 53 of the Canadian Human Rights Act, which sets out the remedies, states that the tribunal can order that a practice be ceased, that there be a special program adopted, or to make available the rights, opportunities, or privileges that are being denied, and the compensation.

We don't know how clause 9 will be read, but we think it will be read into negating the ability for the tribunal to order these remedies. We can't make that decision, obviously; it's one argument that we would expect to be brought forward.

Mr. John Duncan: Right, and the current challenge you anticipate coming from the federal government is one that any defendant at any time would likely invoke as well. Because this is going to be litigious, maybe it's very good to get this clarified right up front. Would that be a reasonable proposition?

Ms. Jennifer Lynch: In my view—and of course I've been a member of the bar for over 30 years—if a legal issue can be referred or dealt with or clarified in an act of Parliament, that's far better than asking the Sharon McIvors of the world to go forward to make the law.

● (1610)

Mr. John Duncan: Correct.

One other thing in your submission leads me to a simple technical question. There is the federal Canadian Human Rights Commission, and then there is one in each province. Is that mandated somewhere? Or did this just happen because every province decided that it was a good idea?

Ms. Jennifer Lynch: The latter, I would say. It can look like a bit of a patchwork, really, because there isn't a commission in every jurisdiction. For example, in British Columbia, there is just a tribunal, so one goes straight to the tribunal. You don't have your complaints screened by a commission per se.

Mr. John Duncan: Would it be reasonable to assume there could be things flowing from this Bill C-3 that would fall under a provincial human rights act as opposed to the federal?

Ms. Jennifer Lynch: I'm going to turn to my deputy chief commissioner, David Langtry. We have analyzed this quite closely.

There is an association called the Canadian Association of Statutory Human Rights Agencies, of which we are a member, and we are working collectively on this very point.

Would you like to give some further information, David?

Mr. David Langtry (Deputy Chief Commissioner, Canadian Human Rights Commission): Yes, and really, the mandates of the various commissions—federal, provincial, and territorial—are based on the constitutional powers of each. The federal commission has those powers the federal government has, so as the chief commissioner indicated at the outset, we cover all federal departments and agencies and federally regulated employers, whereas the provinces have jurisdiction within those provinces. If it doesn't fall to the federal government, it falls to the provincial.

There are some issues that might occur on a first nations community that would fall within provincial jurisdiction—for example, employment law—but they would not also fall to us. So there is no concurrent jurisdiction, but there is sometimes uncertainty as to where it lies.

The chief commissioner referenced CASHRA. There is a working group of lawyers studying the very issue of jurisdiction in the first nations context—the aboriginal context, more broadly speaking—to know which side it would fall on.

The Chair: Thank you, Mr. Duncan, Mr. Langtry, and Ms. Lynch.

Mr. Bagnell, for five minutes.

Hon. Larry Bagnell (Yukon, Lib.): *Merci, monsieur le président*.

I'd like to ask the lawyers a question—Ms. Lynch and Ms. Phillips and anyone else who is a lawyer. Everyone in the room, I think, understands that there will still be discrimination in place after this; this removes some of it. Could or would a law like this be challenged constitutionally in the sense that it leaves residual discrimination, as opposed to the Charter of Rights? This isn't a question for the Human Rights Commission, but for lawyers in general.

Ms. Jennifer Lynch: There are three of us here, so Michael gets a pass. Michael is not a lawyer.

Valerie, would you like to comment on that?

Ms. Valerie Phillips (Legal Counsel, Canadian Human Rights Commission): May I clarify if you are asking whether Bill C-3 itself would be challenged for failing to remedy all of the residual discrimination?

Hon. Larry Bagnell: Yes, or you could say for continuing to promote discrimination.

Ms. Valerie Phillips: I think that's unclear, but my instinct would be that it's unlikely, unless the bill itself is found to be discriminatory.

There have been people before you who have raised flags about family status discrimination, for example, as a possibility in the act, so there is a question whether Bill C-3 contains discriminatory provisions.

But as to whether it could be challenged for not correcting full discrimination, I don't think so. If it's not in compliance with the B. C. Court of Appeal ruling, there may be some legal remedy there.

Hon. Larry Bagnell: Right. Okay. I just wanted to make a note for the record just so the public knows this, actually. When you talked about there being no remedies before section 67 was repealed, that applied to Indian Act bands, but there were a number of bands that did sign land claim agreements where section 67 didn't apply to them anymore so they had recourse to you.

The problem with repealing section 67 for some of the people was the difference between the communal rights of historic aboriginal societies in North America and the individual rights of our European culture. Now that the Human Rights Commission is having to grapple more with aboriginal issues, I wonder whether you have views on that distinction between the communal rights of historic aboriginal communities in North America and the individual rights of our European-based system when it comes to a complaint.

● (1615)

Ms. Jennifer Lynch: I'm not sure that I'm understanding the question—

A voice: I think you could pass that along to me, if you want.

Ms. Jennifer Lynch: Oh, my colleague would be pleased to—

Hon. Larry Bagnell: That's why you pay him the big bucks.

Mr. Michael Smith (Senior Policy Analyst, Canadian Human Rights Commission): As the only non-lawyer on the panel, I don't think so.

The issue that comes up was addressed with the interpretive clause of section 67, which, while it's technical, is important. I'll read it to you: “In relation to a complaint made under the Canadian Human Rights Act against a First Nation government”—including related activities—“this Act”—and that's applying section 67—“shall be interpreted...in a manner that gives due regard to First Nations legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and interests, to the extent that they are consistent with the principle of gender equality”.

So there are three balances, and the final balance looks to the impact of whatever is being decided as not diminishing the rights of girls and women. So with respect to individual and collective rights, it's a sense in some camps that the sense or philosophy of individual rights is an importation on our traditional aboriginal collective rights and that mentality.

The commission has undertaken a fair bit of research and will be developing positions and guidance on how to do that kind of balancing—that being done, it must be said, in direct collaboration with aboriginal communities.

The Chair: Ms. Neville, you wanted to ask a brief question. We have about 30 seconds left for a short one.

Hon. Anita Neville (Winnipeg South Centre, Lib.): I don't know how brief it is.

Given that we've acknowledged there will be residual discrimination if the bill passes the way it is, and given that Mr. Duncan commented that it will be litigious, what would your advice be to us? We are doing all kinds of gymnastics to find an appropriate way to amend this bill so that there is no residual discrimination. Have you any advice for us?

Ms. Jennifer Lynch: With the greatest of respect, you are in a complex area with a tight timeline. The bill does appear to respond to the narrow order of the British Columbia Court of Appeal. As you've said, and as we've all said, it will rectify some but not all of the discrimination.

I found the submission of the Canadian Bar Association to be very good reading. This is a group of national aboriginal law experts who've identified areas of concern and made suggestions on amendments to address those concerns. My advice to you would be to turn there—

Hon. Anita Neville: For their advice....

Ms. Jennifer Lynch: —for their advice.

Hon. Anita Neville: Thank you.

The Chair: Thank you, Ms. Neville.

Now let's go to Mr. Dreeshen for five minutes.

Mr. Earl Dreeshen (Red Deer, CPC): Thank you very much for coming here today to enlighten us somewhat on this. We appreciate it.

I want to give you an opportunity to perhaps go back and discuss what you meant specifically when you spoke about review and process of "complaints of discrimination in employment or services". You indicated that in your brief; I just wonder if you could expand upon that somewhat.

Ms. Jennifer Lynch: I'll give an example generically and then I can move to Bill C-3 as well.

That means we do not receive complaints.... Let me put it in a positive light. We have jurisdiction over complaints if they are based on one of our 11 enumerated grounds—religion, age, sex, family status, etc.—-and the alleged act of discrimination must have happened in an employment setting or a service setting.

For example, let's take the banks. If I'm a bank employee and I feel I didn't get a promotion or what have you, I could complain to the Canadian Human Rights Commission. If I'm a customer of the bank and I go to the bank and I feel that for some reason they kept me waiting too long in line because of my colour or whatever, I could complain to the Canadian Human Rights Commission.

If I am a woman working in the trucking industry and I'm experiencing what I believe to be discrimination, I can complain to the Canadian Human Rights Commission, because we have jurisdiction over employment and services being provided.

But if you own the ABC motel and refuse people of a certain group, that doesn't come to us. It's a service, but it's not under our jurisdiction. That's what a service is.

When we get to the specifics in the world of status and funding, this is where we're getting challenges from the Attorney General that these are not services. I'll give you an example for a service.

Three complaints that we've sent to the tribunal recently are McIvor-like complaints—two brothers and a sister—and the Attorney General of Canada has filed a preliminary motion to stay the tribunal proceedings until Bill C-3 has been passed. The Attorney General has given notice that it will be challenging whether the determination of Indian status is a service within the meaning of section 5 of the CHRA. That's one. Now, in these three cases, they would all receive Indian status as a result of Bill C-3, hence the request for a stay. That's one kind of service.

We have another case before the tribunal as to whether funding is a service, funding by the federal government. It relates to aboriginal children in foster care. It's known as the Child and Family Services case. It's alleged that Indian and Northern Affairs Canada discriminates against aboriginal children in the provision of a service by inadequately funding child welfare services, and that the funding formula results in underfunding of services to keep families together and over-funding of services to put children in foster care.

Again, the argument will be made that this is not a service, that funding is not a service. Actually, on this whole definition of service, the courts have been quite broad in defining government services as service; however, there could be a narrowing. This is what we are waiting to find out through the courts.

● (1620)

Mr. Earl Dreeshen: So for band membership, is there ever a question as to whether or not that could become discriminatory? Would one ever consider that?

Ms. Jennifer Lynch: Now, I've just been reminded by my colleague that we cannot receive cases like that until June of 2011.

Mr. Earl Dreeshen: But once that time comes, then you would be able to deal with it, or you would be expected to...?

Ms. Jennifer Lynch: Well, provided that it is a service, yes. It would flow. The one would flow towards band councils as well, the definition of service, yes.

The Chair: That's about it, Mr. Dreeshen. Yes, the time goes rather quickly.

We'll have a final question from Mr. Lemay.

Monsieur Lemay, pour cinq autres minutes.

[*Translation*]

Mr. Marc Lemay: I listened to you very carefully, and I remembered that we had passed Bill C-21, An Act to amend the Canadian Human Rights Act. On March 30, 2010, I read a report entitled "Balancing Individual and Collective Rights: Implementation of section 1.2 of the Canadian Human Rights Act".

I have a question for you. You have one year left. Are you prepared to deal with the dozens of complaints that are going to land on your desk, as a result of section 67 being repealed and Bill C-21 being implemented? You have one year left, just amongst ourselves.

Did the committee do a good job? Are there elements you are lacking, things we could ask the government for in preparation for June 18, 2011, so that you are not accused of being unprepared? I am not criticizing. On the contrary, we want to help you. Obviously, there will be a lot of applications.

● (1625)

[*English*]

Ms. Jennifer Lynch: Obviously we're doing our best, sir. When we took on this project.... When the law was changed and we received this mandate, we had funding given to us over a five-fiscal-year period. That's temporary. I think we've added something like five full-time equivalents to our staff for these 600 communities and 700,000 individuals.

This has also included the expertise you see at this table, which is obviously part of our quest to give the best advice we can and to handle complaints in the most effective way. To do this, we've taken a good look at all of our service delivery, and we have instituted processes that are commission wide, to attempt to be as efficient as possible with our complaints.

But I want to park the generic processing of complaints for a minute and talk about the specificity of receiving complaints from aboriginal people. The reality is that we need to look at and are looking at our own processes to ensure that they will be culturally sensitive and accessible.

To that end, we also believe that we can provide a better service by helping communities handle their own complaints. We're doing two things in this regard.

The first one we're working on is to help communities develop their own internal dispute resolution processes that will satisfy people in the community so they won't have to go to the Canadian Human Rights Commission.

The second one is that we are developing tools so we can educate communities to create environments where they can remove systemic discrimination from their practices. This is an enormous job and we work hard at it.

We have brilliant people working with us, and we'll be as prepared as we can be, but resources are definitely an issue.

[*Translation*]

Mr. Marc Lemay: Have you already received complaints that you cannot process yet because the provision does not come into force until June 2011?

[*English*]

Ms. Jennifer Lynch: I guess we have.

Do we have specifics on that?

Valerie Phillips?

Ms. Valerie Phillips: We've received complaints in relation to housing on reserve that we have not been able to accept because of the transition period. I believe there may have been one or two more. There's just been a handful, but we've had to reject them because of the transition period.

[*Translation*]

Mr. Marc Lemay: Thank you.

[*English*]

The Chair: *Merci, Monsieur Lemay.*

I have a final question here, which is a point of clarification, actually, relating to Mr. Russell's question. It also picks up a bit on what Mr. Lemay was asking.

Have there been any complaints thus far that you can't or don't have to put off to 2011? Did I hear you say earlier that for those that you have received, they have all been sent to the tribunal? Did I hear that correctly?

Ms. Jennifer Lynch: Right. Well, I'll begin, but the Deputy Chief Commissioner actually has that file and he'll have the statistics.

We've had a part of and a whole year of two fiscal years. During that period of time, we have received in the neighbourhood of over 30 complaints since the repeal.

● (1630)

The Chair: Okay. Can you consider these complaints prior to the 2011 transition?

Ms. Jennifer Lynch: Yes, absolutely. They are in various stages of being processed. I don't know how many we've actually sent to the tribunal.

Mr. David Langtry: Three have been sent to the tribunal, all of those cases because they're against the federal government, which did not have the three-year time period applying. The three-year time period was only as against a first nations government.

The Chair: Okay. To your knowledge, then, are all three of those cases at the tribunal being challenged on the basis of this service issue that Mr. Russell referred to?

Mr. David Langtry: Yes.

The Chair: Okay. That's what I just wanted to be clear for the record. You just referred to all of them and I wanted to be sure that we were talking about those in front of the tribunal as opposed to those you have in-house.

Ms. Jennifer Lynch: Right, and we have a couple of issues. One is whether funding is a service. The other is whether registration is a service. Then there's another argument about comparator groups, but that's—

The Chair: Okay. Could you give us an idea of the other 27-odd cases that you have been able to deal with? What sort of subject matter would those pertain to if they're not specifically complaints against the Government of Canada?

Mr. David Langtry: There are several before us that deal with the funding of education. As well, the status ones are ones that we would still be processing.

Just to clarify, the respondents are able to raise the jurisdiction issue before the commission as well, and we could reject them under section 41 and not deal with them. All of the jurisdiction issues have been and are continuing to be raised before us. Our approach to it is that unless it's plain and obvious that we do not have jurisdiction, the law is that we are to send it on, so the tribunal will make the determination. We're not finding that there is jurisdiction; we're saying that it's not plain and obvious that we do not have jurisdiction.

The Chair: Okay. Thank you very much. I just wanted to make sure that we had that correctly on the record.

I think that will finish our first hour, members and witnesses.

Thanks to all of you for joining us in this important consideration of a bill that, as you can imagine, is very important to the stakeholders, particularly first nations people right across the country.

We'll have a brief suspension, members, for about three minutes, and then we are going to get going. We will be in camera, members, for this next section. If there are other visitors present, we will have to scale it back as per the rules for in camera meetings. We'll suspend for three minutes.

[*Proceedings continue in camera*]

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