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Chair

Mr. Chris Warkentin

Standing Committee on Aboriginal Affairs and Northern Development

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• (1135)

[English]

The Chair (Mr. Chris Warkentin (Peace River, CPC)): I call to order this fifth meeting of the Standing Committee on Aboriginal Affairs and Northern Development.

Committee members, I want to get going as quickly as possible. We've lost some time because of the vote.

I want to thank the witnesses for waiting for us patiently. We appreciate your attendance today, and we look forward to your testimony and to our opportunity to be briefed on these important issues.

We have Mr. Andrew Beynon, Kris Johnson, and Isabelle Dupuis. Welcome.

We'll turn it over to you for a brief testimony and then we'll begin the questioning. If it goes over the 10 minutes, we're fine with that. What we're here for today is to learn.

We're going to fit in as many questions as possible. If you don't need all the time that you've been given, please be mindful that we are going to run into some time constraints today and act accordingly.

Please bring forward the testimony.

Mr. Andrew Beynon (Director General, Community Opportunities Branch, Department of Indian Affairs and Northern Development): Merci.

I would like to thank the committee for providing us this opportunity to discuss in particular the first nations land management regime.

As the chair indicated, my name is Andrew Beynon. I'm the director general responsible for lands modernization and community economic development, all under the umbrella of community opportunities at the Department of Aboriginal Affairs and Northern Development.

I have with me today Kris Johnson, the senior director responsible for lands modernization, and also Isabelle Dupuis, the acting director of the first nations land management regime.

We are indeed very pleased to be here today to brief you on the first nations land management regime. We would like to begin by describing the benefits of the FNLM regime, and then turn to describe the way in which the FNLM regime works. Then we'd like to close with some thoughts on the lessons learned and potential

opportunities for your consideration as parliamentarians going forward.

The FNLM regime is one of several examples of recent legislation and other initiatives, all intended to achieve an objective of lands modernization. First nations have a substantial and growing reserve land base that can be a very important asset for activating economic development on reserve, but only if the right tools are available to achieve the potential.

Through lands modernization, we seek to work with first nations to break down the barriers imposed by the Indian Act and its outdated regulations, provide greater first nations community control of their lands, as well as to strengthen capacity to manage and plan the use of these lands.

The first nations land management regime provides an avenue for first nations to achieve many of these goals, most importantly by managing their own reserve lands rather than having those lands administered by the minister under the Indian Act.

In fact, the first nations land management regime has proven to be a powerful tool for first nations to unlock the economic potential of their reserve lands. An independent study by KPMG associates recently concluded that first nations operating under the FNLM regime are able to complete land transactions significantly faster and at a lower cost than is the experience under the Indian Act system.

The FNLM regime also makes possible developments that would not have been possible under the Indian Act. For example, subsequent to approving its land code and entering the FNLM regime, the Whitecap Dakota First Nation in Saskatchewan has issued 16 commercial leases, including an award-winning golf course that was named *Golf Digest's* best new course in Canada in 2005. This has benefited not just the first nation but many other Canadians and Canadian businesses in the area. This would not have happened under the Indian Act.

The FNLM regime is a very dynamic regime in the sense that more and more first nations seek to opt into the legislation over time. There are currently 32 first nations operating under the FNLM regime, and soon, 38 first nations will have completed all of the necessary prerequisites to take over the management of their reserve lands.

I will now turn to describe the way in which some key features of the FNLM regime work. The first nations land management regime provides self-government authority to first nations over their reserve lands through the operation of a framework agreement provided for by the federal legislation.

This framework agreement was originally entered into with the 14 first nations who led the proposal and negotiated the terms of the framework agreement. It has now been expanded so that the framework agreement can also apply to all new first nations who enter into the FNLM regime.

Unlike the Nisga'a or Westbank self-government arrangements, which cover a broader range of subjects than lands, the FNLM regime is not a comprehensive self-government regime. It does, however, encompass not just management of reserve lands but also management of resources and environmental issues on those lands.

First nations that enter into the FNLM regime take on the authority and responsibility for managing reserve lands and the Indian Act lands management system shuts off. This is critically important, because the FNLM and the Indian Act take very different approaches to management of lands.

Under the Indian Act, the minister rather than the first nation has decision-making authority over many land issues. For instance, subsection 28(2) of the Indian Act describes the authority of the minister to issue permits for occupation of portions of reserve land in the following terms:

The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

By way of...I'll say "dramatic contrast", under the FNLM the first nation, not the minister, has the authority to decide how to manage their reserve lands. For instance, subsection 18(1) of the FNLM legislation specifies that:

A first nation has, after the coming into force of its land code and subject to the Framework Agreement and this Act, the power to manage first nation land and, in particular, may

• (1140)

To make it clear that the Indian Act system of land management ceases to apply to FNLM first nations, section 38 of the FNLM legislation lists a series of provisions of the Indian Act governing land management that no longer apply when a first nation becomes operational under the FNLM regime.

As stated earlier, the FNLM provides an avenue for first nations to manage reserve lands, but first nations are not obliged to take this avenue. The FNLM is optional, and it is sometimes called opt-in legislation that only applies to those first nations that have voted to enter into the FNLM regime. A formal process must be followed before a first nation can become operational under this legislation and the framework agreement rather than being governed by the Indian Act. Sections 10, 11, and 12 of the FNLM legislation outline the role of the first nation membership in deciding whether to leave the Indian Act and whether to enter into the FNLM regime.

Once a first nation becomes operational under the FNLM regime, much of the day-to-day land management authority is typically in the hands of a first nation government, sometimes called a band council, but the authority of the first nation government is derived from a decision of the community as a whole through a formal vote on whether to enter into the FNLM regime.

Not only do the members of the first nation, rather than the first nation government, decide on whether to enter into the FNLM regime, but members have a key role in setting the rules under which the first nation government will manage land. To enter into the FNLM regime, the members of the first nation are called upon to vote on whether to approve a land code that sets the basic rules for land management that must be followed by the first nation government. Section 6 of the FNLM legislation specifies that the land code to be voted on by community members must include various elements. Examples of what must be provided for in a land code include the following:

6(1)(b) the general rules and procedures applicable to the use and occupancy of first nation land, including use and occupancy under (i) licences and leases

6(1)(e) is also another example:

the requirements for accountability to first nation members for the management of first nation land and moneys derived from first nation land.

Those are just some examples of what must be dealt with, but in a land code that's approved by the members.

Not only does the FNLM regime provide for first nations to make their own decisions on managing lands, environmental issues, and disposition of interests in lands, but the FNLM regime also sets out first nations government law-making authority over reserve lands. Under the Indian Act, first nations have limited authority to make bylaws on reserve with limited penalties for non-compliance. In dramatic contrast, sections 20 to 24 of the FNLM legislation describe more extensive and modern law-making powers. Most importantly, while much of the first nation bylaw-making power under the Indian Act is subject to the authority of the minister to disallow bylaws, the FNLM regime takes a more modern approach, more respectful of self-government authority, by eliminating the role of the minister in making laws in relation to land and environment within a participating first nation community.

The FNLM regime also establishes a broader authority for first nations to manage environmental issues than would be possible under the Indian Act. The FNLM regime requires first nations to establish an environmental assessment process for all projects on reserve lands that are approved, regulated, funded, or undertaken by the first nation. The FNLM regime also contemplates environmental protection being governed by first nation laws, provided those laws meet or exceed the environmental standards of the province in which the first nation land is located.

Currently the power to make environmental protection laws is required to be exercised in accordance with an environmental management agreement to be concluded with the federal Minister of Environment. No such agreements have yet been concluded, and first nations operating under the FNLM regime have recommended that this procedural step be eliminated. This would require an amendment to the FNLM legislation, and that is of course a matter for you as parliamentarians to consider. We would note, however, for your consideration that there is no similar requirement in other self-government regimes to enter into an environmental management agreement with the minister before exercising environmental law-making powers.

• (1145)

The FNLM regime sets out not just law-making authority over reserve lands, resources, and environmental issues but also the first nation's authority to manage and dispose of interests on reserve lands. With this authority comes the responsibility for these decisions. Canada remains liable for the land management decisions it makes prior to a first nation's entry into the FNLM regime, but first nations operating under the FNLM regime take on authority and potential liability going forward.

Having described how the FNLM regime works, I would like to close by describing some of the next steps for building upon the success of the FNLM regime.

As suggested, the Lands Advisory Board has discussed with us some potential minor amendments to the FNLM legislation that could help to make the legislation operate better, and in particular could smooth the transition for new first nations to enter into the regime. An example is the potential elimination of the current requirement for an environmental management agreement while maintaining the strong environmental protections that the FNLM legislation establishes. Again, that is a matter for you, as parliamentarians, to consider when it comes to legislation.

Another consideration in moving forward is the federal funding for operational first nations. Although the FNLM regime has expanded over the years since its inception, the number of first nations seeking to enter into the FNLM regime is now even greater than the number that currently operate under this legislation. At this time, as many as 80 first nations have formally expressed an interest in entering into the FNLM regime through band council resolutions. The first nations land management regime has not accepted new first nations since 2008 because of funding limitations.

The federal budget, Budget 2011, included a commitment to reallocate \$20 million over two years towards the FNLM regime. We are working with first nations on options for changing the federal funding formula in order to open up the FNLM regime to new entrants. These negotiations are proceeding very well, and we, as officials, hope that a new operational funding formula can be finalized in time for operational first nations to consider and potentially ratify at their upcoming Lands Advisory Board annual general meeting set for October 19 to October 21 here in Ottawa.

We are also working with the Lands Advisory Board to finalize prioritization criteria to assist in determining which first nations will be best positioned to take advantage of the opportunities this regime can offer in future.

In summary, and in closing, the FNLM regime is one avenue that first nations can use to move beyond the restrictions imposed by the Indian Act. Many first nations have been economically successful using this option, and we are working closely with first nations on options for making the FNLM regime even more successful.

We would be very pleased to answer any questions you may have.

The Chair: Thank you very much. That was an excellent presentation.

Ms. Duncan, I'll turn it over to you for the first seven minutes.

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

Thank you very much for coming on relatively short notice.

It was my understanding that we were also going to have the land management organization, but we have had the benefit of the briefing, so some of my questions might touch on information they've provided to us.

I have four categories of questions. I prefer to put those to you so you can mull them over and give a timely answer, just so you have an idea of the areas.

The first one is on capacity building. I noted in the materials provided to us by the land management group, the Lands Advisory Board, that there are dollars for capacity building, but they only appear to be available to the signatories to land codes. It was noteworthy to me that while there might be Alberta first nations representatives on the actual board, there's not a single Alberta first nation that has yet signed up and has a land code. I thought that very interesting. And I don't see any Maritimes or Northwest Territories/Yukon first nations. So I'm raising a question about capacity and who those dollars are made available to.

The second category of my questions has to do with the process for the land code, the liability issues, and the capability to replace federal and provincial regulatory regimes, particularly for environmental impacts. I'm wondering about, in the process of the guidelines, providing ample information, including in the consultation with the first nation members, on the potential liabilities the first nation and its peoples may assume, including to external persons and lands and waters external to the reserve, if they accept development on their lands and it causes damages.

You mentioned that it replaces a federal assessment. There are recommendations being made that this code can be absent in an environmental regime. I would appreciate some discussion about that, because there are obvious potential major implications, plus the fact that, frankly, there's not much to replace at the federal level. Most of the environmental regime is at the provincial level and it doesn't apply to first nation lands anyway.

My other question is this. What about traditional lands? That tends to be where most of the impacts are occurring. Developers external to the first nation, sometimes in partnership with the first nation, are developing not on the reserve lands but on the traditional lands. Are those included? And if not, why?

My final category is on the implications of replacing the Indian Act regime with the land code regime. Does that mean the land then becomes fee simple? What are the tax implications for a first nation if they sign on? And will the property become subject to Canadian tax laws?

That's a big bundle of questions, but in three or four categories.

Whoever would like to respond, I welcome your comments.

● (1150)

Mr. Andrew Beynon: Thank you. Those are very carefully considered questions and are all very interesting. They warrant very significant time for answers. But I'll try to answer them quickly and comprehensively, if I can.

Let me begin, first of all, with the question regarding capacity building. You commented on the question of whether capacity building is only available for signatories to land codes. We can provide a more detailed written answer, but there is a process for building entry into the FNLM regime.

After first nations have adopted a land code, there is federal funding. First nations can use a portion of those dollars toward capacity. But before a first nation approves the land code, before it enters into the regime, there's a developmental process, and there is funding called "developmental funding" that assists in that regard.

I do think it's fair to say it's a process that builds gradually toward communities being informed, communities deciding how to make the transition from the Indian Act, and then to operate in the future.

You commented on first nations from Alberta not being present. We'll have to see the opportunities for opening the legislation in which first nations may wish to come forward. If Alberta first nations turn to us and the Lands Advisory Board and express an interest in moving forward, one of the very first stages would be to talk about how to make a transition effectively and how to build the capacity and the community consent to move forward.

The fact that there are now so many first nations operating under the FNLM legislation and framework agreement who have had experience with enacting their laws, establishing their land codes, and building that kind of capacity is also a very important point. The Lands Advisory Board is also supported by a resource centre, and they can provide a great deal of assistance and practical knowledge from first nations that already operate.

On the process considerations regarding adoption of a land code and the liability issues, you asked whether the process includes clarity for the members before they vote on such issues as the nature of the liabilities they take on. That may be a question best directed for details to the Lands Advisory Board or the resource centre. But I would just say my understanding is that there is a careful process in which the changes that come with shutting off the Indian Act and turning on the FNLM regime are explained to the voting membership.

You asked about the replacement of the federal environmental assessment processes. I need to break that answer down a little bit.

In my presentation I commented on the issue of environmental management agreements currently found in the FNLM legislation as

a condition before environmental law-making authority could be triggered.

In the discussions we've had with the Lands Advisory Board, the suggestion has been made that we could maybe remove that procedural step for an environmental management agreement, but not remove the provisions in the legislation and framework agreement requiring that there be environmental assessments for government decision-making by first nations operating under the FNLM regime and not alter the environmental protection law-making authority either. So it's only one ingredient, just to clarify.

● (1155)

The Chair: I'm going to have to jump in. Unfortunately, Ms. Duncan asked more questions than there was time for answers. I'm certain that additional members will ask subsequent questions. If we don't get full answers to the questions that have been posed, maybe we can get the written responses.

Mr. Seeback, you're up next, for seven minutes.

Mr. Kyle Seeback (Brampton West, CPC): Thank you.

Mr. Beynon, thanks for your presentation. It seems to have been thorough enough to answer several of my questions. But I'm going to try to ask a few just so we can perhaps have a better understanding of a couple of the issues.

The first thing I want to talk about is your mention of \$20 million being discussed. Could you advise us as to what that's going to mean going forward? How is that going to affect the 80 first nations that seem to be interested in entering into the regime? How is that going to go forward?

Mr. Andrew Beynon: I'll ask my colleague Kris Johnson to answer that question.

Mr. Kris Johnson (Senior Director, Lands Modernization, Community Opportunities Branch, Department of Indian Affairs and Northern Development): Thank you for the question. It's an excellent one.

When the regime started, there was a fair amount of uncertainty. It was a fairly large change. It took the experience of some first nations that had gone through it and proved its benefits to gather attention from additional first nations and increase their interest in it.

Perhaps the potential scope of this had not been contemplated early on. The funds that had been provided were targeted towards the understood scope at that time. As the interest grew, the available funds simply couldn't keep pace with the demand. The funding was structured such that it was not sustainable if you had too large a contingent of first nations. That is why we have been having discussions with the Lands Advisory Board over the past number of months. We have been revisiting how those funds can flow such that the funding can be more predictable and allow for greater participation.

We likely won't have enough with the additional dollars to address the entire demand. We are hopeful that we will be able to make a meaningful dent in that demand, perhaps bringing in anywhere from 10 to 15 more.

This brings us to the other key component: coming up with a formal methodology to look at those who have expressed interest, allowing them to assess themselves as to how this might benefit their communities, and then working together to identify how we can get the most benefit out of the dollars being provided so that we can make the greatest difference in the lives of the first nations members in those communities.

● (1200)

Mr. Kyle Seeback: That leads nicely into my next question. You're going to determine which communities are best suited for the program. What are the parameters, and how do you decide which first nations are going to be best suited for the program? It's clear that the demand for this program is exceeding the capacity to deliver it.

Mr. Kris Johnson: It is a matter of some discussion, and we are working on it. Defining what success means is never evident, so it is a process that we have to go through. The kinds of themes we have been discussing are in line with the comments my colleague made at the beginning. We see this as a powerful tool for unlocking the potential economic development of reserve lands. A large part of our focus has to be on which communities can benefit from the unique and powerful law-making powers provided for in this legislation, a determination that will make a difference, economically, in their communities. In other words, we will be looking at what economic development is already under way, where there is potential for greater economic development, and how that ties back to land, environment, and natural resource discussions.

There are also several provisions in the act related to governance and accountability. We see communities with a strong record of good governance as being in a position to make effective use of these considerable powers. We have also learned, over the course of operating the regime over the last dozen or so years, that there are some issues that make it difficult for a first nation to make it through the developmental stage. We would want to do some due diligence upfront and make sure we're not going to run into any potential stumbling blocks that might prevent the developmental stage from becoming operational. There will likely be some other considerations as well, but these I would highlight as the more pertinent themes.

The Chair: Thank you, Mr. Seeback.

Mr. Trudeau, for seven minutes.

Mr. Justin Trudeau (Papineau, Lib.): Thank you very much, Chair.

I thank you very much for this presentation. As you may know, I'm subbing in, so I don't have quite the background I'd like to have on this program. But to get an idea of it, the way I understand it there are the three levels. There's the full self-government—for example, the Nisga'a—there's the FNLM model, and then there's the direct Indian Act management.

If you could give a proportion, either by territory or by population or by number of bands—which would be very different things obviously—across the country, what proportions do we have for each of those different levels?

Mr. Andrew Beynon: Thank you. That's a good question to ask.

I guess my answer would be to say that it's almost like a pyramid. By far the greater number of first nations are operating under the Indian Act. There are over 600 first nations across the country, and the majority do operate under the Indian Act. As I was indicating earlier, we're currently at about 32 first nations operating under the FNLM legislation, and we're hoping to expand that in the next few months toward a number of about 38. As my colleague Kris Johnson explained, with work that we're doing with the Lands Advisory Board, we'd like to see that expand further. Over the next few years, I would expect a number approximately in the range of 50.

In terms of more comprehensive self-government or land claims arrangements, the number of first nations—and this is south of the 60th parallel—is far, far smaller. I'd have to double-check exactly, but you're looking at about 6 to 10. So it is a dramatically different number.

I would also say that, to me, the harsh dividing line is between the Indian Act, where there is so much that is managed day to day by the department and by the minister, and FNLM, which is very much on a path toward self-government, taking your own responsibility as a key issue.

I'll conclude by saying that of the first nations who have entered into the FNLM regime, two of those first nations moved on to more comprehensive self-government arrangements, the Westbank First Nation and the Tsawwassen First Nation in British Columbia.

● (1205)

Mr. Justin Trudeau: Thank you very much. That flows nicely into my next question. Have you done studies in terms of prosperity and economic benefits, about how moving into an FNLM is beneficial to a first nation?

Mr. Andrew Beynon: I mentioned in my remarks that the study that was conducted by KPMG Associates focused on the FNLM regime, and I think it illustrated well some of those benefits.

Mr. Justin Trudeau: When one thinks about the actual administering of the Indian Act on very, very local issues for so many different bands, there must be significant savings to the government to pass on responsibility to FNLM, or is that offset by a greater need for assistance and accountability? You talked about the resource that you provide. Does it end up being neutral as they move to that, leaving aside the sense that when they prosper economically, everyone ends up benefiting? Simply, in terms of the cost to government, how does that shift?

Mr. Andrew Beynon: That's a very good question. I think I would answer it by saying that if you tried to break it down to an almost per unit cost—I don't have the exact figures—the cost of operating under the FNLM regime is probably higher than the amount the federal government devotes to that individual first nation under Indian Act lands administration. Now, that may cause some concern: are we increasing costs over time? But I think it's also fair to say that as we expand the FNLM regime and as we work with our partners and the Lands Advisory Board, we very much have our eye on efficiencies that are going to be created over time. It is relatively young legislation, so I think it's not surprising the cost structure is that way. I anticipate at least that we'll be bringing that cost structure down, working with our partners over time.

Mr. Justin Trudeau: You mention \$10 million a year over the next two years will make a small dent of 10 to 15, maybe 20 more. Does that include the 38 who are about to achieve, or is that on top of those? Is that 10 or 15 out of the 80, or it is out of the 38?

Mr. Andrew Beynon: The target of getting to 38 would be within our existing operational dollars. The injection of the new moneys is intended to lift the regime even further and spread it wider.

Mr. Justin Trudeau: To 50 or more.

Here is one last question; I know I'm running out of time.

Is the blockage—I don't want to call it necessarily a blockage, but the issue of the environmental regulations and the need for approval or coordination with the Minister of the Environment—something that has been a significant impediment to first nations communities going forward with the environment? You say that no one has been able to enact it. Is it unworkable? Could you talk a little more about that, sir?

Mr. Andrew Beynon: I think it's fair to say that it has proven to be an unworkable element. I have to say on the record that we don't have any examples of those environmental management agreements. It has impaired the ability of first nations under this regime to move to the step they'd like to move to in terms of sound environmental management.

Again, though, it's going to be for you to consider as parliamentarians whether to change the legislation or not. I have to respect that role. The thing that I think needs to be examined is whether, if you take that component out and keep the remainder of the environmental provisions, they will be sufficient to meet the needs you would identify for all Canadians.

The last point I would make is that if you take out the environmental management agreement, the environmental assessment processes in the legislation are those that apply to the first nation government; they don't change the federal ones. Very often first nations, even under the FNLM regime, would be working with

Canada on various projects—capital infrastructure investments, new water systems, and so on—and the environmental assessment rules that apply to the federal government in making its own decision regarding that injection would still govern our own administration.

I expect that over time, even if you eliminated the environmental management agreement requirement, there would be many issues on which you'd find the first nations government, Canada, and provinces working together on environmental issues.

● (1210)

The Chair: Thank you, Mr. Trudeau.

Mr. Clarke, you have seven minutes.

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

I'd like to thank the witnesses for coming here today. You have mentioned a lot of interesting things.

Having grown up in B.C., and with my grandmother actually living in Westbank, and also now myself residing in Saskatchewan, I have experienced and seen how the reserves of first nations communities expand and grow, especially the Westbank and also the Dakota First Nation in Saskatoon.

I have read the Indian Act, and it's quite archaic. It's an outdated document. I've just seen the first nations land management.... That's almost like a living, breathing document that can change over the course of time the way the first nations may want to promote economic development through the years going forward. If I look back, in 1991 there was a group of first nations that came forward, and we've seen how it progressed from 1996 to 1999, when other first nations began to become actively involved.

Really, I want to start asking more about the process leading to first nation signatories, going down to the decision-making powers of the first nations. Also, I'd like to get further into examining the regulatory gaps that need to be amended. If you could provide me some of that information right now, it will segue into further questioning.

Mr. Andrew Beynon: I'll invite my colleagues to add to the answer, but I think I would provide this answer.

The FNLM legislation, as I said in my opening remarks, changes the scope of the law-making authority on reserve. The Indian Act suffers from antiquated language and scope concerning what laws can be made, even if a community steps forward and says that it would like to make a bylaw under that authority. By way of contrast, the language in the FNLM regime is significantly broader, giving authority to enact laws, but also to evolve those laws over time.

The second comment I would make is that it's relatively new legislation, but you're seeing many first nations move forward with operational experience under the legislation. Some communities are coming back to revisit what was the first round of laws those communities enacted, and they have the flexibility to expand upon them, making some comparisons among first nations communities that operate under the legislation. The Lands Advisory Board and the resource centre that supports it has a strong role in that regard—sample laws, for example.

Mr. Kris Johnson: Let me add to his response that another point was mentioned that I think is quite important to the conversation, and that's on the issue of regulatory gaps.

One of the large impediments to economic development on reserves is that the way projects are regulated on those reserve lands is dramatically different from the way they would be regulated on lands next door. Potential investors or industry partners are sometimes quite concerned about that difference. Under the Indian Act we have very limited tools—or, to use your word, archaic tools—to address those concerns. FNLM first nations, with their scope of law-making powers, have much more scope and authority to address those concerns, respond to them, and attract that investment.

Mr. Rob Clarke: From what I've seen, there is a development in southern Saskatchewan in which the great gaps in the federal laws and provincial legislation are going to have to be addressed in the development of a potash mine. That's a huge issue. Could you help clarify how the environmental portion would be addressed?

Mr. Andrew Beynon: Just expanding upon Kris Johnson's answer, there are two things.

One is that when you look at the terms of the Indian Act, there clearly is a regulatory gap. For example, the Indian reserve waste disposal regulations are one of the only environmental controls for development, and as I recall, the maximum penalty that can be imposed is \$100. By way of contrast, in the FNLM regime the authority to make environmental protection laws is set out, but they have to include standards equivalent to those that apply on the neighbouring provincial lands around them, which is getting at the issue of a gap in regulation compared with neighbouring lands.

It may not be possible to expect that FNLM first nations would have the resources to fully close that gap, particularly with a major industry such as potash development. It is up to the FNLM first nations—they would need to consider this themselves—but for a very large-scale economic development they might want to use the option of working with Canada under the First Nations Commercial and Industrial Development Act, FNCIDA, as it is sometimes called, which allows Canada to establish regulations to control major commercial and industrial developments on reserve.

I would just note that this legislation is optional. It depends upon a band council resolution from the first nation, if they want to manage economic activity of as massive a scale as that.

• (1215)

Mr. Rob Clarke: I come from a law enforcement background and have lived and worked on the reserves. I've had some experience with matrimonial property. Maybe you can elaborate further on that.

Mr. Andrew Beynon: It's a good question.

Under the Indian Act there is a gap in the application of matrimonial real property laws on reserve. The federal authority under class 24 of section 91—your federal legislative authority—over lands reserved for the Indians creates a barrier to the application of provincial laws regarding the division of matrimonial property; it's a barrier on the reserve lands, which are within federal legislative authority.

That's not to say that all elements of family relations law provincially don't apply. They can apply contractually and they can apply between individuals, but to the extent that provincial law governing the split of matrimonial real property is an issue, there's a barrier to its application on the reserve, and the Indian Act leaves it as a gap.

Under the FNLM legislation, first nations are required to establish a matrimonial property regime, so that gap is solved.

The Chair: Thank you, Mr. Beynon.

Mr. Genest-Jourdain has five minutes.

[Translation]

Mr. Jonathan Genest-Jourdain (Manicouagan, NDP): Ms. Dupuis, I'd like to ask you a quick question.

Ultimately, who will train the first nations land managers? You know that the literacy level in the communities is fairly low. But we're talking here about land management and land entitlement. This usually requires a bachelor's degree. Who will manage this and ensure that the training is provided to the community members?

I have another question related to that. Will first nations land managers be band council employees?

On page 11 of the document I was given, there is discussion of responsibilities that will be assumed by the first nations. What happens with problems related to accountability for decisions made by a band council? This is a real problem right now. As you know, elections are held every three or four years. When the elected members are deposed, it's very hard to go back and hold them responsible for decisions that were made by the previous council.

Mrs. Isabelle Dupuis (Acting Director, First Nations Land Management Directorate, Community Opportunities Branch, Department of Indian Affairs and Northern Development): Thank you very much. Those are excellent questions. I'll try to do my best to give you a proper answer. I may ask my colleagues for help, since these are very important matters for the committee and for parliamentarians.

First, about the abilities of the land managers, we have a lot of tools in place to help them, a lot of programs. My colleagues mentioned the Lands Advisory Board, which is really a partner. These are people who work very hard with us to ensure the regime's success.

I would also like to mention that we have colleagues in the regions who provide continuous support to land managers. When land managers take on these very serious responsibilities, our colleagues in the regions ensure that they have the essential tools for the regime to be successful.

Mr. Andrew Beynon: I would add a very brief comment.

First, does it have to be employees of the band council? No. The first nations have the capacity to decide, for example, to hire other competent individuals.

Second, with regard to accountability, we need to remember that, in the land codes, the community itself must prescribe rules for the government of the band council.

Third, for matters related to elections, we need to remember that it's a part of the Indian Act that is not affected by the first nations land management regime. So it's pursuant to the Indian Act.

• (1220)

Mrs. Isabelle Dupuis: I would like to add that we are really working with these managers to ensure that the funds are there, of course, so that they are able to take on these responsibilities. This isn't being done alone; we have a true partnership with the Lands Advisory Board, which is an important partner.

Mr. Jonathan Genest-Jourdain: If I'm understanding you correctly, a sort of tutorship will be in place in the community for several years to ensure that things are going well.

I had heard that Université Laval would probably provide training. Is this still what's happening?

Mrs. Isabelle Dupuis: I believe we are in the process of seeing which universities would be the best or what the best way would be to give the courses that are truly essential and to provide continuous training at all levels.

I would like to go back to another very important question as well. The Lands Advisory Board and the Resource Centre are partners that are really going to support the first nations at every stage.

My colleagues mentioned earlier that there were two stages, the development phase and the operational phase. So it's important to support the first nations at every stage, and we have the tools in place to do so.

It was also mentioned that the legislation is really young. But we are still trying to review the practices in place to maintain effectiveness.

We are also consulting the evaluations and audit reports of the Auditor General, who mentioned this idea of ability.

Mr. Jonathan Genest-Jourdain: Will you have coercive power should there be influence-peddling or abuses along the way? Do you or someone in your organization have the mandate to ultimately see to it that coercive power is exercised in the community?

Mrs. Isabelle Dupuis: I'll let Mr. Benyon answer that question.

Mr. Andrew Beynon: It's an interesting question. The federal funds granted to the first nations are done so in the context of all federal funding. If there are management problems, the necessary resources in our funding agreements could be used.

As for environmental matters, once again, we need to remember that the Canadian Environmental Protection Act, for example, continues to apply. So if some problems come under federal jurisdiction, we have the power to react.

[English]

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

Mr. Boughen, for five minutes.

Mr. Ray Boughen (Palliser, CPC): Thank you, Chair.

First of all, let me extend a welcome to you, joining with my colleagues. We appreciate the time you're giving us here this morning.

Just to clarify my own thinking on the framework agreement, is the FNLMA a framework agreement with self-government arrangements? How would you describe that? Could you flesh that out a little bit?

Mr. Andrew Beynon: Thank you. It's a good question.

The framework agreement is really quite detailed and does describe the intentions of the parties regarding self-government authority of first nations: the land management authority, the authority to dispose of parcels of land, plus law-making powers. So it's an integrated system of self-government focused on those issues.

The federal legislation gave legal effect to the framework agreement. I'm sure if you ever have some chiefs of the first nations who operate under the legislation come before you, they'll place a great deal of emphasis on the importance of the fact that there is an agreement between Canada and the first nations, and that's an integral part of what is given the force of law.

Mr. Ray Boughen: You mentioned Westbank and Tsawwassen. What kinds of arrangements do you have in the regime with those two parcels of land?

Mr. Andrew Beynon: They operated under the FNLM regime for a number of years, but when they reached a stage where they decided upon a comprehensive self-government regime extending to a wider range of issues than land, there was federal legislation enacted to give effect to that change. The federal legislation specified Canada's agreement to a wider range of self-government, and through transitional provisions, it turned off the application of the FNLM regime.

• (1225)

Mr. Ray Boughen: Thank you very much, Mr. Chair.

The Chair: I should ask the witnesses if you are okay to extend your time here until we finish our second round. Thank you. I appreciate that very much.

Go ahead, Mr. Bevington.

Mr. Dennis Bevington (Western Arctic, NDP): Thanks, Mr. Chair. Thank you to the witnesses for being here today. It's a really interesting subject.

I have a question about the environmental process. Currently under the Indian Act, what are the regulations that govern...? Are they provincial regulations that are governing the environmental assessment?

Mr. Andrew Beynon: The answer, unfortunately, as I indicated earlier, and I think my colleague Kris Johnson did as well, is that there really is an environmental gap under the current Indian Act. I think that's an important issue for parliamentarians to consider. It has several dimensions.

First, in the Indian Act you won't find a provision that deals with band councils specifically having responsibility or having authority even, clearly, to deal with environmental assessment processes as part of their decision-making as governments.

Second, when it comes to environmental protection and control of environmental issues, when you look at the scope of the bylaw-making powers in the Indian Act, they're very restricted. It's very difficult for first nations, within the scope of the bylaw-making authority, to create much in the way of environmental protection.

Third, under the Indian Act there are federal regulations pursuant to the Indian Act, which I referred to earlier: the Indian reserve waste disposal regulations. They are very limited in scope, and the penalty for non-compliance with those Indian reserve waste disposal regulations is very small. If I recall correctly, it's a \$100 maximum financial penalty, for example.

When you look at reserve lands in terms of both environmental assessment issues and environmental protection issues, there are some inadequacies in terms of first nations authority. Again, though, I would caution about a couple of points.

To the extent that provincial environmental laws don't regulate the use of land but regulate the conduct of individuals, those laws can constitutionally have application. To the extent that provincial laws control the use of land for sound environmental reasons, those laws stop at the border on reserve.

Federal laws apply to the federal lands that are reserve lands. So again, the Canadian Environmental Protection Act, with its careful control of toxic substances, ocean dumping, and issues such as those, does apply. The federal Fisheries Act applies as federal law. The Canadian Environmental Assessment Act applies as well, as federal legislation, but it's oriented to controlling what federal departments do in terms of decision-making, expenditures, and so on. It's not about the band councils.

What the FNLM regime does is several things. One, it specifies a requirement for an environmental assessment process for the government decision-maker under the FNLM regime. That's one change from the Indian Act.

Two, it sets out—

Mr. Dennis Bevington: When it comes to those environmental assessment processes, are there a variety of processes that are legitimized under the process? Can you have a simple screening? Do you have to go to environmental assessment? How is that determined? Through what process is the depth of environmental assessment developed? Is it through the first nations' own regulations?

The Chair: We have one minute for a response.

Mr. Andrew Beynon: The very quick answer is that the community can control their own government by dictating rules—their own expectations from their own government—in terms of environment assessment through the land code.

There's also a provision in the legislation, which I'll try to find and maybe come back to in a second, which dictates the scope of the issues that must be part of the environmental assessment process, where first nations, as I recall, are regulating, financing, undertaking projects on reserve. That's where the environmental assessment process is triggered. So it tries to cover a list.

• (1230)

The Chair: Thank you.

Mr. Rickford, for five minutes.

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

Thanks, Kris, Andrew, and Isabelle, and in particular Andrew and Kris. I've been bugging you, not just for the briefings on this subject matter, but some of the ideas around a broader topic that hopefully I'll get another chance in this meeting to talk about, and that's land modernization for economic development. Thank you for bringing some discipline to my sometimes tangential thoughts around this broad subject matter.

First of all, we talked about benefits for the signatories, and there was a piece that I want to be sure about. One of them obviously flows from the joint action plan the minister recently signed with National Chief Atleo, which placed a real emphasis on governance. One should appreciate how the FNLM helps strengthen first nations governance by supporting political and financial accountability through the development of a professional public service and business expertise.

Very briefly, folks, in these five minutes, how do we get there efficiently and effectively? In some instances that can be a quantum leap, although I appreciate you've got a regime process map in your deck that I think has some built-in features to it.

I'll let you go on that.

Mr. Andrew Beynon: That's a very interesting question.

I would stress, again, that it's relatively new legislation. We're collectively learning lessons as we go. I think we're at a very good stage now to capitalize upon those lessons.

Many of the existing first nations under the FNLM regime have considerable experience. The Lands Advisory Board and the resource centre are institutions that have gained a lot of experience as well. With those two components in particular, the potential for being very effective and efficient in terms of new first nations coming into the FNLM regime I think is greater than ever before.

Mr. Greg Rickford: Sometimes, Andrew, these things get done well and we don't necessarily have a record of it. We hear buzzwords like "centres of excellence" and "best practices", but is there the potential for a record of these successes, a mechanism for first nations who are farther along in the process to work and share their positive experiences with other first nations, as an example?

Mr. Kris Johnson: I'll provide a point of view on that.

The experience I described earlier in the relatively short lifespan of the legislation, where there was a slow uptake and then accelerating to a point where we now have a demand that exceeds our capacity, provides a strong indication that those stories are being shared; they are inspiring other nations to designate their interest in this initiative. The potential has been proven. It's no longer simply a potential.

Mr. Beynon described earlier the experience of Westbank First Nation and Tsawwassen First Nation moving from this initiative into more comprehensive self-government arrangements. Through informal discussions with those communities, it has been suggested to us that the experience of governing themselves—their lands, environment, and natural resources—in effect proves to the community they were ready to take that next step into a more comprehensive arrangement.

Mr. Greg Rickford: Thanks, Kris.

In the last minute and 15 seconds I want to talk about a couple of issues. Stakeholders of mine, not just in my political life but in my previous life, had serious discussions about some of the problems with the Indian Act, and those are land management processes. I'd like you to give me a couple of examples to make this concrete; one that would come to my mind, for example, is allotment land use.

Can you talk specifically about the timelines that are different from the Indian Act to the FNLM, and can you please provide us with any other concrete examples, with specific reference to timelines, that show us how practical this is on implementation?

Thank you.

•(1235)

Mr. Andrew Beynon: I'd be very pleased to do that.

I'll give you an example that I think is one of the most dramatic ones. Under the Indian Act, in order to lease land, for example, there is a process required that involves designating the lands for leasing purposes. Doing so requires a vote by the community. It also requires an interaction with the federal government to review the terms of the proposed designation. It also requires that the federal government look at the terms of the proposed lease. For some communities, the process of working through all of the documentation required to

designate and make a decision on those lands and subsequently to enter into a lease on those lands takes about eight years.

Mr. Greg Rickford: Actually, I would say that allotment and land-use registrations and what you're talking about are just three examples that are dramatically sped up. Is that correct?

Mr. Andrew Beynon: Exactly. It would be significantly faster under FNLM.

The Chair: Thank you, Mr. Rickford.

Mr. Rafferty, you have five minutes.

Mr. John Rafferty (Thunder Bay—Rainy River, NDP): Thank you very much, Chair.

Thank you very much for being here. I have a couple of questions for you.

The first one is about the 32 first nations that have opted in. If things continue and they purchase land and land becomes attached to reserves and so on, does the process continue in the new lands that are added to the reserve lands?

Mr. Andrew Beynon: That's a good question, because there are first nations operating under the FNLM regime that are experiencing that very issue right now. When a first nation operates under the FNLM regime, there is a very clear demarcation of the reserve lands to which the FNLM regime will apply. Where there is an agreement to add lands to a reserve, we have to go through a subsequent step to decide with the community whether they want the FNLM legislation to apply to that reserve land as well.

Mr. John Rafferty: I have a subsequent question. This is a problem I'm experiencing in northwestern Ontario, and I suppose Mr. Rickford probably is as well in his part of Canada, as is perhaps the rest of Canada.

I advised the witnesses who were here on Tuesday that I'd be asking this question, and I asked them to brief the new witnesses coming in on this one. I think it's a straightforward question, but no one seems to know the answer to it.

Let us say, for example, that Rainy River First Nation purchases a strip mall in Fort Frances. Over the course of the next number of years, as it becomes attached to a reserve, the municipality will no longer be receiving tax money on that land. Who is responsible for making sure the municipality receives compensation for that property tax that is now lost?

Mr. Andrew Beynon: I really wish I could give you a nice snapshot answer.

Mr. John Rafferty: Oh, I was hoping it would be like, "oh, the province is responsible", for example.

Mr. Andrew Beynon: I like to give very clear answers. This is an important question that we should follow up on in writing, because there is some complexity to it.

I have to give you this answer. There are different regimes, under which settlements are entered into across the country, that yield these additions to reserve. Different settlements may dictate different outcomes for municipal tax loss compensation. Those in Saskatchewan are different from those in Manitoba, for example. The circumstances vary.

My attempt at a short answer would be to say that in the processes, when lands are identified for potential addition to reserve, to expand for population or economic purposes or for settlement of claims, there are different processes that are built in for consultation with the municipalities, and efforts are made to come to an agreement.

Mr. John Rafferty: If I may interrupt, northern Ontario municipalities are very large and not very well funded. In this particular case, or in some other cases of adjacent lands—farmlands, for example—being bought up, each time a block of land disappears, it disappears from the tax base of a larger municipality. It might not be a mall, for economic reasons; it might just be an increase in the reserve land size, but somebody has to be on the hook for those municipalities. I know, for example, that the municipalities in question, Emo and Fort Frances, were never consulted.

Mr. Andrew Beynon: The one comment I would offer to that is that while efforts are made to negotiate with municipalities, it is fair to say you would probably hear that concern about potential long-term loss of tax revenues from a lot of municipal organizations.

I would suggest, though, that sometimes when first nations are working with neighbouring municipalities, they get into the issue of what economic development would take place if the land became reserve land. If there are appropriate servicing agreements and potential expansion of local revenues, those can be factors that sometimes cause neighbouring municipalities to say they will support the proposed addition to a reserve.

• (1240)

Mr. John Rafferty: Is there one person whom municipalities can write to about these issues? In other words, when I'm approached, can I give people a person to call?

Mr. Andrew Beynon: I think that's probably best handled by addressing the inquiry to the Department of Aboriginal Affairs and Northern Development or to the minister. It will go through the appropriate channels, whether it pertains to a region or to those who are negotiating an active claim. There's also a division in our lands and environment branch that is responsible for additions to reserve.

Mr. John Rafferty: Can you follow up and get an answer on that one?

The Chair: Thank you.

Mr. John Rafferty: Is there an information package that can go to first nations, a set information package if first nations inquire?

Mr. Andrew Beynon: On the FNLM regime, there's the Department of Aboriginal Affairs and Northern Development Canada website, which has some information. I would suggest, though, that the best avenue for contact is through the resource centre that works with the Lands Advisory Board.

The Chair: Thank you, Mr. Rafferty.

Mr. Rickford.

Mr. Greg Rickford: Thank you, Mr. Chair.

Now for what keeps me up at night, ladies and gentlemen. I have been looking at the legislative agenda for the next year. I'm starting to see a constellation of policy platforms that are focusing on lands modernization for economic development as an umbrella statement. This includes a lot of things. Indeed this committee has already been dealing with specific land claims. Land tenure reform is going to fit into modern forms of land ownership. We heard another colleague and fellow lawyer talk about fee simple.

Could you highlight possible topics of study for land modernization and sustainable economic development? We're hearing a lot of substantial questions about the environment and the gaps.

Furthermore, I would appreciate it if you could give us a sense of what you believe the recommended background briefings might be. This would help us in our scheduling. I may interject, but I'll try my best not to. Take it away.

The Chair: I hope there'll be no interjections.

Mr. Greg Rickford: Go ahead.

Mr. Andrew Beynon: You're right, there are a wide variety of issues under this general rubric of land tenure or lands modernization. We would be pleased to come back and discuss these topics with committee members. In fact, it may be best to get back with a bit of a suggested list. I'd hit a few examples and I'll ask my colleagues to add as well.

One of them would be sustainable economic development. It's important to proceed with economic development, but we need to balance that with an appropriate management of the environmental issues. There is a current environmental regulatory gap on reserve for most first nations. That is one subject matter that I would suggest merits consideration.

The second is land tenure itself, the nature of ownership on reserve. As you suggest under lands modernization, there are various first nations groups that are raising for consideration a variety of options. FNLM is an opt-in regime. It would apply only if first nations want to pursue that avenue. Some other first nations are suggesting that there may be a different avenue that would involve fee simple ownership of reserve lands.

• (1245)

Mr. Greg Rickford: I assume you're going to go down a list. John has raised a point now on the second occasion. I hear you loud and clear. It's on my list of things to do. But I think this would address economic opportunities linked to additions to reserves and claims. That could be a topic.

Mr. Andrew Beynon: I agree with you, yes. I was going to suggest that one of those subject matters is the question of additions to reserves and the processes, implications for a neighbouring municipality, relationships.

Another issue in the list could be issues relating to and just specifically concentrating on linkages with provinces and municipalities as the neighbours of reserve land. Some of the issues arise in a claims context, sometimes in additions to reserves. For example, earlier in my presentation I commented on the environmental issue and having laws that meet or exceed the standards of provinces. Well, that suggests an area of interaction with provinces, for example. So that can be itself an area.

Mr. Greg Rickford: In the last 36 seconds, can you just tell me what kinds of background briefings we might benefit from? If you can't, Andrew, maybe...a list and what specific acts we may want to consider.

Mr. Andrew Beynon: I think it would probably be best to get back to you with a list because there are so many subjects under this general area of lands modernization. But briefly, I would add to what I just said a few moments ago. There are some specific pieces of legislation I alluded to. The First Nations Commercial and Industrial Development Act and the First Nations Oil and Gas and Moneys Management Act would be two good examples of concrete items we have in the lands modernization group on which you may like to have briefings.

Mr. Greg Rickford: Thank you. My time is up.

The Chair: Your time is up. Do you have a request for the other witnesses?

Mr. Greg Rickford: I don't need descriptors at this point, but I would like a list, enumerated, of possible topics of study under this. I want to be able to work with my colleagues around something like this for us at least to consider, and a list, similarly without descriptors, of background briefings that we might benefit from. I think that sets us on a road map here that if this is the area that we're going to head to, this is how we get it. I'm impressed by the regime process map, which your department has come up with in the deck. I

can't help but think that you would be able to create a similar kind of road map for us under this subject matter.

Thank you. I appreciate it.

The Chair: Thank you very much.

We appreciate the fact that you waited for us and that you stayed longer for us. We really appreciate the information that you brought forward, and we will probably hear from you again. It sounds like there are still some questions that you may be able to answer for us in future meetings. We certainly appreciate that, Mr. Beynon.

Mr. Andrew Beynon: Perhaps I could have your indulgence for just half a moment. I would just like to make sure that one thing is clear that didn't quite get answered, and that is, the scope of the FNLN legislation and regime is Indian reserve lands, lands that are set apart for the use and benefit of first nations, not traditional lands, not lands that are in claims areas. The legislation switches off the Indian Act lands management system, which applies only to reserve lands. That's why the scope is that way.

The Chair: I appreciate that clarification very much. I know there's some correspondence that will be floating back and forth to the committee from you, and we appreciate that. We may then subsequently be asking you for additional information. Thank you so much.

Committee members, I'm wondering if there's a possibility that I can keep committee members here to go in camera for five minutes. We just have some quick business, and if we can keep the committee as a whole here, we can actually expedite our planning—not the steering committee. I think if we can get the approval of committee members, that would be excellent.

[Proceedings continue in camera]

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