House of Commons
CANADA

Standing Committee on Aboriginal Affairs and Northern Development

AANO • NUMBER 012 • 3rd SESSION • 40th PARLIAMENT

EVIDENCE

Tuesday, April 27, 2010

Chair

Mr. Bruce Stanton

Standing Committee on Aboriginal Affairs and Northern Development

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● (1535)

[*English*]

The Chair (Mr. Bruce Stanton (Simcoe North, CPC)): Good afternoon, members. Welcome back to our consideration of Bill C-3, pursuant to the order of reference of Monday, March 29: 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).

Members, we're back under, as we had planned, the clause-by-clause consideration of this bill. We welcome back Martin Reiher of the Department of Justice and Mr. Roy Gray from the Department of Indian Affairs and Northern Development, who are here, really, for consultation purposes. We're not expecting any presentations.

Members, you'll recall at our last meeting I did indicate that we were going to pursue another line of consideration around the issue of the unstated paternity and illegitimate children issue. That issue did not come forward, as we've seen at least thus far, from any of the amendments that had been proposed. My preference would be just to proceed directly to clause-by-clause consideration, so we'll leave that for another time.

We haven't done this too often, but it's great to be back here considering clause-by-clause analysis of the bill. You actually have the agenda in front of you. I'll confirm or affirm that all of the amendments that have been proposed by the various members have been received by the committee. Of course that doesn't preclude the possibility of further amendments while we take up consideration of this bill.

We will proceed with the clause 2 amendments.

(On clause 2)

The Chair: I'd like to first start by inviting the sponsor of the bill to move his amendment and speak to it if he wishes, and then we'll proceed from there.

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

I understand that each committee member has been provided a copy of the proposed amendment.

I move that Bill C-3, in clause 2, be amended by adding after line 16 on page 1 the following:

> (a.1) that person was born prior to April 17, 1985 and is a direct descendant of the person referred to in paragraph (a) or of a person referred to in paragraph 11(1)(a), (b), (c), (d), (e) or (f) as they read immediately prior to April 17, 1985;

In proposing this particular amendment, we certainly consulted with those who had been before the committee and those who could provide some advice or some clarity on this particular amendment. This particular amendment proposes to respond to the vast majority of the witnesses, if not all of the witnesses, who indicated that there would be residual discrimination based on what was in Bill C-3. So finding an amendment that satisfies the grievances of those who appeared before us and trying to be all-encompassing when it comes to removing a residual discrimination, this is the amendment we came up with.

The effect of our amendment is to make entitlement to paragraph 6 (1)(a) status totally non-discriminatory. That would be the effect, the basic impact, of this particular amendment.

Some will say, and probably rightly so, that this is more reflective of what was in the Supreme Court of B.C.'s ruling and not as reflective, maybe, of what was in the B.C. Court of Appeal's ruling, which was much narrower. But we've always made the argument that in fact the government had the ability to respond in the way it so chose to respond to the B.C. Court of Appeal's decision. So we feel that this is a way to respond effectively and efficiently to the pleas of witnesses, particularly Sharon McIvor, who came before this committee and whose long battle and whose court case has helped lay before us Bill C-3.

That's what I will say to this particular amendment, Mr. Chair.

The Chair: Thank you, Mr. Russell.

I'm sure the admissibility question is going to be considerable, as most members would acknowledge, particularly on the Bill C-3 amendments that have been proposed. However, on the amendment proposed by Mr. Russell that's in front of us, before I get to the ruling, I just want to ask about this, because it would have implications if this amendment were adopted for this bill. It would in fact have more far-reaching implications, including the other amendments that are before us today. In lay terms, it would engulf many of the other amendments that have been proposed and would be considered by the committee.

So I'd like to ask Mr. Reiher if he could, in this particular instance, speak to the implications that this amendment would have, not just in respect to the amendments we have in front of us, but even to the very structure of Bill C-3 and what it proposes.

● (1540)

Mr. Martin Reiher (Senior Counsel, Operations and Programs Section, Department of Justice): Thank you, Mr. Chair.

Indeed this amendment would take a radically different approach from the one that is taken in Bill C-3. This would amend paragraph 6 (1)(a) of the Indian Act, which basically was the provision allowing the registration after 1985 of all the individuals who were previously entitled to registration. The amendment would allow any person born before April 17, 1985, to be registered under paragraph 6(1)(a) of the Indian Act if that person was able to identify an ancestor who was, at the time of his or her death, entitled to be registered, which obviously increases significantly the number of persons entitled to registration under the Indian Act.

I would point out that I'm not clear personally on the purpose of the last three and a half lines of the proposed amendment, which read, "or of a person referred to in paragraph 11(1)(a), (b), (c), (d), (e) or (f)".

This is a reference to the previous act and not to the current legislation. Individuals who were entitled to be registered under section 11 of the previous act are actually covered by paragraph 6(1) (a). So to my understanding—

The Chair: As a point of clarification, when you say "the previous act", it's the act as it existed before 1985.

Mr. Martin Reiher: Thank you, yes.

I would just point out that these words, the words following from line 3 of the proposed amendment—"or of a person", etc.—would appear to be unnecessary to achieve the goal of this amendment.

That said, this is simply to point out a difficulty with this specific amendment, but in terms of the impact, I think I've described the impact of the amendment.

The Chair: Perhaps as a follow-up question—I just want to get this and then I'll go back to Mr. Russell—what effect would this amendment have on those persons who are now registered under subsection 6(1) categories under the Indian Act? In a way, this is extending paragraph 6(1)(a) status to a group, but in what way would that affect people who are registered in different categories, if at all?

Mr. Martin Reiher: I believe individuals who are currently entitled to registration under one provision of subsection 6(1) would maintain their entitlement and would potentially gain an additional entitlement. There might be dual entitlement for many individuals. This is obviously something that we try to avoid when we develop legislation, but that would presumably not result in the loss of entitlement to individuals.

There's one thing I would like to point out in terms of the logic of the Indian Act. This amendment, because it goes back in the past, would actually have the result not only of allowing the registration of descendants of Indian women who lost status upon marrying a man, but also, for example, individuals who took scrip in the past and their descendants, which was another rule.

You know, scrip was a certificate provided to Métis people. They could choose to receive money instead of being covered by treaties. Thereafter, they could no longer be considered Indians, and their descendants the same. In this case, their descendants would become entitled to registration.

The Chair: Okay.

Mr. Russell.

Mr. Todd Russell: As to impact, I think the testimony before the committee by Mr. Gray and Mr. Reiher was that it's hard for the department to quantify or qualify impact, because it's on an individual basis. That particular argument was made when we asked what the financial implications would be.

The department could not quantify the impact in terms of exactly how many people we might get, because it's on an individual basis. While this would probably allow more individuals to apply for registration, I think the same argument would hold: that the department does not really know. It just expands the category of eligibility, but if the department couldn't quantify for Bill C-3, I don't hear anybody saying that they could either quantify or qualify it for this particular amendment.

I might be wrong, but I certainly would like to hear what the department says, because when we asked questions on Bill C-3, that was the answer I received.

● (1545)

The Chair: All right. Thank you both for clearing that up.

Thank you, Mr. Russell, for your proposed amendment under clause 2.

I would like to give the ruling now on this particular amendment.

[*Translation*]

Bill C-3 amends the Indian Act by specifying a new right of registration in response to the McIvor v. Canada case. The amendment seeks to amend the act by specifying an additional right for children born prior to April 17, 1985 of a parent registered under paragraph 6(1) (a) or subsection 11(1) as it read before April 17, 1985.

[*English*]

House of Commons Procedure and Practice, second edition, reads on page 766 as follows: "An amendment to a bill that was referred to committee after second reading is out of order if it is beyond the scope and principle of the bill." Therefore, in the opinion of the chair the introduction of the additional entitlement to registration under this amendment is a new concept that is beyond the scope of Bill C-3 and is therefore inadmissible.

Members, we'll have to move on to the next—

Hon. Larry Bagnell (Yukon, Lib.): Mr. Chair, can I just ask a point of clarification?

The Chair: Mr. Bagnell, yes.

Hon. Larry Bagnell: If the bill is titled "gender equity in Indian registration" and the amendment is just making for "gender equity in registration", how is it incompatible?

The Chair: Principally it's because under the Standing Orders there is no ability for the committee to expand the scope or the application of the law beyond the scope that is given and provided in the bill.

I could perhaps turn to Mr. Cole. He might want to expand on that idea. Mr. Cole, as members will know, is the legislative clerk who has been assigned to this committee.

Mr. Cole, do you want to...?

Mr. Wayne Cole (Procedural Clerk): The bill seeks to respond to the decision of the court of appeal in the McIvor case, and the provisions of the bill, as approved by the House at second reading, are limited strictly to making the necessary changes to the act. The advice has been given that attempts to extend that exceed the scope of the bill as it was approved by the House.

The Chair: Mr. Russell.

Mr. Todd Russell: There's no doubt around this committee table that we respect your particular position and the vast majority of the rulings that you have made, and we certainly respect the work of our legislative clerk. But on this issue, I think we would like to challenge the chair's ruling on this particular amendment, because it's necessary that we take every step possible to respond to the witnesses and to approach an amendment strategy that responds to the witnesses who came in unanimity before the committee.

From a procedural perspective, is a motion to challenge the chair the way that this has to be done? Is it open for debate? Can you give me some clarification on that?

The Chair: The ruling is really not debatable. It's a member's prerogative if they wish to challenge the ruling of the chair. They can do that. At that point most chairs would typically seek to have an assertion of the chair's ruling. If that is overturned, then the amendment, insofar as our committee is concerned, can be debatable at that point.

● (1550)

Mr. Todd Russell: With all due respect to you, I'd like to challenge your particular ruling on this particular amendment.

The Chair: Okay, that being the case, I would seek a motion to maintain the chair's ruling.

Mr. John Duncan (Vancouver Island North, CPC): I so move.

The Chair: We need a decision on that.

Mr. John Duncan: Could we have a recorded vote while we're at it?

The Chair: We will have a recorded vote.

An hon. member: So the question is about the decision of the chair—

The Chair: The motion is to sustain the ruling of the chair.

(Ruling of the chair overturned: nays 6; yeas 5)

The Chair: This does pose an interesting question. It actually takes us back to our earlier discussion, that if this amendment were adopted—and I may have to seek some counsel from Mr. Cole on this question—it would effectively engulf the other amendments that we have before us, save and except two amendments to clause 3 proposed by Mr. Lemay and an amendment proposed by Ms. Crowder to clause 1. All of the other clause 2 amendments are, for all intents and purposes, negated by the adoption of this amendment.

At this point in time, we haven't adopted this amendment. It is, I assume, available now for discussion, because it has not been ruled inadmissible. But should this amendment be adopted by the committee, it does call into question the other amendments that we have, save and except those three.

I'll get to you, Ms. Crowder, in a second.

If members wish, we can proceed to consider debate on the amendment, but just keep in mind that we'll have to come back to this other question.

Ms. Crowder.

Ms. Jean Crowder (Nanaimo—Cowichan, NDP): Could we take a five-minute recess?

The Chair: It's up to the committee.

Is there agreement to suspend for five minutes?

Mr. John Duncan: Do we have a rationale?

Ms. Jean Crowder: Yes. Since this particular amendment would supersede all other proposed amendments to clause 2, I wouldn't mind a quick clarification with my colleagues on the opposition side.

The Chair: Is that acceptable to members?

Mr. John Duncan: If the opposition wants to have a five-minute caucus, I have no problem with that.

The Chair: All right, we'll suspend for five minutes. We'll resume our meeting at 4 p.m.

● _____ (Pause) _____ ●

● (1555)

The Chair: We'll resume consideration now.

We'll now debate the amendment put forward by Mr. Russell, subsequent to the ruling on its admissibility being overturned. We'll now hear questions or comments on the amendment.

Mr. Duncan.

Mr. John Duncan: This morning we had the debate on the motion from Jean Crowder in the House of Commons. There was quite a bit of discussion revolving around unintended consequences. I think we've just seen a classic example of unintended consequences. The opposition has tabled amendments. There was a lack of recognition that one of those amendments would usurp many of the other amendments. This is why I think this is the wrong venue in which to be trying to tinker with a very complex issue that courts have ruled on and that we're trying to respond to, and this is why we set up the exploratory process.

This amendment would certainly increase significantly those eligible for Indian status in Canada, in comparison with Bill C-3 as tabled. It goes much further than the Court of Appeal for British Columbia, so I think it's completely consistent with the chair's ruling that this is beyond the scope of the bill.

I don't know what more to say about it. This is about as broad an amendment as one could imagine. The unintended consequences go well beyond what any witness.... If this were what had been tabled in Bill C-3, we would have had a very different set of witnesses come before this committee, I can assure you. It is most inappropriate that we would even entertain something this broad.

● (1600)

The Chair: Thank you, Mr. Duncan.

Mr. Russell.

Mr. Todd Russell: Mr. Chair, I thank the parliamentary secretary for his comments and his acknowledgment that this would entitle a far greater number of people to be registered and not discriminated against. I think that's a fine acknowledgement on the part of the parliamentary secretary, which only speaks to the problems and the deficiencies in the bill before us, which is why we try an amendment strategy.

The reason we've introduced this is that the government has not responded in any way, shape, or form to much of the protest, if you want to put it that way, on the part of so many witnesses and on the part of parliamentarians such as us, and even most recently the motion that was put before the House this morning. I think that adequate offers were made and adequate avenues were open to the government. This amendment speaks to the fact that we had to respond in the most appropriate way we know how.

The parliamentary secretary speaks about unintended consequences. We knew very well that this particular amendment would engulf, to some extent, the other amendments that were coming before us. When it comes to consequences, I would only say that we had government witnesses come before us who really could not speak in any adequate way, shape, or form about the consequences of Bill C-3. So I doubt whether one can speak now with any more clarity about the consequences of this particular amendment that's before us.

The only consequence would be that more people would be entitled to register. It would end gender discrimination once and for all. To me, that is totally consistent with at least the principle of the bill, which was to extend or to try to eradicate some form of gender discrimination under the Indian Act. The argument here would be that the scope and principle go together and that you would have to deny both in order to deny at all.

I think it's totally consistent with what the government at least purports to do in Bill C-3.

The Chair: Thank you, Mr. Russell.

Ms. Neville.

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

Mr. Chair, this is clearly a complex and very difficult bill, and it's difficult for everybody around this table. Whatever way we go is a no win. Whatever way we go there will be litigation. Whatever way we go there will be people who are dissatisfied. I have a great deal of difficulty, in this day and age, supporting any proposition, any amendment, that would consciously leave one group of people in this country less equal than others, and in this situation, it's clearly aboriginal women, or some aboriginal women and their children, who would be less equal than others.

I know Ms. Crowder's effort this morning to put the motion before Parliament was to deal with the issue in a manner that's respectful to all parties, to allow this committee to do its work.

I want to read into the record, because I think it came after we had hearings, a brief that came from LEAF, the Women's Legal Education and Action Fund, which has often been an intervenor on a number of equality cases at the Supreme Court. They say in their brief, and I hope you'll bear with me so I can read this:

> The Government of Canada can and should amend the Indian Act to fully and finally eliminate sex discrimination from the status provisions. The Government of Canada is not limited to implementing only the remedy required by the British Columbia Court of Appeal in McIvor v. Canada. The Court's ruling in McIvor does not create a "rigid constitutional template". The Supreme Court has affirmed the role of Parliament to "build" on a Court's ruling, particularly where the judicial scheme "can be improved" by the legislature. For example, in its decision in R. v. O'Connor in 1995, the Supreme Court of Canada laid down a procedure for the disclosure of confidential records of sexual assault complainants which purported to balance the equality rights of complainants and the rights of accused to full answer and defence. In 1997, Parliament enacted amendments to the Criminal Code which differed from the procedure delineated by the Court and which ostensibly went further to protect women's equality rights and protect their confidential records from disclosure to those accused of sexually assaulting them. In upholding the new legislation in R. v. Mills in 1999, the Supreme Court of Canada emphasized the importance of Parliament building on the Court's earlier decision in O'Connor.

Mr. Chair, as parliamentarians who have heard from a whole host of witnesses who are all aware of the inherent inequity in this bill and that there will be intended consequences of gender discrimination, gender inequality, I think it's incumbent upon us as legislators that we move forward with my colleague's amendment. I would hope that we would speak out with some unanimity on the reality of what gender equality means in this country.

● (1605)

The Chair: Thank you, Ms. Neville.

Now we'll go to Mr. Rickford.

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

With the greatest of respect, what's incumbent upon legislatures is to be responsible. I'm going to speak quite frankly to members of the opposition who have not had as much Kool-Aid as others have and believe that this specific motion here is the direction we want to go. I think we should understand that this bill as it's written now responds to the McIvor decision. If we look at the second prong of this exercise, or this process, as the parliamentary secretary raised in debate today, it's important that we understand we should not make the same mistake that the lower court made. There were unintended consequences at that court. The court of appeal rightly confined the issue, and Bill C-3 responds to that. It deals urgently with more than 45,000 people to whom it will have application.

In my view, the exploratory process deals with the second part of this process, and that is to reconcile. We heard that theme consistently here. With the greatest of respect around the gender equity issue, we know that there are competing claims and a host of rights that are at stake here: first nations governance, capacity, issues around status or registration membership and citizenship.

I would have thought, frankly, that we would have been thinking about more refined amendments for discussion, debate, perhaps negotiation, rather than this blanket kind of thing that not only sets us up for unintended consequences but is not consistent with what we heard, more importantly, from the stakeholders. There continues to be debate and serious questions around the implications of something like this proposed amendment from Mr. Russell. What we did hear is a desire from stakeholders and witnesses to understand through another process how we can, or if we can, deal with some of the other issues that would arise as we expand this.

This government was committed to Bill C-3 as it's written because it deals with the court decision. That's the substantive part. As a matter of policy, we entertained ourselves with the very serious realization that a process would have to take place to see how this would go on implementation. That's the responsible way to go.

I urge members of the opposition who are thinking about supporting this amendment to understand that jeopardizing it by supporting this kind of amendment, as the language is now, puts the people who are contemplated by Bill C-3, as it stands right now, in jeopardy and disables and disarms some of the quality contributions we heard from stakeholders with respect to a host of other issues and rights that pose serious competing claims on what I believe, and we believe, should come from the first nation stakeholders themselves.

Thank you.

● (1610)

The Chair: Thank you, Mr. Rickford.

I have no other speakers on the list. Is the committee ready for the question?

Mr. Todd Russell: Yes.

(Amendment agreed to)

The Chair: That brings us to additional amendments on clause 2.

In light of our earlier discussions in terms of the scope of the amendment that we just passed, I really should at this point defer to Ms. Crowder, who is up next in terms of her amendment, and this is in respect to the deletion of lines 32 through 35 on page 2 of Bill C-3.

Ms. Crowder, I'll put it over to you.

Ms. Jean Crowder: I'll withdraw my amendment.

The Chair: You wish to withdraw the amendment? Okay. That's fine.

[*Translation*]

Mr. Lemay, over to you.

Mr. Marc Lemay (Abitibi—Témiscamingue, BQ): I ask for the amendment to be withdrawn.

[*English*]

The Chair: Okay. So you choose to withdraw that as well.

That takes us to the second amendment proposed by Ms. Crowder, in respect to the creation of a new paragraph under 6(1) entitled (c.2).

Ms. Jean Crowder: I'll withdraw my amendment.

The Chair: Okay, the amendment is withdrawn.

[*Translation*]

Mr. Lemay, do you want to keep the amendment to clause 2?

Mr. Marc Lemay: Is that BQ-2, Mr. Chair?

The Chair: Yes.

Mr. Marc Lemay: I ask for that amendment to be withdrawn.

[*English*]

The Chair: Okay.

[*Translation*]

How about amendment BQ-3?

Mr. Marc Lemay: I ask for it to be withdrawn.

[*English*]

The Chair: Okay. So BQ-3 has been withdrawn by Mr. Lemay.

That brings us to amendment....This was circulated after the first set, this is

[*Translation*]

BQ-3.1.

Mr. Marc Lemay: I ask for it to be withdrawn.

The Chair: Okay. Amendment BQ-3.1.

[*English*]

is withdrawn.

Shall the amended clause 2 carry?

Mr. John Duncan: I ask for a recorded vote, please.

The Chair: Okay, a recorded vote.

(Clause 2 as amended agreed to: yeas 6; nays 5)

● (1615)

The Chair: We'll now proceed to clause 3. Clause 3 is as presented. I note there will be an amendment to create an additional or a new clause, clause 3.1.

As I see it, we'll pose the question on the existing clause 3 and then we will go to the amendment to create the new clause.

Shall clause 3 carry?

Mr. Todd Russell: *Oui.*

Mr. John Duncan: Can you back up, please? Do we have amendments to clause 3?

[*Translation*]

The Chair: Mr. Lemay has introduced a new clause. It is clause 3.1.

[*English*]

It's a new clause, so we'll actually ask the question on the existing clause 3. The effect of Mr. Lemay's amendment would be to create, in fact, a new clause. So that's a separate question. Okay?

Mr. John Duncan: Okay.

The Chair: Ms. Crowder.

Ms. Jean Crowder: Can I ask for clarification from the department? Given the amendment we just passed, does clause 3 make any sense?

The Chair: The question has been put by one of our members. Mr. Reiher, do you wish to comment?

Mr. Martin Reiher: Thank you.

The Chair: Could you hold for a second? We actually haven't got to debate on this. So let's go in order here. We'll come to that amendment, but we do have existing—

Ms. Jean Crowder: Not the amendment. My question is on the existing clause 3.

The Chair: Oh, on the existing clause, okay.

Ms. Jean Crowder: Given the amendment that we passed—

The Chair: Thank you for the clarification.

Ms. Jean Crowder: —does the existing clause 3 make any sense?

The Chair: So now let's go to Mr. Reiher, then, for that question.

Mr. Martin Reiher: Thank you.

Just to be very clear, my understanding of the question is that assuming that the Indian Act is amended with an amendment to paragraph 6(1)(a) along the lines of what was discussed today, then would the addition of paragraph (c.1) to section 6 make sense. I believe what it would do is to cover the same individuals, to provide dual entitlement to the same individuals. So if that were the situation, I think that is what would be the impact.

Now, in terms of how this should inform the vote on this clause, I think you should consider what would be the form of the bill later on in this process, if that's understandable.

The Chair: It's understood.

If I may—and I shouldn't—comment, this is indicative of the implications, sometimes, when you create a much larger or broader-sweeping amendment. It has perhaps some implications for other parts that you may not have considered. I say that without prejudice.

We'll go to the question.

Mr. Bagnell.

Hon. Larry Bagnell: I just want to summarize what you said. Basically you said that if we keep clause 3 it will create a double entitlement, which you'd try to get rid of. So if we just eliminated clause 3, the people would still be entitled because of the now-amended clause 2.

Mr. Martin Reiher: The amended clause 2 would entitle a very large number of individuals.

Just to clarify my answer.... Thank you; this gives me an opportunity. We are answering questions without the opportunity to consider this very carefully.

I just realized now that the amended clause would expand significantly the entitlement of registration for individuals born before April 17, 1985, whereas the proposed new paragraph 6(1)(c.1) would actually allow entitlement after that date. So the proposed new paragraph 6(1)(c.1) would still cover individuals, I believe, who are not covered by clause 2 as amended.

● (1620)

The Chair: Is that okay?

Is there any other debate on clause 3?

Mr. John Duncan: Once again here we are, talking about unintended consequences. This is really unfair to legal counsel, to the officials we have as witnesses: to be presenting them with a scenario in which they're having to offer an opinion on something on the fly. If we start deleting or keeping proposed sections or clauses based on what we think we know and report that back to the House, I'm concerned that it can be an embarrassment to the committee, to be quite truthful.

The Chair: Okay.

Is there any other debate on clause 3?

(Clause 3 agreed to)

[*Translation*]

The Chair: We now move to amendment BQ-4.

Mr. Lemay, you have the floor.

Mr. Marc Lemay: Mr. Chair, I introduced two amendments that deal with a new clause, clause 3.1. We are asking that the government report to Parliament on the progress and implementation of this bill. We chose amendment BQ-4. We are going to ask that it, not BQ-5, be voted on. We will ask for BQ-5 to be withdrawn once BQ-4 is passed.

There is only one difference between amendments BQ-4 and BQ-5. In BQ-4, we are asking that a report be laid before Parliament every two years while, in BQ-5, it is every three years. After studying the matter, we concluded that it was better to ask for a report every two years. This is a request that we received from Quebec Native Women Inc. We reflect it here, Mr. Chair.

[*English*]

The Chair: I can report to the committee that the amendment is admissible, so we'll entertain debate on the amendment.

Mr. Duncan.

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

I'm not surprised that the chair has ruled this in order and within the scope of the bill. But the logic I'm having some difficulty with is that Monsieur Lemay put two amendments forward, one for two years and one for three years. Any of the discussions I've had would indicate that the longer the timeframe, the more will have settled out after passage of the bill, because the whole registration process is going to take some time. The concern is that after two years we'll just be really getting going in terms of some of the registration numbers, so that three years would be more meaningful, and I would argue that four or five years might be a better number as well.

If you're agreeable to an amendment to change two years to three, four, or five years, I'd be quite accommodating.

The Chair: Monsieur Lemay, *vous avez la parole*.

[*Translation*]

Mr. Marc Lemay: Mr. Chair, we chose two years because it seemed clear to us that, two years after the passage of the bill, the report we will get will be very short. That seems quite clear to us. Things have to be put into place.

However, two years after the first report, we expect a much more complete report. That is why we prefer to opt for two years. As with Bill C-21, it seemed important to us that, every two years, Parliament should know what is happening with the implementation of this very important bill. All we are doing is reflecting the request made to us by Quebec Native Women Inc.

● (1625)

The Chair: Thank you, Mr. Lemay.

First Mr. Russell, followed by Mr. Bagnell.

Mr. Russell, you have the floor.

[*English*]

Mr. Todd Russell: Thank you, Mr. Chair.

I'm understanding that we have the two-year period in the proposed additional clause before us. I'm certainly going to speak in favour of it. I was quite surprised that the parliamentary secretary said that registrations would only have just begun and that we would hardly be able to measure them in two years, since the government itself has talked about the urgency of getting this particular bill through. If there's urgency in terms of allowing people to register, there would presumably be lots of activity within the first couple of years related to this bill, and something to report.

I want to speak in favour of this particular additional clause to report after two years.

The Chair: Thank you.

Mr. Bagnell.

Hon. Larry Bagnell: I want to ask the mover a point of clarification. The way I read the clause, there is just one report, coming either two or three years after the bill. But when he was speaking, it sounded as though it would be every two years or every three years. Can I get clarification?

[*Translation*]

Mr. Marc Lemay: My colleague is perfectly correct. I went a little far, Mr. Chair. It is two years after the coming into effect. So it is just one report. If the House wants another one, it would have be requested at that time. Yes, it is just one report.

[*English*]

The Chair: I see no other speakers. Are you ready for the question on the amendment?

Mr. John Duncan: Can I request a recorded vote?

The Chair: We're doing a recorded vote.

Mr. Todd Russell: Another recorded vote?

(Amendment agreed to: yeas 11; nays 0)

The Chair: Thank you.

In accordance with Mr. Lemay's request.... He indicated he will not move amendment BQ-5, which makes sense, of course, because it was really just a different term.

Thank you, Mr. Lemay.

We will now proceed to clause 4.

(Clauses 4 to 8 inclusive agreed to)

The Chair: Shall clause 9 carry?

[*Translation*]

Mr. Marc Lemay: Where is my amendment?

The Chair: Yes, Mr. Lemay

Mr. Marc Lemay: I am sorry, Mr. Chair. I thought I needed to make an amendment, but I do not need to. To reflect the requests of several witnesses, Mr. Chair, it seems clear to us that we have to vote against clause 9. We are asking that that clause not be passed.

[*English*]

The Chair: Okay, that is the question. Does anyone wish to comment on Mr. Lemay's intervention in respect to clause 9?

Mr. Duncan.

Mr. John Duncan: Yes, we did receive some concerns from witnesses. I do agree on the subject, but I think there was a lack of comprehension of what the clause is designed to protect. It's designed, most importantly, to protect first nations bands who have made decisions in the period since 1985 from liability from people who presumably will be eligible for registration under the terms of this bill. It's for clarity. It's in there to include the crown as well.

Rather than my spouting off about this, I would ask that the witnesses from DOJ and the other department be asked to comment on this clause.

● (1630)

The Chair: Certainly.

Mr. John Duncan: I think it's a crucial item. Without the clause, we're sending the wrong signal to people in terms of their expectation of first nations. I think the committee may regret it in the future, if we were to do that.

The Chair: Okay, Mr. Reiher.

Mr. Martin Reiher: Thank you, Mr. Chair.

Clause 9 indeed protects both the crown and the council of a band from any claim for compensation, damages, or indemnity for decisions, or because of “anything done or omitted to be done”—in other words, for decisions made on the basis of the fact that certain individuals who will have an entitlement to registration after the amendments are in force were not entitled before. Obviously, the goal of this clause is to avoid reopening decisions that were made in the past, including agreements, and including specific decisions with respect to individuals who sought benefits, etc.

This is a "for greater certainty" clause, because even without this clause, it is the state of the law that normally damages are not awarded once legislation has been struck down. First of all, when a court rules on a charter challenge, for example, when what is being sought is a declaration of invalidity, the courts are generally very reluctant to award damages in addition to a declaration of invalidity. In technical words, section 52 of the Constitution Act, 1982 has the effect of rendering legislation considered contrary to the Constitution inoperative, and section 24 of the charter allows a court to issue damages. These two remedies are usually not combined.

In addition to this, there is a doctrine in the case law called limited immunity for the crown. According to this doctrine, if a decision made by the government or its officials on the basis of legislation is made in good faith, there can be no damages if legislation supporting the decision is later found to be contrary to the Constitution. This is why this clause is for greater certainty, at least from the crown's perspective.

We believe that this clause would nonetheless be useful, because it clarifies the state of the law. It sends a clear message. Madame Lynch, the president of the Human Rights Commission, indicated that this would prevent individuals from trying to get damages or compensation through litigation, if in fact there would be little hope of doing so. So this would avoid litigation by individuals, for example. It would therefore avoid raising expectations, and it would send a very clear message to the courts as well.

My last comment is that certain concerns were raised with respect to the possibility of bringing complaints before the Canadian Human Rights Commission, for example. This clause clearly doesn't prevent any complaint being brought before the commission. It will be up to the commission to determine whether the complaint is receivable. What this clause would do is simply circumscribe the remedies that may be awarded for the true complaint under the Canadian Human Rights Act.

● (1635)

[*Translation*]

The Chair: Thank you, Mr. Reiher.

We will move to Mr. Lemay and then to Mr. Bagnell.

Mr. Lemay, you have the floor.

Mr. Marc Lemay: When they appeared before us, the representatives from the Canadian Bar Association, along with Mr. Dupuis, from the Quebec Bar, expressed concern about clause 9. The following words sum up those concerns:

> Section 9 is a concern, as it would remove the right of anyone to sue the federal government for not providing them with status as a result of the gender discrimination addressed by the bill. If the federal government can be presumed to have been aware that Bill C-31 was not consistent with the Charter as far back as 1985, and did not act for over twenty years until the McIvor decision reached the BC Court of Appeal, the CBA section is concerned with the justice of such a "no liability" provision. Further, we caution that including such a provision could make the bill vulnerable to further Charter challenges.

Mr. Chair, this is one of the reasons why we are going to vote against clause 9. Representatives from aboriginal communities asked us to when they appeared before us, I feel. They found that denying them the right to make claims of that kind was discriminatory.

The Chair: Thank you very much.

Now we move to Mr. Bagnell.

[*English*]

Hon. Larry Bagnell: I want to ask about another point.

My understanding from other situations is that when something is covered, as you said, in case law, that's a universal type of principle and it is accepted, such as going back, in this particular case, retroactively on things. That's a pretty strong argument that a lot of the courts would support.

This clause may have the unintended consequences of actually weakening that case. I think what we've been told in other situations is that when you draw attention to something separate from the normal way of doing things, it actually brings the whole situation into question. It may actually work detrimentally to the purpose of this clause 9.

The Chair: Did you wish to comment, Mr. Reiher?

Mr. Martin Reiher: Thank you, Mr. Chair.

It seems to me a clear indication from Parliament that there can be no compensation for a lack of entitlement for individuals who are covered by these new amendments. It would actually assist and strengthen a principle that exists in the case law but would in no way weaken it.

The Chair: Thank you.

Mr. Duncan.

Mr. John Duncan: Everyone's comments so far have largely been focused on the federal government. I think there's a failure to recognize that there's been a fundamental change. The fundamental change is that the Canadian Human Rights Act has been amended. The net effect of the amendments to the Canadian Human Rights Act is that remedy could be sought from the first nations and it may not even target the federal authority. I think clause 9 is important.

And I would ask the witnesses one further question. Is it not the case that Bill C-31, the 1985 amendment, contained a very similar clause, and that clause in no way pre-empted McIvor and a whole bunch of other things from coming forward? This is not eliminating the possibility of many things from occurring, but it is very specifically referring to outcomes specific to Bill C-3, remedies they might seek that would be.... I'm losing myself, but I think I've asked my question for the witness.

● (1640)

The Chair: Go ahead.

Mr. Martin Reiher: Thank you, Mr. Chair.

This is an important verification. Clause 9 is fairly precise and circumscribed. It prohibits awards of damages on the basis of the fact that the individuals who will gain entitlement further to this amendment did not have an entitlement before. It in no way prevents other charter challenges to the Indian Act, or further challenges and awards of damages for something not related to the lack of previous entitlement.

Mr. John Duncan: What about Bill C-31?

Mr. Martin Reiher: There was a similar clause in the bill amending the Indian Act in 1985. If I recall correctly, it was clause 21, 22, or 23. There are other provisions in the statutes dealing with aboriginal issues or other issues limiting the liability of the crown as well. This is not unique.

The Chair: Thank you very much, Mr. Duncan and Mr. Reiher.

Let's go to Ms. Crowder.

Ms. Jean Crowder: I have a question for the department. You mentioned the wording "done or admitted to be done in good faith in the exercise of their powers". I wonder if people are making an argument around part of this to protect first nations band councils from any complaints. If that were amended to remove "indemnity from Her Majesty in right of Canada, any employer or agent of Her Majesty".... I'm sorry, leave in that part; take out the government. Leave in band councils so they would be liable. Is that possible?

I want to refer back to the 1988 report. The issues we're talking about of residual discrimination are well known. They were tabled in Parliament, so it might be difficult to argue that the government in good faith didn't know about them. Could that be amended to just protect band councils and leave the government out on a limb?

Mr. Martin Reiher: On whether decisions are made in good faith or not, it's not because provisions are litigated that we can assume what the result will be. Government officials have to apply legislation until it's struck down. So with respect, I wouldn't conclude that there is good faith simply because later on provisions are—

Ms. Jean Crowder: Sorry, can I ask for clarification? Are you saying that even though the government may be aware of alleged residual discrimination, until there is litigation they don't have to act?

Mr. Martin Reiher: Thank you for the question. What I'm trying to say is that in a democratic society like ours there are courts and tribunals to adjudicate on disagreements between individuals, as well as between individuals and the state. Further to the attempt in 1985 to remove the discrimination from the Indian Act, issues were raised and litigated. The McIvor decision was the first in this set of litigation. What I'm expressing is that the government had a different view on whether the Indian Act was still discriminatory, and it couldn't be concluded before the court rendered a decision on whether there would be a pronouncement of discrimination or not.

On the first nations, clause 9 would protect a band council, for example, where there was per capita distribution to members. It's conceivable that persons added to the Indian registry and the band list of a band would attempt to participate in past per capita distribution on the basis that they should have been members of that band before. So I believe that clause 9 would protect the council of a band.

● (1645)

Ms. Jean Crowder: My question, though, is what would happen if we left band councils protected and removed the section around "Her Majesty in right of Canada, any employee or agency of Her Majesty", and just put band councils?

Mr. Martin Reiher: I can't speculate on how this provision would be interpreted. Clearly it wouldn't target the government; it would simply protect the first nation. It is possible.... There was a previous question that was asked by one member of this committee a few minutes ago about whether including this clause might actually weaken an existing doctrine because Parliament would have tried to modify it by adding something.

I think that withdrawing the dimension of Her Majesty, the crown, in this provision might have the effect of sending the signal that Parliament wanted to amend that doctrine. In other words, it might actually create a situation where the courts would be unclear on the state of the law with respect, for example, to the limited immunity or the restricted immunity doctrine.

The Chair: Thank you.

Ms. Crowder, are you okay on all of that?

Ms. Jean Crowder: I don't have the legal background to determine whether removing the government from this clause would cause the courts to be uncertain of the interpretation of the clause. I guess that would remain to be tested in courts, presumably.

The Chair: Thank you, Ms. Crowder.

Now we'll go to Mr. Duncan.

Mr. John Duncan: Thank you.

I wasn't sure where the conversation would go or end up. But what I will say is we had the broad change adopted by overturning the chair, and I believe that is completely out of order. In terms of this amendment, which is arguably problematic, I can assure—to the best of my knowledge—that this is not within the minister's mandate to go forward with the bill without this clause. So if you want to invest in this clause, it's worthwhile to have that as background.

The Chair: Are there any other comments?

● (1650)

[*Translation*]

So, shall clause 9 carry?

[*English*]

Mr. John Duncan: Could we have a recorded vote, please?

The Chair: It will be a recorded vote.

(Clause 9 negatived: nays 6; yeas 5)

[*Translation*]

The Chair: Shall clause 10 carry?

[*English*]

(Clause 10 agreed to)

The Chair: Now we will go to the short title, and we have an amendment there. I'll go to Ms. Crowder to speak to her amendment. We are now back to clause 1, members.

Ms. Crowder, you have the floor.

Ms. Jean Crowder: Very briefly, I think that the amount of discussion that we've had today and certainly from the witnesses calls into question whether this is truly a gender equality bill. So I am proposing that the short title be amended to say, “This Act may be cited as the Act amending certain definitions and registration provisions of the Indian Act."

The Chair: Okay. Is there debate or are there any questions?

Mr. Duncan.

Mr. John Duncan: Yes, I think this is disingenuous. The title of the bill is “An Act to promote gender equity in Indian registration by responding to the Court of Appeal for British Columbia decision in McIvor v. Canada...”. That's very clear. I think what the opposition has been doing is characterizing that title quite differently, and it's quite clear that title does circumscribe what Bill C-3, as tabled in the House, is trying to do.

The Chair: I didn't actually speak to the admissibility of this particular amendment. It is in fact admissible as it currently is because of the changes implemented by the committee here this afternoon.

For the benefit of members, I'm advised by the legislative clerk that a change in the title would have to be compelled by a change to the bill. In other words, as has been done here through the amendment to clause 2, when you make a substantive change to the bill that would compel a change to the title, then it would be and is admissible.

If I can just go backwards, had the amendment not been adopted as it related to clause 2, this amendment in fact probably would not have been admissible. I say that just to inform members of how these things work.

The amendment is admissible. Is there any further debate on the clause 1 amendment by Ms. Crowder?

Mr. Todd Russell: I call the question.

The Chair: Okay.

Mr. John Duncan: Could we have a recorded vote, please?

The Chair: Okay, we'll go to a recorded vote on amendment NDP-0.1.

(Amendment agreed to: yeas 6; nays 5)

The Chair: Now we'll go to clause 1 as amended.

● (1655)

Mr. John Duncan: That's the title. We'll ask for a recorded vote on this.

The Chair: We'll have a recorded vote on clause 1. This is the short title. I'll just remind members that we also will have the title. That will be another question that's coming.

(Clause 1 agreed to: yeas 6; nays 5)

The Chair: Next, shall the title carry?

Some hon. members: Agreed.

The Chair: Shall the bill as amended carry?

Mr. John Duncan: Hang on a second here. What is the question again?

The Chair: Shall the bill as amended carry?

Mr. John Duncan: We want a recorded vote on that.

The Chair: Okay. I'm at your pleasure.

An hon. member: I thought you were asleep there.

Hon. Larry Bagnell: I'll bet you on the outcome. Do you want to make a bet on the outcome?

Mr. John Duncan: No. I thought my arguments were so convincing that you'd change your mind, Larry.

Hon. Larry Bagnell: Okay.

The Chair: Let's proceed with the vote.

(Bill as amended agreed to: yeas 6; nays 5)

[*Translation*]

The Chair: Shall the chair report the bill as amended to the House?

[*English*]

Some hon. members: Agreed.

The Chair: Shall the committee order a reprint of the bill as amended for the use of the House at report stage?

Some hon. members: Agreed.

The Chair: There being no other business on the orders of the day, thank you, committee members, for your indulgence this afternoon.

This meeting is adjourned.