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Chair

Mr. James Bezan

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● (0850)

[*English*]

The Chair (Mr. James Bezan (Selkirk—Interlake, CPC)): Let's call the meeting to order.

Continuing on with clause 19, we have two amendments, NDP-8 and LIB-2. They are identical. Since NDP-8 was in first, I will deal with that one.

(On clause 19—*Powers of the Federal Court*)

The Chair: Ms. Duncan, you have the floor.

Ms. Linda Duncan (Edmonton—Strathcona, NDP): Thank you, Mr. Chair.

For clarification, although we can't talk about the next amendment, the agreement simply is that I proceed with mine and we can deal with the next one later. I was going to withdraw mine, but I will speak to this proposed amendment.

The proposal is that for Bill C-469, in clause 19, to be amended by deleting lines 22 to 38 on page 12.

Could I speak to that, Mr. Chair?

The Chair: You may.

Ms. Linda Duncan: In the process of drafting this bill and working with the drafters, we made the decision that because the bill was for the purposes of the community, we wanted to make it as user-friendly as possible. So originally we had drafted it with all of part 2, all the remedies together. Then we decided that it made more sense to divide them up into separate sections to make them distinct remedies, to make them clearer to anybody who might want to utilize them.

In the course of doing that, a mistake was made and that part that I have tabled to be removed was included and should have been excluded from clause 19. That is essentially why.... A number of the remedies provided in subclause 19(2) are already provided in subclause 19(1).

The Chair: Okay. Are there any other comments?

(Amendment negatived)

The Chair: Since those are identical, we'll continue on to clause 19 as a whole.

All those in—

Mr. Francis Scarpaleggia (Lac-Saint-Louis, Lib.): We're asking for a moment, please, Chair.

The Chair: Ms. Duncan.

Ms. Linda Duncan: I suppose as the tabler of the bill I probably should explain the section.

Mr. Chair, as is the case with all bills providing judicial remedies, normally the right of action is provided and then, for the purpose of clarification, the declaratory relief is provided. In drafting this bill, I reviewed other environmental statutes, including the Canadian Environmental Protection Act. Particularly because this provision, the Canadian Environmental Protection Act, would allow citizens to bring actions against the Government of Canada, it was appropriate that those remedies be relevant to bringing an action against the government. For example, that could include Public Works, the Department of Transportation, or the Department of National Defence.

In my experience as the chief of enforcement and in my experience over 40 years of working in enforcement agencies, the government has taken a complete transition in its opinion. Back as recently as 1989, the Department of Justice was of the belief that no actions could be brought against the crown because it was absurd that if you imposed a penalty, then the penalty simply is imposed and goes back into the government. But a change of opinion moved forward and the Department of Justice then decided it was very appropriate, because in all environmental statutes, pretty well all federal statutes, at the very beginning of that statute is a statement that the crown is bound, and therefore it is possible that actions can be brought against individual government agencies and individual officials in a department, including the ministers of departments.

So it's very important then that the kind of relief be specified and made relevant. In section 19, the type of relief that is specified is... rather than specifying that the crown would have to post a certain amount of money and so forth, I found it more relevant to—for example, if you go to paragraph 19(1)(e) “order the defendant to restore or rehabilitate any part of the environment”, well, in fact those kinds of orders have been issued against airport authorities, against the Department of National Defence, against Public Works when they're building facilities and they have impacted the environment. Similarly, it is more relevant to grant an injunction against some government authority proceeding with a development that hadn't been properly environmentally assessed or didn't have the proper approvals.

One important provision that we've added in, paragraph 19(1)(g), is to order the defendant to prepare a plan for or present proof of compliance with the order. Over time, enforcement agencies, not just in this country but in other countries, including the United States, Mexico, and around the world, in collaborating through the International Network for Environmental Compliance and Enforcement, have found that what's most important is to be putting in a lot of work on enforcement compliance strategies and plans and, where there are violators, requiring them to do specified actions to come into compliance. So a number of those kinds of provisions are included in here to make this a very pragmatic, constructive measure.

I think that's probably all I want to present. I'm happy to take questions.

The Chair: Thank you.

Mr. Warawa.

Mr. Mark Warawa (Langley, CPC): I'm fine.

The Chair: Okay.

Mr. Scarpaleggia.

Mr. Francis Scarpaleggia: You mentioned airport authority. This is just a point of information. What is the status of airport authorities? I mean, they're not governmental; they're independent. They have leases with the government. I'm told in fact that they don't even have to do environmental assessments or release those environmental assessments. Does Ms. Duncan know anything about that, which she could add?

Ms. Linda Duncan: I'm mixing things. Airports actually are heavily regulated by the federal government and are subject to federal laws, the Aeronautics Act and so forth. Just like many other facilities, they can be shipping hazardous goods, and because they've got a lot of fuel and so forth being stored, utilized, and spilled, they're watched very closely.

On the question of whether or not they require environmental impact assessments, that's a really good question. I'm sorry I can't answer off the top of my head. Probably under the law they do, but they could be simply required to do a simple...I forget the first stage.

● (0855)

Mr. Francis Scarpaleggia: Go on.

Ms. Linda Duncan: Just an initial review rather than a full environmental impact assessment. If they were going to expand it in a major way, and if it was going into a wetland or so forth, there is a strong chance that there would be pressure for a complete environmental impact assessment.

Mr. Francis Scarpaleggia: Thank you.

The Chair: Mr. Bigras.

[*Translation*]

Mr. Bernard Bigras (Rosemont—La Petite-Patrie, BQ): Thank you, Mr. Chair.

I would like to come back to the question raised by my NDP colleague. In fact, clause 19 is fairly clear:

> 19. (1) Notwithstanding remedial provisions in other Acts, if the Federal Court finds that the plaintiff is entitled to judgment in an action under subsection 16(1), the Federal Court may
>
> ...
>
> (c) order the parties to negotiate a restoration plan in respect of the significant environmental harm resulting from the contravention and to report to the court on the negotiations within a fixed time;
>
> ...

There is no set deadline; it's a question of a "set time frame". What could "set time frame" mean? Is it short, medium or long term? Is it two years, three years, 10 years?

[*English*]

Ms. Linda Duncan: The reason why that would be drafted in that way is because it gives flexibility in the court for all the parties to negotiate what would be a reasonable timeline. It may be a small area that's being restored. It might be a significant restoration. It may be that it has to be done in a phased manner. What that provides for is negotiations within a fixed time. It allows for the court to talk to all parties in the case, as there may be additional interveners.

One thing I would add in there for the provision that you've raised there...the reason why it says “notwithstanding remedial provisions in other acts” is that these are the remedies available under clause 16, and they could relate to another law that provides for additional remedies.

The Chair: Mr. Woodworth.

Mr. Stephen Woodworth (Kitchener Centre, CPC): Thank you, Mr. Chair.

We're now debating clause 19, correct?

The Chair: Correct.

Mr. Stephen Woodworth: Again, it's a rather complex clause, which of course has in paragraph 19(1)(i) different kinds of relief that the court can order, and in subclause 19(2), four different kinds of relief that the court can order.

I should say at the outset that the reason I opposed the deletion of subclause 19(2) is that it is possible—in fact, I think Ms. Duncan just alluded to the fact that government agencies can in fact be required to obtain permits and authorizations to build. If it's Public Works and there are environmental issues involved, they indeed do have to get permits, so potentially, if one were to preserve the rather—I'm looking for a less impolite word—unusual terms of this act, there would be no reason why it ought not to be imposed against an agency of the federal government as well as other agencies. That is subclause 19(2).

On the other hand, I say unusual because this is, in many respects, without precedent in law, and I'll refer to that again in a moment.

Certainly, when it comes to subclause 19(2), the way those provisions are drafted make them singularly inappropriate to enforce against government agencies. I'm not saying that if we have this kind of an act it shouldn't be enforceable against government agencies. But the notion of a government agency providing financial collateral for the performance of its obligations does seem a little odd, because it doesn't indicate to whom the money ought to be paid or that the government should pay an amount to restore an area. Where, let's say, the Department of Public Works put up a building in violation of some public trust obligation under this act and the court orders it to pay an amount of money to restore that area, there's no indication in subclause 19(2) to whom that would be paid.

Nonetheless—

● (0900)

The Chair: A point of order, Ms. Murray.

Ms. Joyce Murray (Vancouver Quadra, Lib.): Are we debating subclause 19(2), which we've already voted to delete?

The Chair: No, that subclause is still there. The amendment was defeated.

Ms. Joyce Murray: Sorry, Mr. Chair.

Mr. Stephen Woodworth: This is a good case in point of the difficulty we have with the time allocations and closures that have been debated. These are complicated issues. I have been talking quickly, and perhaps too quickly, to get my point across, so I really should repeat this for my friend across the way, since I didn't quite articulate for her what I'm trying to say.

I voted against deleting subclause 19(2) because there are government agencies that do require permits to put up public buildings or to do other things. Let's say the public works department puts up a building and it clearly involves some harm to the environment, but the environment department of the Government of Canada assesses it and determines that it should be authorized anyway, because sometimes, even if there is harm to the environment, the benefit of a particular undertaking outweighs the harm.

So in this case, if the court sees fit, it can order that kind of an undertaking. It violates the public trust duty that is imposed upon the government under this act, and it can order the government to take remedial action. For example, the court could order the government to pay an amount to restore or rehabilitate that part of the environment that the public works department has harmed.

However, having said that, this subclause 19(2) is sort of necessary in the scheme of this unusual act. In fact, it makes it even more unusual because the provision doesn't say to whom the money should be paid and it in effect sets up one department of the government to be forfeiting money from another department of the government. It creates all sorts of oddities.

That's my point with respect to this subclause, and I regret that it's taken so long, because there are more injurious and harmful clauses here that we really need to discuss in the five minutes or so that I have left, assuming my colleagues give me their one and a half minutes apiece.

The Chair: You have two and a half minutes left.

Mr. Stephen Woodworth: I have to say that the spirit of this act is violated by the fact that we are trying to say we want input on environmental issues and yet members of Parliament, who are the elected officials, are being denied a voice in the discussion of this act. I feel quite strongly that this is an incredibly foolish way to proceed. I can't say it in any polite way.

However, I want to refer to a couple of things about this. One of them is that paragraph 19(1)(f) has no parallel in Canadian law anywhere. I don't say these things without having researched them. The particular language used in paragraph 19(1)(f) is not replicated in the United States, for example. Indeed, the language used in paragraph 19(1)(f) has not been used in any other Canadian legislation in relation to orders that can be made against the crown. The result of that is that anything we say about how the courts are going to interpret paragraph 19(1)(f) is pure speculation. We don't know whether they will order the government to take remedial action when they think the government has not acted.

For example, on the issue of greenhouse gases, day after day we hear people in the environmental activist community say that the government is not acting to curb greenhouse gases. Well, if an individual or a group, even an American group, were to come to Canada and take advantage of this legislation, and if they were able to get the court to agree that the government has not acted on greenhouse gases, then under paragraph 19(1)(f) we would be left to speculate. Can the court order the government to act on greenhouse gases, and if so, in what respect? And what lawsuits can the government be ordered to launch against private individuals under this?

I see I'm out of time and I haven't even scratched the surface.

● (0905)

The Chair: Are there any other comments?

Ms. Duncan, you have roughly three minutes left—not even.

Ms. Linda Duncan: Thank you, Mr. Chair.

I think it's important to point out that, yes, indeed, this law, Mr. Chair, does add new, innovative, leading-edge provisions. It's the entire intent of this bill to introduce and expand on the rights of citizens to participate in environmental decision-making and to hold the government accountable. Those are completely consistent with the platform of the Conservative Party of Canada, to provide for grassroots decision-making and to make sure that government is accountable. So far in law we don't have a lot of mechanisms to really ensure a voice for citizens. It's been revealed that in most cases ministers responsible for the environment are meeting mostly with industry and not with citizens.

This is providing forums for people to actually assert those responsibilities.

If you look, for example, in the measure that the member is mentioning, 19(1)(f), "order the defendant to take specified preventative measures", well, that's logical because the action is to deal with the government's duty as the trustee of the environment to protect the environment in the interests of Canadians and not to violate the right to a healthy, ecologically balanced environment.

When the court interprets this and when the actions are brought, they're going to be considered in the context of other environmental laws and responsibilities and commitments that the Government of Canada has signed on to, obligations in environmental law and commitments that include the precautionary principle. That is precisely why that provision is added in.

The Chair: Thank you.

Seeing no other hands, I'll call the question.

Mr. Mark Warawa: A recorded vote, please.

(Clause 19 agreed to: yeas 6; nays 5)

(On clause 20—*Terms of an order*)

The Chair: Mr. Woodworth.

Mr. Stephen Woodworth: Thank you, Mr. Chair.

Clause 20, of course, also provides for a variety of orders that the court can make, including a cleanup order, a restoration order, and an order to pay a fine that directs moneys to environmental protection or monitoring.

The first thing that should be said about this is, of course, that by allowing the court to have such powers, this committee and the Commons, if this bill passes, would in effect be allowing the court to set environmental priorities. Particularly, I'm referring to paragraph (c), which allows the court to direct money into environmental protection or monitoring programs.

The government, of course, has a finite budget within which to work. It's juggling a lot of balls in a variety of areas, including employment insurance, seniors' benefits and pensions, and our armed forces—any number of things—so the amount of money that the government can devote to environmental programs is limited.

Right now the executive function of government, which in a constitutionally accepted way is ordinarily left to the cabinet, allows the cabinet essentially to determine, of that limited envelope of money that's available for environmental spending, how much will be directed, for example, into research on species at risk, or how much will be directed into cleaning up or readiness to clean up oil spills in the Arctic, or how much will be directed into the enforcement of environmental regulations. That executive priority-setting function is now going to be subject to judicial order based on the priorities of litigants who come to court and the priorities of judges who decide their cases. This is an inappropriate use of the executive function in the sense of turning it over to the courts.

The other issue is that of course the government, as I alluded to in earlier comments, does have the power to approve projects right now, where warranted, despite the significant adverse environmental effects. So in this particular case, if the government enters into an agreement with *la province de Québec* to build a hydroelectric project *avec* Hydro-Québec, and that hydroelectric project involves the flooding of a certain number of hectares in northern Quebec and perhaps interference with the fish that benefit from that area of the waterway or the wildlife that benefit from the flooded area, the Government of Canada is quite empowered to enter into agreements with the Province of Quebec to permit those works to go ahead.

However, under this act the government will be subject to the possibility that a judge—if a judge feels that such an agreement and such an undertaking is unreasonable, or for any other reason the judge chooses to say there are significant adverse environmental effects, which of course there will be—may order the government to issue a restoration order requiring the Government of Canada to, in effect, restore the waterways and restore the wildlife habitat that may have been significantly adversely affected by a project of Hydro-Québec.

Of course, the government, in pursuance of that, would need to resile from its agreement with the Province of Quebec and would need to take, in effect, court action against the Province of Quebec to compel the Province of Quebec to remedy the significant adverse effects of such a project. This will have a very deleterious effect on federal-provincial relations if and when a court does decide to intervene in what has ordinarily been an executive function, at least up until this point.

Of course, the difficulty is noted by the hydroelectric producers in Canada who appeared before this committee, who, by the way, speak for Hydro-Québec, and in that respect speak for the people of Quebec, if no one else does.

● (0910)

The first time a project of this nature, a hydroelectric project, which will have environmental benefits and will have benefits for the economy of Quebec, is in fact brought to a halt as a result of an order such as this under the act, I hope the people of Quebec remember that their representatives on this committee did not speak up on their behalf. They did not, in effect, take action to prevent this kind of—

The Chair: A point of order. Go ahead, Mr. Bigras.

[*Translation*]

Mr. Bernard Bigras: I think my colleague's comments go beyond the scope of the clause currently under review. He's also impugning the opposition's motives.

Mr. Chair, I would ask you to call him to order and remind him that he must stick to the clause that we're looking at right now. If he has nothing more to say, he need only end his comments. I would like him to stop impugning the opposition's motives.

● (0915)

[*English*]

The Chair: On that point of order, Mr. Warawa.

Mr. Mark Warawa: Mr. Chair, I see that you have a stopwatch to make sure that you're guiding and restricting the time within the eight minutes.

I see from across the table that there are some papers there, but I don't see any stopwatch with Mr. Bigras. He has indicated that you're not keeping time. I would wonder how he has determined that you're not—

The Chair: He didn't say I wasn't keeping time.

Mr. Mark Warawa: He did. He said that he was well over the eight minutes. At least, that's what the translation said.

The Chair: Mr. Woodworth is at about five minutes, 45 seconds. I stopped the clock for the point of order. As long as we're being relevant, Mr. Woodworth, that is the key to all this, so I do ask that you speak to the clause. I believe that you were, so I ask you to continue.

[*Translation*]

Mr. Stephen Woodworth: Mr. Chair, I accept Mr. Bigras' argument. It's true that there has not yet been a vote on the matter.

[*English*]

I will modify my comments to simply say that if the members of the Bloc support this provision, as they supported clause 19, then I hope that if this clause is used to put a stop to an environmental hydro undertaking in Quebec at some future date, the people of Quebec will remember that their representatives at this table did not speak up for their interests in putting an end to this kind of mischief with the government—

An hon. member: [*Inaudible—Editor*]

The Chair: Order. Mr. Woodworth has the floor.

Mr. Woodworth, continue.

Mr. Stephen Woodworth: I am having some difficulty speaking over Monsieur Bigras, Mr. Chair. Thank you.

The other interesting point about this is that this act is intended to be an environmental bill of rights. Consequently, it will supersede all other legislation. Indeed, this act is intended to be legislative direction to the government that its fiduciary duties under this act are paramount. And the court is going to follow that direction.

The reason I mention that is that I want to go back so that we understand how clause 20 is going to relate to clause 16. I am mindful of the fact that subclause 16(4) was deleted. But I want to remind people that, as Ms. Duncan explained to us, the Supreme Court of Canada has apparently already implemented provisions similar to subclause 16(4) in some of its decisions. The deletion of that subclause does not mean that the Government of Canada will be able to override the provisions of clause 20 in any other way, save and except with an act that contains what might be described as a notwithstanding clause. In my opinion, at least, the only way the Government of Canada or the Parliament of Canada will be able to override this act, since it's a fundamental bill of rights, will be if the subsequent authorizing legislation says that it's not withstanding the provisions of this act.

Once again, I am out of time, without having hardly scratched the surface.

The Chair: Thank you, Mr. Woodworth.

Are there other comments?

Ms. Duncan.

Ms. Linda Duncan: Mr. Chair, briefly, just to clarify the record, I don't believe that when we discussed subclause 16(4) I said the Government of Canada had overridden that or provided that in other laws. I just said it was provided by judicial precedent.

I understand that some of the members of the committee are trying to rile members of the Bloc and to suggest that perhaps they're not looking after the interests of Quebeckers on the expansion and use of hydroelectric power. I think we can leave that up to the representatives of the Bloc. They have a strong record in the House of speaking up on protection of the environment, and I will rely on that.

I would just like to point out that just because the right is provided, the right of standing is given and certain remedies are provided, does not automatically mean that the court will offer that relief. It doesn't mean automatically that somebody will win the case, and it doesn't automatically mean that somebody will bring an action. We heard plenty of testimony from witnesses that despite the numerous actions available in federal and provincial law for citizens to take the government to court, there has not been a flood of litigation in Canada. These provisions are here as a safeguard and to bring Canada into compliance with most nations of the world, which have actually constitutionally entrenched environmental rights. This is simply a statutory measure.

That's all I wanted to add, sir.

● (0920)

The Chair: Thank you.

Seeing no other hands, we'll go right to the question.

Is this a point of order, Mr. Bigras?

[*Translation*]

Mr. Bernard Bigras: No. But I'd simply like to make a small comment, in response to Mr. Woodworth. I have read and reread the memo that we were sent by the *Conseil patronal en environnement du Québec* about Bill C-469. In fact, some clauses of the bill, including clauses 16, 22 and 23, bother that organization a little, but I see nothing in the brief that the organization presented to us that indicates a problem with the clause that we are currently looking at.

When Mr. Woodworth claims that this clause is so important that Quebeckers would tear their hair out, I don't know what he's referring to. I'm also trying to find mention of clause 20 in the speaking notes of the witness from the Canadian Hydropower Association. Of course, they mention clauses 16, 19 and 23, but there's nothing in clause 20.

We would support the clause that was presented to us.

[*English*]

The Chair: Thanks.

On a point of order, Mr. Woodworth.

Mr. Stephen Woodworth: I took Mr. Bigras to have been asking a question of me, and I don't know whether the allocation rule that we made earlier would prevent me from answering the question—

The Chair: He has to raise his point of order first. Let him finish his point of order and I'll come back to your point of order.

Mr. Woodworth, make sure it's a point of order.

Mr. Stephen Woodworth: The point of order is to inquire. I don't know whether the time limit rule that the opposition passed in this study prevents me from answering a question that seemed to be asked of me directly in the course of debate—

The Chair: I will say that your time has been used, your eight minutes. You can speak on points of order, but you cannot respond in debate. Your eight minutes are used. Your debate is done.

Mr. Bigras, on a point of order?

Mr. Bernard Bigras: No.

The Chair: You're done.

Mr. Warawa, on this point of order.

Mr. Mark Warawa: That's fine, Chair. I was going to point out that you had already ruled, so you couldn't then provide Mr. Bigras—

The Chair: I thought maybe he was raising a different point of order.

Okay. Let's go to the question, and we'll record it.

(Clause 20 agreed to: yeas 6; nays 5)

(On clause 21—*Costs*)

The Chair: Are there comments?

Mr. Warawa.

Mr. Mark Warawa: Mr. Chair, clause 21 provides that a plaintiff bringing an environmental protection action against the government may only be ordered to pay costs "if the action is found to be frivolous, vexatious or harassing" and that it may be entitled to counsel fees, legal fees, regardless of whether they are used, whether that person or organization has used counsel.

Chair, I think that's of great concern, or should be. The provision would lead to plaintiffs being awarded fees for counsel even if counsel was not used. That would act as an incentive to bring a lawsuit against the government, creating a more adversarial relationship between government and the public.

We've heard clearly from the different witnesses that this is supported not by Canadians generally but by special interest groups. Of course, members of the coalition have regularly been seeing and consulting special interest groups. Is this good for Canada? No. It removes the Federal Court's existing discretion, which is shocking, toward costs against a plaintiff only if the action is frivolous. They have that discretion now. That will be removed.

Chair, what it would actually do is create an incentive. In what way? Well, the person or entity that brings this action against the government would be able to profit. If they do not have counsel and they take the action themselves, they will profit from this action. Again, we heard that the likely groups are special interest groups that would be taking this action. So they can actually profit from this.

So here we have coalition members supporting new legislation that would supersede every other piece of legislation that was developed through consultation in the interests of Canadians, in the interests of a sustainable development—that principle—that we just passed. Under this bill, which is a special interest group bill, they could take American-style litigation against the government and profit for it. We had a vote in the House—I think it was a couple of months ago—on sustainable development. At the same time as the NDP introduced this bill—at the same time—they voted against sustainable development. So we see a trend—

● (0925)

The Chair: A point of order.

Ms. Linda Duncan: On a point of order, Mr. Chair, I grow tired of this false accusation in both the House and in this committee. At no time have I or any of the members of my party voted in the House against sustainable development. There was simply a bill requiring that a report of the commissioner be tabled in the Senate, and in no way did that provision provide that the government was for or against sustainable development.

The Chair: I believe that is debate—

Mr. Mark Warawa: Speaking to the point of order?

The Chair: It's a debate of the facts; it has nothing to do with order. What Ms. Duncan was raising was debate, not a point of order, so it's a matter of debate of the facts.

The one thing I will ask is that you stay relevant to the clause we're debating.

Mr. Mark Warawa: I think I do that, Chair.

Am I able to speak to that point of order?

The Chair: No. I've ruled. So if you can, continue with your discussion on clause 21, please.

Mr. Mark Warawa: Before I begin my time again, Chair, would I be able to speak to her comments and actually present and table a record that actually indicates...? Sustainable development is a very important part of this bill and this clause. It should be, and it's not, and I think that's a relevant point.

In fact, I have here, from *Hansard*, a record of all those who voted nay, and it was every NDP member. So, Chair, in fact it is here. Would you like to have this tabled?

The Chair: We don't table documents at committee; we table documents in the chambers. So it has absolutely nothing to do with what we're talking about right now in clause 21. Essentially you're just discussing an item, a fact, on which you have an opinion different from Ms. Duncan's.

So I ask you to continue on to clause 21. You have just over four minutes left.

Mr. Mark Warawa: Thank you, Chair.

What should be in this clause is a balance, including sustainable development. It's missing. It's missing in every clause of Bill C-469. On the matter of sustainable development, the House voted on December 1, two months ago. The NDP—every member of the NDP—voted against sustainable development. I have it right here in *Hansard*. I'm not questioning motives, but I'm sharing facts that the NDP did not support sustainable development.

They do support, though, changes to Canadian legislation that would permit special interest groups to profit, and this is actually providing an incentive for them to take action. It removes the Federal Court's existing discretion.

What is the result of this? Well, it's anti-sustainable development. As we've heard, it creates American-style litigation. It empowers special interest groups and activists trying to intimidate. We heard from the witnesses that the reason they supported Bill C-469 was that they wanted to have a stick to bully and intimidate.

It will be bad for the environment. Why? Because it creates duplication. It creates red tape. You have this government trying to eliminate red tape and the coalition trying to increase red tape and duplication. It will increase administrative and legal costs for government and industry. It will threaten existing first nations agreements.

It'll threaten existing facilities like Hydro-Québec, and that's why Hydro-Québec is against Bill C-469. That's why Mr. Woodworth brought this up with members of the Bloc. I too am puzzled about why Bloc members would be supporting something that would be bad for Quebec. They're supposed to be standing up for Quebec, and it seems that this government is the only one standing up for Quebec, for all Canadian provinces, for all territories, for all Canadians. It'll threaten B.C. Hydro, and B.C. is my province. I'm very concerned about this.

We heard from the witnesses that it will kill jobs. How will that happen? It will create uncertainty in existing permits, uncertainty in existing legislation, and the economy is the number one thing for Canadians right now. This government is committed to improving the economy and creating jobs, and Bill C-469 will kill jobs.

Clause 21 is one of the important clauses within the bill. It creates an incentive for certain residents or entities within Canada to seek profit. They will be able to receive costs for counsel even if they don't have counsel. That's why I'm hearing clearly from Canadians that this is a bad bill. Clauses 19 and 20 carried, even though members of the coalition wanted to amend them, acknowledging that they were bad. Yet they supported them even without having them amended.

This bill moves forward. Our time is limited, which is also a shame in that we can't speak adequately.

Chair, I think I've made my points. Clause 21 is bad and we will not support it.

● (0930)

The Chair: Thank you.

Ms. Duncan.

Ms. Linda Duncan: Thank you, Mr. Chair.

I have to say, Mr. Chair, that I am finding these presentations a little incredulous. The process of reviewing bills by committee provides committee members who feel that certain provisions of the bill should be added or subtracted and that the bill could be improved every opportunity in constructive debate to table amendments. We've heard in provision after provision, including the one we're discussing right now, that the representatives of the Government of Canada, the Conservative Party, are extremely concerned that there isn't reference to sustainable development in every provision of this bill. I will note that they did not offer that when they brought forward their various bills.

I have been completely open to any suggestions for amendments to this bill, and if they are sincere in wanting to have those provisions included, I would encourage them to table those so we can debate them, and I think they would find a lot of support. I might add that we need to review back, in looking at clause 21, the very purpose of the bill and the intent of this part of the bill, and particularly clause 16, that these remedies are attributed to.

This Government of Canada has said that it believes in a balance between economic development and environmental protection, and yet there has been a record, in decisions by this government, in both its expenditures and in its decisions, to exclude the public from decision-making and to exclude consideration of the environment. Evidence of that is in the record of the mounting number of cases being filed against the government by either first nations or by environmental organizations, simply for failure to enforce mandatory provisions of statutes such as the Species at Risk Act. The very purpose of this act is to ensure that when the federal government is making decisions to balance the various interests to ensure that we have sustainable development, environmental protection is thoroughly considered.

A case brought under this part of the act would not succeed unless the plaintiff proved that the government had failed to consider protection of the environment and the responsibility of the government to consider that in its decision-making. I find it frankly a very specious argument to be arguing continuously that sustainable development is not here. Sustainable development is going to be delivered in this country by a whole coterie of projects, of activities, by industry, by citizens, by the government, and by having provisions to ensure and require that both economic development and environment are considered together and integrated.

As to the question of whether or not this provision allows for some kind of unfair profiteering, I find it frankly absurd. The rules of court will determine what kinds of costs are awarded, and this in no way derogates from that.

On many occasions, small organizations can't afford to hire legal counsel but are extremely brave and come forward and intervene in a lot of proceedings, and this simply provides that their work done, they can claim the costs of providing that. That could include transportation. That could include a hotel when they bring the case for it. It's hardly profiteering.

Thank you, Mr. Chair.

● (0935)

The Chair: Thank you. Seeing no other hands, I shall call the question.

(Clause 21 agreed to: yeas 6; nays 5)

(On clause 22—*Right to review a government decision)*

The Chair: We're moving down to the heading, a new one, and as I mentioned at the last meeting, on page 733 in O'Brien and Bosc, chapter 16 on the legislative process, it says, "In past practice, such headings have never been considered to be part of the bill and have not therefore been subject to amendment." However, footnote 125 to the preceding says, "In recent years, however, some authorities on the legislative process have modified their position in this regard in response to jurisprudence, and Committees of the House have occasionally amended headings."

That has happened twice now in this committee.

Ms. Duncan.

Ms. Linda Duncan: Thank you, Mr. Chair.

Mr. Chair, I wish to table before the committee the following amendment: that Bill C-469 be amended by adding before line 24 on page 13 the following: "JUDICIAL REVIEW".

I'd like to speak to that proposed amendment.

Consistent with the introduction of the previous header, this header, "JUDICIAL REVIEW", is recommended to be added at this point because this is the part of the bill that deals with the legal action, which is judicial review, and it is intended to be added in to make the bill more user-friendly.

The Chair: Thank you.

Mr. Woodworth.

Mr. Stephen Woodworth: I have just a brief comment.

I would just remind those who are listening at home—because I know that my comments don't get well received by the opposition—that this is simply a misleading tactic. What we are really talking about in these sections is lawsuits, and the real title ought to be that: "Lawsuits".

So I will not be supporting this amendment.

Thank you.

The Chair: Okay.

Seeing no other hands, I shall call the question on NDP-9.

(Amendment agreed to: yeas 6; nays 5)

The Chair: We now shall go to amendment NDP-10, on clause 22.

Ms. Duncan, please.

Ms. Linda Duncan: Thank you, Mr. Chair.

Shall I read the entirety of it into the record?

● (0940)

The Chair: No, I think everybody has reviewed it.

Ms. Linda Duncan: Okay. I'll just briefly summarize.

I wish to amend Bill C-469 in clause 22 by adding, after line 4 on page 14, new paragraphs 22(3)(a) to (i).

May I speak to that, Mr. Chair?

The Chair: You may.

Ms. Linda Duncan: I'm recommending the addition of subclause 22(3) simply to provide clarity on the kinds of relief ordinarily provided in a judicial review action and to provide more of a user-friendly version of the bill so that all readers of the bill, including those who might consider an action, understand the types of action that can be brought in a judicial review action.

The Chair: Thank you.

Ms. Linda Duncan: And they're consistent with other laws.

The Chair: Mr. Armstrong.

Mr. Scott Armstrong (Cumberland—Colchester—Musquodoboit Valley, CPC): The addition of this amendment doesn't change the basic problems with this section of the bill. The Federal Court already has discretion to grant public interest standing to those who meet the test set out in the sections appropriate. That the Federal Court retain this discretion...it allows the court to discourage frivolous litigation, preserves scarce judicial resources, and ensures that the determination of an issue benefits from the contending points of view of those most directly affected by this issue.

As the Chamber of Commerce observed, this provision could increase litigation on environmental matters, which in turn could lead to a situation where government priorities are determined by the success of individual litigants as opposed to the broader public interest.

If we look at the last section, we are now providing incentives to people to take action against the government. And we say "action", but as my colleague has said, it actually means "lawsuits". The Chamber of Commerce is very concerned that it's going to lead to a cascade of lawsuits from many people from across the country on individual projects that have no direct effect upon them.

So I'm going to be voting against this section in the bill.

The Chair: Thank you.

Monsieur Bigras.

[*Translation*]

Mr. Bernard Bigras: Mr. Chair, perhaps we would need some clarification about the amendment that was presented to us. I see that it looks a lot like paragraph 19(1)(*a*) on page 11, where declaratory relief is requested.

Why is the honourable member requesting this amendment to clause 22? What is the purpose? I see that the wording is similar. I understand that it's for the amendment…

[*English*]

The Chair: Excuse me, we're having some trouble hearing the translator.

It's very quiet; maybe you could speak a little closer to the mike.

Please continue, Monsieur Bigras.

[*Translation*]

Mr. Bernard Bigras: In fact, I would say that the wording of amendment NDP-10 that was presented to us is similar to the wording that's already in clause 19 of the bill, on page 11.

I'd like to know what motivated the honourable member to introduce this amendment.

[*English*]

The Chair: Ms. Duncan.

Ms. Linda Duncan: Thank you, Mr. Chair.

Monsieur Bigras, through the chair, a judicial review action is different from other civil actions. One brings judicial review for a specific declaratory relief. You're quite right, Monsieur Bigras, that some of the remedies overlap, and that's somewhat normal. Generally speaking, quite often somebody brings a judicial review action, which is a very straightforward action, to have the court declare and to clarify what the law provides and what the duties and responsibilities are. Once that is done, they may seek additional recourse in the courts, but the court can also direct that certain actions be taken, that there be compliance with the law, for example.

There have been quite a few judicial review actions against the Government of Canada on the Canadian Environmental Assessment Act, where they sought a declaration to clarify what exactly the requirements were under that act, and then in certain cases to ask that the act be applied was sought. In some cases, the court would declare that they had to actually apply the act properly, and then they might have to review part of the project again and so forth.

So you're quite correct that some of them do repeat, and that's because the remedies are available under both circumstances. But generally speaking, one brings a judicial review simply to clarify the law and direct that the government deliver on its responsibilities.

● (0945)

The Chair: Thank you.

Mr. Woodworth.

Mr. Stephen Woodworth: Thank you, Mr. Chair.

I just want to point out that in this amendment we have at the outset of the clause the sort of reverse of the notwithstanding provision, which, I mentioned earlier, might be applied if the legislature ever wanted to override this act. I think it's important to note this, because when this particular provision says “notwithstanding remedial provisions and other acts”, the court can go ahead and do these things. If the legislature passed this act, it would be clearly expressing the intent, which I mentioned earlier, that this act be superordinate and supersede all other legislative provisions.

That places this act in a very special category of acts that do have that quality of being superordinate. That's why, in my opinion, it is incumbent upon us to take the highest care when discussing an act like this that will have such a fundamental impact upon people and businesses and job creators and ordinary Canadians, hunters, and trappers across the country who might be affected at the instance of a lawsuit from someone anywhere in the world who comes to Canada to engage in these kinds of lawsuits.

I must say, as a new parliamentarian, I'm very disappointed and rather shocked that we would be discussing this kind of legislation in the manner that we have been. If I haven't said so already, I want to say that I consider a number of these provisions to be very irresponsible, and yet they're passing anyway.

I don't know how I can make clear to those around this table the severity and the importance of what they're talking about today. It's really for that reason that I point out this notwithstanding clause in this amendment, which makes the intention of this act very clear.

I'm sure Ms. Duncan wouldn't disagree with me that she wants this act to be superordinate and to supersede any other laws or regulations in Canada. I'm sure she wouldn't disagree with me when I say that she would regard this as a piece of fundamental legislation of great importance. The only point where she'll disagree with me is that she is speaking on behalf of environmental activists who want the ability to challenge the government and other Canadians with lawsuits. I'm speaking on behalf of those Canadians who would like some balance in their laws and some more moderate provisions. I think we both agree, however, that this is a superordinate act, and certainly the notwithstanding clause in this amendment demonstrates it.

Thank you.

The Chair: Thank you.

Ms. Duncan.

Ms. Linda Duncan: I just want to clarify for the record, Mr. Chair, that I don't really appreciate members of the committee imposing motives on me, or whose interests I'm representing, when I'm putting forward this legislation we're trying to argue in support of.

I've had the experience of working with and assisting many persons concerned about the impact of developments on their environment. That includes farmers, fishers, first nations communities, Métis communities, fish and game associations, wildlife organizations, birding organizations, nature organizations, and individual citizens who are concerned about the impacts of certain developments on their communities.

I have other comments about the overall bill. My understanding is we're supposed to be just speaking to the amendment. I will add those later on, but I don't really appreciate having motives impugned to me—except for the fact that I agree that I do think this is a very important bill and I think it is necessary to ensure that environment is considered in all decision-making.

● (0950)

The Chair: Thank you.

Mr. Woodworth.

Mr. Stephen Woodworth: Thank you very much, Mr. Chair.

I want to apologize to Ms. Duncan. I think she's correct that we ought not to be impugning motives, and I do sincerely regret that my comments came out that way.

What I more properly should have said, Mr. Chair, is that everything on the bill that Ms. Duncan has proposed and everything that I have heard her say in this proceeding is supportive of environmental activists who wish to bring lawsuits against the government and against ordinary Canadians. Nothing in this act and nothing I have heard Ms. Duncan say in this proceeding in any way supports job creators and hunters and trappers and other Canadians who wish to go about their business in a system wherein their democratic representatives decide—with balance—how to manage the environment.

Thank you.

The Chair: Thank you.

Mr. Warawa.

Mr. Mark Warawa: Chair, just to support what Mr. Woodworth has said, the witnesses who came to the committee were basically divided up into two groups. There were witnesses who represented industry and Canadians in general, and they opposed Bill C-469. The only groups that supported Bill C-469 were those who were special interest groups, actual groups that would profit from Bill C-469. This supports what Mr. Woodworth has just said.

The Chair: Okay. Seeing no other interventions, I'll call the question on amendment NDP-10.

(Amendment negatived)

The Chair: We will move to amendment NDP-11. Ms. Duncan.

Ms. Linda Duncan: Mr. Chair, I wish to table an amendment to the effect that Bill C-469, in clause 22, be amended by adding after line 4 on page 14 the following:

> (3) In making a decision or an order respecting an application brought under subsection (I), the Federal Court retains jurisdiction over the matter so as to ensure compliance with its decision or order.

The Chair: Do you wish to speak to it?

Ms. Linda Duncan: Yes, thank you.

I've brought forward this amendment as a result of litigation that was proceeding through the courts at the time the bill was being drafted, and this provision has been recommended to me by a number of legal experts so as to provide certainty that the Federal Court retains the jurisdiction to ensure compliance with any decision or order that it renders.

The Chair: Are there any comments?

Mr. Armstrong.

Mr. Scott Armstrong: Again, this amendment doesn't change the basic premise of the section. The Federal Court already has the discretion to grant public interest standing to those who meet the test set out in the section. It's appropriate that the Federal Court retain this discretion. It allows the court to discourage frivolous litigation. And that's what we're talking about today: the increase in frivolous litigation caused by this bill. We need it to preserve scarce judicial resources and ensure that the determination of an issue benefits from contending points of view of those most directly affected by the issue.

This allows any entity—it could be a foreign entity that sets up in Canada—to challenge any project in any province, including Quebec, projects in Atlantic Canada, projects in Alberta, B.C., and all across the country. You don't even have to be a Canadian citizen to do it. Nor does this amendment address the concern that is likely, that this provision would increase litigation on environmental matters, which in turn could lead to a situation where government priorities would have to be determined not by the best interests of the citizens of Canada but rather by the success of individual litigants, as opposed to the broader public interest.

Therefore, I'll be voting against this amendment.

● (0955)

The Chair: Ms. Duncan.

Ms. Linda Duncan: I feel it necessary, Mr. Chair, to yet again clarify the false information that the members across the way are providing. As I have pointed out numerous times, the term "entity"—

The Chair: Mr. Woodworth, on a point of order.

Mr. Stephen Woodworth: The difficulty I'm having with what Ms. Duncan has just said is that she has applied that accusation of false information indiscriminately. To my knowledge, I haven't provided anybody with any false information in respect of this debate. I am not sure I correctly remember the parliamentary rules that prevent a member from accusing another member of lying, but to my ear, I've just been accused of lying. And I ask the chair to rule that out of order and to direct Ms. Duncan not to repeat such slanderous accusations, at least if they're directed at me. I'll let my colleagues speak for themselves, but I rather suspect they feel the same way.

The Chair: As you know, we are not allowed to use language here that we wouldn't be allowed to use in the House. We definitely do not want to impugn other members.

That being said, I'm here to keep decorum and exercise that authority. However, I do not have authority to censure, nor can I rule on these types of matters, to tell you the truth. If somebody believes he or she has been impugned, the proper course of action is to raise a point of privilege or to put forward a motion. That would then go to the House for consideration by the Speaker. Only the Speaker has the power to censure.

I do ask, though, because my job is to ensure that we have decorum and respect around this table, that we stay away from unparliamentary types of language.

Ms. Duncan.

Ms. Linda Duncan: Just to clarify, Mr. Chair, I at no time said that anybody lied. If their preference is, I would say...and if they let me finish my sentence, I was clarifying the information that I thought was incorrect. That is that it could be a foreign entity. As we have discussed on other provisions, the term "entity" is defined in the act. I simply wanted to clarify that.

The Chair: Seeing no other hands, I call the question on amendment NDP-11.

(Amendment negatived: nays 7; yeas 4)

(On clause 22—*Right to review a government decision*)

The Chair: We go back to the original clause, clause 22. It's not amended. It stands in its original form. Is there any discussion?

Mr. Armstrong.

Mr. Scott Armstrong: What does the clause do? Well, clause 22 provides that:

> Any resident of Canada or entity, regardless of whether they are directly affected by the matter in respect of which relief is sought, has standing before the Federal Court to review a government decision that would otherwise be open to judicial review...provided that
>
> (a) the matter arises in the context of environmental protection;
>
> (b) the applicant raises a serious issue;
>
> (c) the applicant has a genuine interest in the matter; and
>
> (d) there is no other reasonable or effective way for the matter to get before the court.

Well, the Federal Court already has discretion to grant public interest standing for those who meet the tests set out in this section. It is appropriate that the Federal Court retain this discretion. It allows the court to discourage frivolous litigation. And, again, that is what we're encouraging here, frivolous litigation, which is going to increase red tape. It's going to increase the pressure on valuable judicial resources, scarce judicial resources, and assure that the determination of an issue benefits from the contending points of view of those most directly affected by this issue.

It is likely that this provision would increase litigation on environmental matters—we heard from the Chamber of Commerce who said as much—which in turn could lead to a situation where our government priorities, the government that is duly elected, the government that represents the people across this country, are going to be now determined by the success of individual litigants, individual litigants who may not even be Canadian. It could be foreign entities; it could be entities that are set up in Canada. It could be any small group from any part of the country now challenging in court something that happens all the way on the other side of the country that has no direct impact upon them.

● (1000)

The Chair: On a point of order, Mr. Scarpaleggia.

Mr. Francis Scarpaleggia: Did we not deal with the identity of litigants earlier in the bill? Would that apply to the rest of the bill, or would we need to insert something here?

The Chair: Yes, I think we stood that.

Mr. Francis Scarpaleggia: We stood that?

The Chair: We stood that, didn't we?

Yes, we stood that. We're going to go back to it, so that's still—

Mr. Francis Scarpaleggia: When did we vote on the first item when we came back then?

The Chair: We come back to stood clauses after we get through the rest of the bill.

If you look at your agenda, you'll see that once we finish clause 26, we go to definitions, which is clause 22. We then go back to stood clauses 6 and 9, and then we go to the preamble. That's the process.

Mr. Armstrong.

Mr. Scott Armstrong: I would hope from that intervention that we can count on the Liberal Party, when we do get to that, and they will stand behind us when we discuss the definition that we're talking about here.

It's likely, again, that the provision would increase litigation on environmental matters, which in turn could lead to a situation where government priorities are determined by the success of individual litigants as opposed to the broader public interest, which is why we should all be here.

Because of that, because of this broader public interest, instead of special interests across this country, I'll be voting against this clause.

The Chair: Monsieur Bigras.

[*Translation*]

Mr. Bernard Bigras: Thank you, Mr. Chair.

We would also oppose clause 22, based on the fact that section 18.1 of the *Federal Courts Act* states that anyone directly affected by the matter can make an application for judicial review. Clause 22 of the bill would allow a plaintiff, "regardless of whether they are directly affected by the matter in respect of which relief is sought", to make an application for judicial review of a federal decision.

In our opinion, the reference must remain the *Federal Courts Act*, which states in section 18.1 that the plaintiff must have a legitimate interest to make an application.

[*English*]

The Chair: Ms. Duncan.

Ms. Linda Duncan: Thank you, Mr. Chair.

That is precisely why this provision is added in. There's been a history, in public interest litigation in Canada, of dragging out these kinds of cases and imposing more costs on a public interest litigant by making them also come forward and prove that they have some kind of a special interest and that therefore their case should be heard. Over time, precedent has been set and in fact standing has been broadened. If one reads this provision carefully, one will recognize that in fact it fetters discretion as well as broadening it, because it provides the factors that the court must consider before it will grant standing. If we took out this provision, then we would simply go back to the common law precedent, which has in many cases allowed for a lot of public interest actions, including environmental ones, to proceed. This provides some refinement.

In fact, Monsieur Bigras raised exactly that point. There's been continuous concern raised that in many cases there are areas of the nation where private property is not held, and entities—the courts and review panels—have deemed that one is only directly affected if one owns property. That excludes the public from participating in decision-making to protect, for example, a wetland that is important for migratory bird fowl, to protect an important hunting and fishing area, to protect a navigable stream. This shows that people who are not “directly affected”, which in many statutes is defined as owning property, may still bring forward this action, but they must show cause, that is, that they meet all of these requirements.

That is the intent of the provision. We're talking about environmental protection. The purpose of this is not private profit, as has been suggested by some people. The intention is that individuals or organizations who care about protecting the environment, endangered species, and navigable waters can have the opportunity to go to the courts and make sure that environmental laws on the books are enforced and that those areas are protected.

● (1005)

The Chair: We shall call the question.

(Clause 22 negatived: nays 7; yeas 4)

The Chair: We have a heading that says "JUDICIAL REVIEW" with no clause underneath it.

Amendment NDP-12 proposes that a new subclause 22.1(1) be added.

Ms. Duncan, could you speak to this, please?

Ms. Linda Duncan: Thank you, Mr. Chair.

Can I avoid reading it into the record in its entirety by summarizing again? I'm happy to read it all in.

The Chair: You can summarize. Just move that first part and summarize after that.

Ms. Linda Duncan: Okay.

Mr. Chair, I wish to table an amendment proposing that Bill C-469 be amended by adding after line 4, on page 14, the following new subclauses, 22.1(1), 22.1(2), and 22.1(3).

Maybe it's easier just to read them in.

> 22.1(1) A plaintiff bringing an application under subsection 22(1) may only be ordered by the Federal Court to pay costs if the application is found to be frivolous, vexatious or harassing.
>
> (2) The plaintiff referred to in subsection (1) may be entitled to
>
> (a) counsel fees—

The Chair: A point of order, Mr. Woodworth.

Mr. Stephen Woodworth: Mr. Chair—

Ms. Linda Duncan: Was I reading the wrong one?

Mr. Stephen Woodworth: The difficulty I perceive—and this is sort of emblematic of this whole process—is that the NDP is now proposing an amendment to a clause that has been deleted. Sorry, not proposing an amendment; the NDP is proposing an amendment that refers to a clause that has been deleted from the bill. The amendment that's being—

The Chair: We have a point of order. Let me hear this point of order first. Then I'll come back to you, Monsieur Bigras.

Mr. Stephen Woodworth: The amendment that is being proposed refers to a plaintiff bringing an application under subclause 22(1), and we've just voted to delete clause 22. It rather amazes me that the NDP member is persisting in moving an amendment that relates to a provision that has been deleted from the bill. I think that is out of order because it would just be a gong show if we had a clause in an bill that refers to another clause that doesn't exist.

The Chair: Mr. Bigras, if it's on this point of order....

[*Translation*]

Mr. Bernard Bigras: Mr. Chair, I don't understand why you allowed this point of order. In fact, you shouldn't have let Ms. Duncan table this amendment because it refers to a clause that has already been rejected. It seems to me that we shouldn't have a point or order or a debate on this.

So I ask you to immediately rule on the amendment that we are in the process of discussing.

[*English*]

The Chair: I will rule on it once we have it on the floor. We have to get it on the floor first and then I will rule on the admissibility of the amendment.

You haven't started speaking to it; you were still moving the amendment when there was a point of order.

Ms. Linda Duncan: I'm still moving the amendment.

The Chair: Can you please finish moving the amendment, and then I will render my decision?

Ms. Linda Duncan: Perhaps, given what is about to happen, I can say "and so on", including subclauses (2) and (3).

The Chair: According to the interventions that we've already heard from Mr. Woodworth and Monsieur Bigras, this is inadmissible because it does refer, in both subclause 22.1(1) and subclause 22.1(3), to subclause 22(1), which is no longer in the bill. So this is no longer admissible. We are not dealing with it.

We'll move on.

(On clause 23—*Superior Courts*)

The Chair: We have three amendments right off the bat on clause 23. We have Liberal amendment number three.

Monsieur Scarpaleggia.

● (1010)

Mr. Francis Scarpaleggia: The purpose is essentially to reproduce subclause 18(1), except this time under the heading of "Civil Action".

This was a recommendation of the Shipping Federation of Canada, and I just thought this particular subclause was quite confusing for them. I know there were some briefing notes produced by the Library of Parliament, our analysts, and also by another group, trying to explain the consequences of that subclause. However, I think there's a lot of uncertainty around what it means, at least from the Shipping Federation of Canada's point of view. I would just like to remove it.

The Chair: Okay. Are there other comments?

Mr. Woodworth.

Mr. Stephen Woodworth: Mr. Chair, I have some thoughts about the fact that this provision, which the amendment seeks to remove, may be something that the courts would be implying anyway. For that reason, I want to oppose the amendment, because I think it's far better to have it on the record that this is the kind of provision that people are facing if we enact this subclause.

However, and I know it is not my right to ask a question, I said earlier that I do respect Ms. Duncan's previous expertise in dealing with the courts on environmental issues. And before I comment further, if she so chose, I would be happy to ask her whether or not she feels that in a similar way to subclause 16(4), the courts would likely engage or would likely propose this kind of a provision anyway, whether we have it in the act or not. If she doesn't wish to help me out with that, I understand and wish to speak further, but for now I'll simply offer her that opportunity.

The Chair: Okay. Comments?

Were you going to respond, Ms. Duncan?

Ms. Linda Duncan: Mr. Chairman, I'm trying to remember what we did in clause 16. Did we take that out or leave it in? We took it out. It's obviously there because it provides clarification, but I'll leave that to the wisdom of the members of the committee.

The Chair: Mr. Woodworth.

Mr. Stephen Woodworth: Thank you, Mr. Chair.

The reason I raised this point is that we did have a brief from an organization known as Ecojustice, which I believe presented itself as a group with the same sort of knowledge of environmental law that I was hopefully attributing to Ms. Duncan. In their brief, they included an appendix A, and the statement that was made in that appendix A is as follows, and I will quote it:

> The principle that regulatory authorizations such as permits and licenses do not create blanket immunity from prosecution under the regulatory statute is a fairly well established principle in a variety of contexts.

That seems to me to be the principle that was set out at least in paragraph 23.3(a). So it concerns me that even if we were to delete that paragraph 23.3(a), we would still be left in a position whereby if this clause 23 were enacted, the courts would proceed on the same principle.

I'll repeat that from Ecojustice's brief:

> The principle that regulatory authorizations such as permits and licenses do not create blanket immunity from prosecution under the regulatory statute is a fairly well established principle in a variety of contexts.

The Ecojustice people were kind enough to present four cases in support of that proposition, and the one that seemed clearest to me was a case of R. v. BHP Diamonds Inc. in which they state:

> ...the project which caused the sedimentation was executed in accordance with the plans and standards established by a variety of regulatory bodies. The construction of the channel was included in the s. 35(2) authorization by DFO.
>
> ...the court concluded that although the sedimentation caused by the project was included in the s. 35(2) authorization, such authorization does not provide "blanket immunity from prosecution for any and all infractions under the Fisheries Act."

The difference is that in that litigation, the Government of Canada was going after the private individuals, and now, under clause 23, we've provided a right for any number of people to go after other private individuals. So my concern is that the courts will simply extend that principle, and that it is somewhat misleading for us to try to delete it when we know we can laugh behind our backs that the courts are going to do it anyway.

These are complicated issues, and I don't pretend that I necessarily have it right. I'm not an environmental expert, but in light of Ms. Duncan's comments to a similar effect regarding subclause 16(4), that the courts would probably import the same provision anyway, that's the concern I have with respect to subclause 23(3), even if it's deleted.

● (1015)

The Chair: Okay.

Any other comments? Ms. Duncan.

Ms. Linda Duncan: Mr. Chair, I would just again add the comment—indeed Mr. Woodworth put forward very well the discussion we had previously on a similar provision—that it's quite common that the law be adjusted based on a series of judicial rulings, and this simply carries forward previous judicial rulings. Of course, future decisions of the court may well follow the precedent. This simply provides certainty. It's up to the members to decide.

The Chair: Okay. Let's vote on Liberal amendment number three.

(Amendment negatived)

The Chair: We'll go to NDP-13, which is on page 23 in your docket.

Ms. Linda Duncan: Mr. Chair, I'm happy to stand down my amendment if the Liberals wish to proceed with theirs. Theirs is identical to mine.

The Chair: They're not identical. If you go to page 27, there's the Liberal amendment, and—

Ms. Linda Duncan: As I understand it, Liberal-4 is identical to mine.

The Chair: They're not identical, if you read them.

Ms. Linda Duncan: No?

The Chair: Maybe the intent is the same, but they're definitely not identical.

Ms. Linda Duncan: Okay. We have a dilemma then.

The Chair: Are you going to withdraw yours, you're suggesting?

Ms. Linda Duncan: Can I have one second, just to confer?

The Chair: I'll give you a chance for a quick sidebar....

Do you guys wish to suspend for five minutes so that you can have a quick discussion?

An hon. member: Okay.

The Chair: We'll suspend for five.

● _____ (Pause) _____

●

● (1020)

The Chair: We're back in, and we think we have this all clarified.

We are at amendment NDP-13.

Ms. Duncan.

Ms. Linda Duncan: Mr. Chair, I wish to table a motion to the effect that Bill C-469 in clause 23 be amended by adding, after line 31 on page 14, the following:

> (4) If a superior court finds that the plaintiff is entitled to judgment in an action under subsection (1), the court may

And then it provides, in new paragraphs 23(4)(a) to (d), a number of remedies.

This is merely moving forward remedies that were struck under clause 19, to place them in the appropriate place to make the bill more user-friendly.

● (1025)

The Chair: Okay.

Mr. Woodworth.

Mr. Stephen Woodworth: Thank you, Mr. Chair.

What we really need to do is look at the effect of new subclause 23(4), which is being proposed, in relation to the whole of clause 23. We are adding new possible remedies that the court can impose on a province like Quebec, or a private individual or organization like Hydro-Québec, in order to enforce a judgment that may have been rendered under clause 23.

One of the many problems with clause 23 is that it is designed specifically to bypass the provisions that are more commonly found that allow individuals to work out their differences and allow the Government of Canada to investigate what may be a way to resolve issues. So these somewhat onerous provisions that Ms. Duncan's amendment proposes to include, such as suspending an authorization, requiring financial collateral, requiring a defendant to pay an amount for restoration or rehabilitation, or to protect the environment generally—which are really like fines—will now be available to the court without the kind of government investigation that, for example, is found in the current right to sue set out in the Canadian Environmental Protection Act.

The Canadian Environmental Protection Act already contains a similar action, and indeed it's called an environmental protection action. I referred to it earlier in these proceedings because of the confusion we have now created in this bill by naming actions against the government environmental protection actions. But section 22 of the Canadian Environmental Protection Act of 1999 provides that there is a similar action with respect to offences under that act that cause significant environmental harm. But it's tailored in a way that will minimize undue pressure on judicial resources and constrain the potential liability of potential offenders.

So first of all, in the case of that provision, in order to proceed with the action, one must first have asked the Minister of the Environment to conduct an investigation of the alleged offence. The minister must have either responded unreasonably to the request or failed to conduct an investigation within a reasonable time.

For example, in the case of an agreement

[*Translation*]

…between the Government of Canada and the Government of Quebec on a *Hydro-Québec* project…

[*English*]

this provision would allow the Government of Canada to approach Hydro-Québec and the Government of Quebec in order to investigate the complaint and try to remedy it, without exposing Quebeckers to the kinds of penalties and provisions that are in the amendment Ms. Duncan is seeking to propose.

The other thing that's interesting is that under section 22 of the Canadian Environmental Protection Act of 1999, damages are expressly and specifically excluded as a potential remedy. In other words, when the wise heads who crafted the Canadian Environmental Protection Act sat down to draft it, they specifically said no to the kind of provision Ms. Duncan's amendment proposes. As I understand it, the reasoning was that it ensures that private actors pursuing such actions don't benefit personally from general damages to the environment.

● (1030)

Now the reason I'm mentioning this is that the provision that Ms. Duncan is proposing in its ability for the court to "order the defendant to pay an amount to be used for the enhancement or protection of the environment generally" doesn't say to whom the amount shall be paid. Although it's speculation, I think it's pretty sound speculation to presume that the court could order it to be paid by the very plaintiff in the clause 23 civil action if, for example, it was an organization that concerned itself with the enhancement or protection of the environment. This would add another incentive to such plaintiffs to go to court in the hope that they might convince a judge to pay them money along these lines.

I should point out as well that paragraph (b) of this amendment orders the defendant to provide financial collateral for the performance of a specified action, but it doesn't say to whom. So I think we can say that it would be open to the court to require that collateral be paid into court or be paid to the federal government, or indeed to be paid to the plaintiff to hold in trust.

I think the drafters of the Canadian Environmental Protection Act were doing the right thing. They were taking a balanced approach, they were looking after the interests not just of environmental activists but also the interests of agencies like Hydro-Québec, the Government of Quebec and other provincial governments, and other Canadians across the country who may wish to engage in developments that involve altering the environment, and certainly could involve damaging habitat, for example, or altering waterways that fish are in, but it's for good and proper purposes such as the generation of hydroelectricity.

If I have a moment more, perhaps I could go back.... I do not?

The Chair: You do not. You've got two seconds left.

Mr. Stephen Woodworth: Well, then I'll have to do it another time.

The Chair: Thank you.

Other comments on this amendment?

Ms. Duncan.

Ms. Linda Duncan: Thank you, Mr. Chair.

I would just like to add that Mr. Woodworth is quite correct. The government, in its wisdom, did create an environmental protection action under the Canadian Environmental Protection Act, but that action restricts actions related to violations of the Canadian Environmental Protection Act. The very purpose of this bill is to provide for those remedies and opportunities under all federal laws. And unless it contradicts, the position can stand and it simply applies to violations of other statutes.

As I've stated earlier, I'm open to any amendments or proposals that members of the committee might like to make. Frankly, I think it may well be advisable to add the condition that Mr. Woodworth is suggesting. I'd be open to a friendly amendment to require the same prerequisite that is in CEPA, that the action may only be filed if under clause 14 the plaintiff had filed a request for investigation that was denied. I have no problem with that. I am open to any constructive proposals and amendments to the bill. I think that may well be a very sensible proposal to add if he would be interested.

This opportunity does not allow for personal damages. It's a public interest civil litigation. It has brought in the public interest where environmental harm has been caused by some party. The intention is to allow persons to bring forward requests that those damages be remedied in some way. It has been the common practice in court—there have been quite a few of these kinds of actions brought in Alberta, including prosecutions—where the court orders the defendant to pay moneys to some entity. For example, in the prosecution of CN on the massive spill in Wabamun Lake, which damaged wildlife habitat and wildlife, the court ordered that moneys be given to certain fish and game associations, I think. So the court is very experienced with this.

My understanding is that some divisions of Environment Canada—and certainly that was my experience with the Ontario region of Environment Canada a few years ago—have actually, in advance, identified organizations who would be worthwhile recipients of court orders. I think the courts and prosecutors and so forth are quite familiar with this.

I don't in any way see this as a measure where somebody is intending to profit. It takes a great deal of work to organize and present a winnable case. I don't think anybody who is concerned about the environment sets out to do that simply for a profit. They're doing it because they see some kind of harm caused to the environment and caused due to a violation or clear evidence of a violation if it did proceed. And they would have to prove that in court.

● (1035)

The Chair: Let's ask the question on amendment NDP-13.

(Amendment negatived: nays 5; yeas 4)

The Chair: The amendment is defeated.

We shall move to LIB-4, which is on page 27 in your docket.

Mr. Scarpaleggia.

Mr. Francis Scarpaleggia: This, as I mentioned before, is to replicate subclause 18(1) in this section on civil action.

The Chair: Any other comments?

Mr. Woodworth.

Mr. Stephen Woodworth: Thank you, Mr. Chair.

The difficulty we have with this amendment is similar to difficulties we have had throughout this bill, in that it refers to any number of ill-defined terms. In fact, those that do have definitions are not consistent with other Canadian law in all cases. So for example, the definition of precautionary principle, which is referred to in this amendment, is not consistent with the definition of precautionary principle as it has been codified in other statutes such as the Canadian Environmental Protection Act, the Federal Sustainable Development Act, and so on. Those acts are rather consistent with the Rio Declaration that I did refer to some time ago in this proceeding. I remind the committee members of it, in that the precautionary principle in the Rio Declaration and in the Canadian Environmental Protection Act indicates that there must be threats of serious or irreversible damage, and in such case lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The statute before us will define precautionary principles differently. Although it refers to threats of serious or irreversible damage, it only talks about postponing action to protect the environment, rather than cost-effective measures to prevent environmental degradation. This is important not simply to ensure uniformity in our law, which I can tell you lawyers are very big on because it creates uncertainty when you use different terms, but this is also important because the absence of that term “cost-effective” puts an entirely different complexion on the precautionary principle, which the amendment seeks to add into clause 23. So we're no longer talking about cost-effective measures necessarily. The addition of this paragraph by this amendment makes section 23 that much more onerous for agencies, which are exposed to threat of lawsuit under section 23. Even if the solution that is being proposed isn't really cost-effective, they may be required to embark upon it under this precautionary principle.

Very quickly, another interesting area is in the (f) section of this amendment, which talks about the “economic and social context of the affected area”. This I believe is new even to this act. I don't think it's been defined, although I stand to be corrected. It would be a nice step in the right direction if we knew what it meant. I'm not sure we can even tell what is meant by “the affected area”. Are we talking about an area of law, or are we talking about an area of environmental expertise, or are we talking about a specific geographic area, or are we talking about a sector of the economy? It's really just not at all clear to me what that means. Of course, when we have ill-defined terms, that's great for environmental lawyers, but it's not so great for developers and job creators who now have to go out and try to guess what's meant by this kind of law and try to plan their activities accordingly. Someone's got to speak for them, and that's what I'm trying to do.

Thank you.

● (1040)

The Chair: Thank you.

Any other comments?

Ms. Duncan.

Ms. Linda Duncan: I don't know if the tabler wanted to speak to that. I think it's a good amendment and it puts some conditions on the factors that the Superior Court can consider. It gives some guidance on how the matter is to be considered. It simply brings forward an earlier provision and places it here.

I've heard a number of what I think could be potentially constructive, helpful suggestions from the Conservative members of the committee. But I find it regrettable that they haven't taken it upon themselves to propose amendments. When I'm tabling amendments and so forth, I would really welcome them.

One of the things we have discussed—we talked to the legislative clerk about this, and this issue has come forward continuously from some of the members of the committee—is the definition of precautionary principle. We had a discussion about whether or not, in the context of the amendments we're making, when we come back to the end and revisit other provisions of the bill, it might be possible to amend the definition. That concern could then be remedied.

It appears by the Liberal amendment that they have taken an effort to try to resolve that in their addition of new paragraph 23(4)(f). I'm not particularly troubled by the way it's defined, and I think it could be sensibly interpreted.

The Chair: Mr. Woodworth.

Mr. Stephen Woodworth: Thank you, Mr. Chair.

I believe Ms. Duncan misspoke when she said the Conservative members have not proposed any amendments. I believe the record will show that we have proposed amendments, and they have been uniformly rejected by the opposition members opposite.

There are some provisions in this bill that are so bad that no amount of amending could possibly cure them. Certainly clause 23 is one of them.

(Amendment negatived: nays 7; yeas 4)

● (1045)

The Chair: We are out of time. We'll come back next week on clause 23, unamended.

The meeting is adjourned.

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