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Chair

Mr. Chris Warkentin

Standing Committee on Aboriginal Affairs and Northern Development

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● (0850)

[*English*]

The Chair (Mr. Chris Warkentin (Peace River, CPC)): Colleagues, we'll call this meeting to order. This is the 68th meeting of the Standing Committee on Aboriginal Affairs and Northern Development. We are continuing our study of Bill C-428.

Today we have the privilege of having representation from the Canadian Bar Association. We have Christopher Devlin with us today, who is back to our committee. We appreciate your willingness to return. We know that you're from Western Canada and it's five in the morning there, so we appreciate your willingness to come this morning and be prepared to answer questions.

We also have Tamra Thomson. Thanks so much for being with us. We appreciate your willingness to come and answer questions as well.

We'll turn it over to you folks and we'll hear your opening statement. Then we'll have some questions for you.

Ms. Tamra Thomson (Director, Legislation and Law Reform, Canadian Bar Association): Thank you, Mr. Chair and honourable members. We are very pleased to appear before this committee today on behalf of the Canadian Bar Association. We represent over 37,000 members across Canada. The statement that you have received from us was prepared by the aboriginal law section, which includes lawyers from across Canada with expertise in all areas of aboriginal law.

On the areas of the bill relating to sections 42 to 47, we have also received input from our wills and estates law section.

One of the objectives of the Canadian Bar Association is improvement in the law and improvement in the administration of justice. It's through that lens that we have examined Bill C-428.

With that, I'm going to ask Mr. Devlin to go into the specifics of the points that you have in front of you in the submission.

Mr. Christopher Devlin (Executive Member, National Aboriginal Law Section, Canadian Bar Association): Thank you.

I understand that all of the members have a copy of our paper in front of them, which will be very helpful. We have three comment sections in the brief.

The bill proposes to repeal several sections of the Indian Act. The first section of our paper just reviews the sections where we have no concerns about the repeal of those provisions. They are archaic provisions for the most part, or they are provisions that enough workarounds have been developed that they are no longer in effect as a practical matter. We suggest that the committee should not be concerned about the repeal of those provisions, so I'm not going to spend any time on those.

What I do want to spend time on are the effects of section 7 of the act, which would be the repeal of certain provisions of the Indian Act relating to wills and estates. Section 7 would remove the minister—of I guess it's still legally Indian and Northern Affairs Canada—from the administration of estates and wills. We have considerable concerns about this section. It's a very small section with huge implications, as we see it. I want to talk first with respect to wills, then estates, and then some transition issues that we've identified in the paper.

With respect to the repeal of sections 42 to 47 of the Indian Act that would follow from clause 7 of Bill C-428, the provincial laws with respect to wills wouldn't then apply to the wills of Indians by virtue of section 88 of the Indian Act. It's all very complicated, but section 88 of the Indian Act brings into force provincial laws that apply to wills with respect to Indians. It's referential incorporation of provincial law. Without federal regulation over Indian wills, then the provincial laws would apply. We see a few challenges with this.

First of all, provincial laws are different throughout all provinces and all territories. You would no longer have a uniform law that would apply to Indian wills across the country.

The second thing is that it would be a very complicated and expensive process that would then fall to individual Indian families rather than be administered from the Department of Indian Affairs. We also have to remember that these provisions only touch on wills for Indians who are ordinarily resident on reserve. The wills of Indians who do not live on reserves or whose main residence is not on a reserve are already subject to provincial legislation with one exception. That is, if they hold any land on a reserve, then they still have to go through and are still subject to the Indian Act with respect to transfer of land. The normal conveyancing of land in a provincial system wouldn't apply. They would then still have to go under the Indian Act to be able to transfer and devise land held on a reserve to the beneficiaries. I'll explain that in a moment.

Without that backstop of having Indian Affairs be the default institution, these private citizens—who are now Indians, ordinarily resident on a reserve, or their families—will be forced to start in the provincial system, and potentially move back to Indian Affairs to get a variety of opinions on the value of the estate, perhaps section 50 sales of their certificates of possession. Then, once all that is taken care of, they have to go back to the provincial system to get it probated. The current system allows the minister, who effectively acts as a probate court, to have all of this happen in a very efficient manner. Those efficiencies will be lost.

Families who have to deal with probate of Indian wills will be flipping back and forth between whatever their regulations are in their province, and then back to the Indian Act if there are land issues on reserve, and then back to the province. We expect that this will increase costs.

The other thing that we have identified in the paper is that many Indian estates, frankly, aren't worth that much. Usually, the typical Indian estate, for someone who's ordinarily resident on reserve, is some sort of landholding on the reserve, like a certificate of possession. There will be a family home. But the value of those land holdings tend to be much less, particularly in rural communities, than you might expect off reserve. The value of a certificate of possession doesn't attract a high market price.

Other provisions in the Indian Act require that certificates of possession can only be bought and sold by other members of the band, and of course, mortgage money can't be raised to pay for these, so they tend to be cash transactions. Because you have a small market for certificates of possession—other band members—and because you can't raise financing, the price for these holdings on reserve gets much less.

Why is this a problem? It's a problem because the public trustees in the various provinces and territories simply won't touch small estates. If they can't get their fees out of the estates, then they won't deal with these kinds of issues. So if a will is declared void for whatever reason, or part of it is declared void, or if the will says you can have all the personal property but the real property on the reserve has to be transferred according to the Indian Act, the value of that could be so small that there won't be any backstop. The public trustees in the provinces simply won't deal with it.

As a result, one of our big concerns is that landholdings on reserve may no longer come out of the names of deceased Indians, because there may be no financial incentive for people to actually go through a probate process, or in the case of intestacies, an administration process. You may have certificates of possession that could remain in the names of deceased Indians for years. There's simply nobody who will have an interest in resolving those estate matters. Indian Affairs will no longer be administering that. The minister's jurisdiction will be taken away. The public trustees won't be able to get their fees, so they're not going to be interested. Quite frankly, some of the families in some of these small rural communities, access to justice for them—accessing legal counsel who will understand this, their ability to fund the probate process—probably won't be there in many cases.

There are some other concerns we have, which I only want to touch on, that are unique to first nations. We mention concurrent spouses as an issue. The Indian Act has significant flexibility to deal with situations in which a person may be married to one person, say early on in their life, then by the time they die are living with someone else. The Indian Act allows for the minister to ensure that a will provides for all dependents of a deceased Indian, and that can include concurrent spouses. That flexibility is lost in most of the provincial jurisdictions that we're aware of.

Also, Indian customary adoptions is another big concern. Under the Indian Act the definition of a “child” includes children who are adopted through indigenous legal traditions. The definition of “child” in most of the provinces and territories does not refer to that. So when you have child beneficiaries under Indian wills, currently they can include children who have been adopted according to the custom of that first nation. That may become lost and those beneficiaries may become disentitled under Indian wills.

● (0855)

I've already talked about the problem of dividing land on reserve, so I won't go into that again.

The form of a will is another big concern. Under the Indian Act and the Indian Estates Regulations, the form of a will is that it has to be in writing, signed by the testator, and expressing the testator's wishes. That's it. It's a much more generous definition than what exists in most provinces and territories.

We have—and we note these statistics in our paper—only 5% to 10% of Indians ordinarily resident on reserve making wills now. The fact that this bill would see them fall under provincial jurisdiction and therefore have to comply with the forms of wills that are required under provincial laws may reduce the incidence of Indians, ordinarily on reserve, making wills. It may increase the level of intestacies of Indians ordinarily resident on reserve as a result of having to comply with provincial jurisdiction. Some provinces, it's true, allow for holographic wills, so just a piece of paper signed by the testator, but many don't. We have to be alive to that as the bill is being considered.

I have touched briefly on the ability of the minister currently to void wills in unjust circumstances. Provincial legislation will allow wills to be voided in circumstances of duress or lack of testamentary capacity. The Indian Act provides greater flexibility to the minister currently, particularly when a will disposes of land contrary to the Indian Act or against the public interest. There is a huge flexibility currently in the Indian Act for the minister and the department to make provision for all those who need to be provided for in a will, and to vary it accordingly. That flexibility doesn't exist to the same degree in a variety of provincial regimes, nor uniformly across the country, the way it does now.

Although it removes the minister's exclusive jurisdiction over wills in estates, the bill still keeps the intestacy provisions in place in the Indian Act. As I mentioned earlier, over 90% of Indians who are ordinarily a resident on reserve do die intestate. However, this removal of the jurisdiction under section 43 of the Indian Act means that the minister has certain obligations, but no longer the jurisdiction to trigger them under the intestacy provisions.

In our paper, we talk about what we identify as potentially harsh, unintended consequences. For example, under section 48 of the Indian Act, the minister still needs to be involved in the valuation of estates assets and intestacies, and also has to provide an opinion as to whether adequate provision has been made for children and dependents. Currently, the minister and Indian Affairs act as the administrative backdrop to Indian intestacies. If that's not the case, if they become more passive players in the process, although the minister has the obligation to come to these opinions, that won't be triggered until a private administrator would come forward from an Indian family on behalf of a deceased Indian to ask for those opinions. That means the minister's obligations would be somewhat reliant, then, on the diligence of these private administrators, or reliant on the fact that the private administrators are indeed appointed.

That goes back to my earlier point. On some Indian estates, there simply won't be enough value in the estate to warrant someone being appointed administrator. Their fees and costs won't be covered.

● (0900)

The Chair: We'll just have you wrap up here shortly and then we'll begin the questions.

Mr. Christopher Devlin: The last part of our paper, the third section, deals with the proposed repeal of bylaw provisions. We talk there about section 85.1 and about how some first nations do have bylaws that govern intoxication on reserve to the extent that those nations may be affected. As well, the department may not see the other bylaw powers as being similar to those in section 85.1, so the existing bylaws could be continued. We see that being problematic for those nations that have chosen to have anti-intoxicant bylaws.

We make a series of recommendations on the final page of our paper. Our first recommendation is that clause 7 of the bill be tabled until further study can be done by the department to determine the best way to reform the wills and estates provisions so that some of these unintended consequences we've identified wouldn't occur or could be dealt with in a more holisitic fashion.

We also note there are no transition clauses in the bill so there's no way to have the bill come into effect in a measured way. If it's passed, it will suddenly be law, and those other provisions of the Indian Act will be repealed without any consideration regarding the effects.

If those two recommendations aren't acceptable, then we have a list of a few recommendations. They are admittedly piecemeal recommendations, the second alternative recommendations, on things like grandfathering existing wills so they are not immediately void upon the bill coming into force, and stuff like that.

● (0905)

The Chair: Thank you, Mr. Devlin.

Thanks, Ms. Thomson.

We're going to turn to Ms. Crowder for the first seven minutes.

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

Thank you, Ms. Thomson and Mr. Devlin, for a very thorough presentation. I appreciated getting the briefing document.

It seems clause 7 of Bill C-428 is the most problematic. There are other issues as well, but it's the most problematic. I have a couple of points of clarification on your specific recommendations.

Regarding your recommended amendment about “common-law partner" for the purposes of Indians ordinarily resident on reserve, under subsection 2(1) of the act, common-law partner is already defined. The assumption is that subsection 2(1) of the act would prevail even if clause 7 were left in Bill C-428. Is there something I'm missing? Because there already is a definition.

Section 2(1) of the Indian Act states that:

> “common-law partner”, in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year....

Mr. Christopher Devlin: Thank you for the question.

The short answer is that once the wills provision in the Indian Act is repealed, then the provincial definitions of common-law partner would prevail vis-à-vis wills and estates regimes in their respective provinces or territories.

So you're correct in that the Indian Act definition of common-law spouse would remain for the rest of the Indian Act, but the regimes that would apply to wills and estates would be the provincial regimes. Therefore you have to look to whatever the definition of common-law spouses is in a particular provincial regime for wills. That would be operative.

Ms. Jean Crowder: If we inserted a definition specifically to deal with wills and estates, referencing section 2(1), would that override the provincial?

Mr. Christopher Devlin: Yes. Again it's the doctrine of interjurisdictional immunity. Whenever you have specific.... Sorry to get technical this early in the morning, but—

Ms. Jean Crowder: I'm not a lawyer.

Mr. Christopher Devlin: —whenever you have specific federal legislation that occupies the field, as it were, then that will push out the provincial.

Ms. Jean Crowder: So if we specify that, then it overrides the provincial.

Mr. Christopher Devlin: But this kind of goes to our first recommendation. I would caution the committee about taking a piecemeal approach to this area of reform. There are many things that need to be thought out, intricacies about how the provincial wills regimes would work vis-à-vis Indian estates. Those need to be thought out carefully. It may not be as simple as just adding that section 2 of the Indian Act, regarding common-law partner, continues to apply. That may not get us all the way there.

Ms. Jean Crowder: I would completely agree with you. I don't think the solution to this is to actually do a piecemeal amendment.

How our process works is that the committee would have to vote no to clause 7. We can't actually put a motion forward to delete clause 7 at the committee stage. We can only do that in the House. The committee would have to agree to vote no to clause 7.

If the committee wouldn't agree to vote no to clause 7, is there a way that we can then amend this egregious piece of the act, which will have unforeseen consequences? You've done a very thorough job of presenting what some of those are. What I'm trying to get to is if we can't get agreement on deleting clause 7 by voting no, then I'm looking for places where there's a potential to amend, even though we disagree with clause 7.

● (0910)

Mr. Christopher Devlin: Right.

Ms. Jean Crowder: That's where I'm going on this. It's not that I think this is a great way to do it, because I don't.

With regard to part (c) of your recommendation 3, "A provision that reserves residual authority and jurisdiction to the Minister under s.43 with respect to intestacies still governed by the *Indian Act*", the legal opinion that we've had said this would involve an amendment to clause 7 so that paragraphs 43(c) and (d) would not be included in the repealed sections 42 to 47 to allow for the continuing operation of these sections, given that the minister's power contained in section 43 relates to intestacy. Is that what you're suggesting?

Mr. Christopher Devlin: That's entirely what we're suggesting. Because of how the Indian Act is written and because the minister has exclusive jurisdiction under section 42 of the Indian Act, the following sections, both the wills and the estates stuff, is all combined together. If you get rid of sections 42 and 43 vis-à-vis wills, you're also getting rid of that exclusive jurisdiction vis-à-vis intestacies.

Because of the fact that we don't see the public trustees stepping in as sort of that final backstop to assist in the intestacies of Indians ordinarily resident on reserve, we see that there's a real need to keep this jurisdiction and retain it for the minister. So, yes, paragraphs 43 (c) and (d) of the Indian Act should remain in the Indian Act. Even if wills are removed, the jurisdiction over estates should remain.

Ms. Jean Crowder: Then the final one, in your recommendation 3(d) and (e), where it's dealing with the minister no longer receiving notices of Indians dying on reserve, there is a notification requirement set out in subsection 3(1) of the Indian Act, which says, "As soon as feasible after the death of an Indian, the superintendent shall forward a notice of the death, in the form prescribed, to the Minister".

Because there is already another section of the act that deals with the notification to the minister, is that going to be good enough, or are we going run into the same case that we had with the common law?

Mr. Christopher Devlin: Can you just give me the reference again?

Ms. Jean Crowder: Sure. It's subsection 3(1) of the Indian Estate Regulations, which are not repealed.

Mr. Christopher Devlin: I see. Right.

The problem is that the superintendent won't necessarily know about these intestacies anymore. Because there's no exclusive jurisdiction, no one will be required to tell Indian Affairs that someone has died who is ordinarily a resident on reserve. There won't be estates officers who are making those enquiries and making sure that the family is doing all it needs to do.

In many of these intestacies someone from the family will come forward as the administrator. I'm not suggesting that the department acts as the administrator in every intestacy. That's not true. Many times people come forward and act—you know, next of kin and that kind of thing. But because Indian Affairs has the kind of administrative presence that it does now and the jurisdiction to make these enquiries, people are much more proactive when someone dies.

There can be changes in band lists where people will send in a new membership list a year later and say, "Oh, yes, so and so has died". That may be the first time that the department ever finds out that someone died on a reserve if clause 7 goes through, whereas those things do happen much more quickly given the department's existing administrative infrastructure right now when dealing with membership changes and Indian estates.

● (0915)

The Chair: Thank you.

We'll turn now to Mr. Rickford for seven minutes.

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

Thank you, Tamra and Christopher. Christopher, it's nice to see you back again and thank you for your analysis.

I'm going to deal with clause 7 of the private member's bill with my questions, but I would like to make a couple of quick opening remarks and observations, if you will, as to where we are at this point and how that might be helpful from some perspective.

There has been some back and forth between words like "incremental" and "piecemeal". What I find most interesting in terms of where we are at this time is that obviously we would be using the word "incremental" and some other colleagues might be saying "piecemeal", but what has happened, no matter what label you apply, is that a very serious conversation has developed, which is what was intended by this member of first nations descent, I might add, around a number of issues, particularly with respect to section 42 to section 47, and then I would say, based on your report, section 48, and then subsection 2(1) becomes impacted.

In other words, this may be more than incremental. I think in your recommendations you give us an algorithmic kind of way of, perhaps, approaching it, so that's what my questions will be focused on. But any time you deal with the descent of property, wills, and appeals mechanisms, obviously it raises issues about the distribution of property on intestacy, and I appreciate that additional source of information.

Similarly, with respect to the Indian custom piece of subsection 2 (1), Christopher, I think it raises some serious issues. My question is specifically on Indian custom. I would like to know for what specific reasons there would be a lack of a definition in some jurisdictions, if you know any. That may be a very short answer.

Then my questions will deal specifically with your recommendations. You have the removal versus the coming into force. There is an option in between recommendation 1 and 2 to a legislative way to find the best way to reform wills and estates without creating unintended consequences or legal gaps. Do you have a time period, if we went the route of a coming into force, where that would be implicated?

Then further, do you have any recommendations for a new way of administering wills and estates, some early stuff to give us some ideas about where we would do this?

I put the questions out first because I thought you would have no trouble going through that list and expounding on it.

Mr. Christopher Devlin: Thank you.

On the customary adoptions, only the Indian Act, so far as I know, recognizes customary adoptions in its definition of a child, pursuant to indigenous legal traditions. The only other body of law that I'm aware of that recognizes that is the common law, so judge-made law, where the common law will also recognize these customary adoptions. To the best of my knowledge, none of the provincial or territorial—

Mr. Greg Rickford: Far be it for lawyers to ever disagree about something, but I do believe British Columbia has some kind of provision. It may—

Mr. Christopher Devlin: It may be that they have new legislation and it may not go as far. I'm not certain about that, but certainly that wouldn't be true across the rest of the country.

You have a very clear definition now in the Indian Act that encompasses customary adoptions and that's something that—

Mr. Greg Rickford: It's a residual category then.

Mr. Christopher Devlin: Yes, it confers civil rights to a class of people that may lose those rights if clause 7 were to go forward as is.

Mr. Greg Rickford: Understood.

Mr. Christopher Devlin: So that's of concern.

The second question, as I recall, related to a time period for the coming into force. We didn't put any specific recommendations in there. We thought we'd leave that to the committee's wisdom.

I would suggest that in order to introduce companion legislation, as we recommend, to fill the gaps that would be created by the repeal of sections 42 to 47 of the Indian Act, I would think we'd be looking at a six months to a year's process in order for Parliament to consider that. That's usually the time that courts give Parliament to change unconstitutional pieces of legislation. I know that's a fairly tight schedule, given how Parliament works, but I think that anything less than a year would be unrealistic.

But that's outside our brief; that's simply trying to answer your question.

Mr. Greg Rickford: Yes.

Mr. Christopher Devlin: Then the third—

● (0920)

Mr. Greg Rickford: That question is an invitation, Christopher, to—

Mr. Christopher Devlin: It is, and that's where I would go with my third answer as well. I think we'd like to be part of a process. The CBA could provide considerable assistance in a process of trying to reimagine a regime for Indian wills and estates, to improve on the existing regime in areas in which it could be concurrent or congruent with provincial and territorial regimes, and then in areas in which a special distinction would still need to be made for land on Indian reserves—that kind of thing.

There is also a host of other pieces of legislation that have to be kept in mind and make it even more complex. You have the matrimonial real property on reserve; that's coming into force soon. You have land codes under the First Nations Land Management Act. All of these different regimes have different land consequences for Indians with land on reserve as they try to pass it on to their beneficiaries.

So I think we would love to be part of an ongoing dialogue about how to reform this particular area. That's as much as I can say today, I think.

Mr. Greg Rickford: That's six minutes and 58 seconds, according to my stopwatch, Mr. Chair.

The Chair: You're absolutely correct. I wondered whether you had a question that would only take five seconds, but clearly that's not the case.

Ms. Bennett, we'll turn to you for seven minutes.

Hon. Carolyn Bennett (St. Paul's, Lib.): Thank you.

Thank you for the brief. It has been very helpful, even in previous hearings. So thank you, even though we're getting you at the end of this.

I guess all of us have been quite concerned that even the language of your brief is pretty strong language. For example:

> The CBA Section does not support the proposed repeal of sections 42 to 47 of the Indian Act. Significant mischief and hardship will occur if Section 7 of Bill c-428 is enacted....

I think it speaks to what my colleague said, that somehow we need to persuade the committee that the right thing to do is to vote no to that clause, with the provision that you and others would perhaps work with the member for a companion bill that could come forward in due course to deal with the complexity of this wills and estates piece, and to ensure that there's no void and that the problems you've articulated are dealt with in a comprehensive way.

Is that your advice to this committee?

Mr. Christopher Devlin: Yes, it is.

Part of my practice—not a big part, but a part of my practice—involves Indian wills and estates, and there are enough complications under the current regime. I think this is why it would be of interest to the CBA to participate in some sort of law reform in this area.

Even now under the Indian Act, because you have beneficiaries of Indian wills—some of whom are members, some of whom aren't, some of them status Indians, some of them not—any time you have a devise of real property on a reserve it can become intensely complicated. This means not only hardships for the family members involved, who have often grown up together but because one of them is a status Indian and one of them isn't, one is entitled to get the land and the other is not. Then they are forced to sell the land. You have to have a section 50 sale so that you can liquidate, so that the non-Indian can actually get the value under the will. These are hardships that exist now. The hardships we've identified in the paper would just exacerbate the situation.

So you have the hardships to these individuals, but then you also have the hardships to bands as a whole. If you have land on reserve that ends up not being able to be devised, such that it stays in the name of deceased Indians for years, it is very hard for band councils and first nations to then engage in any kind of land reforms on their own reserve, for land development issues. It locks in land almost in perpetuity to non-development, to non-use for other band members that would allow the first nation to move forward.

I've seen this with more than one client. You can have literally generations of land disputes that paralyze a reserve and prevent either the individual landowners from developing their land or the band as a whole from developing their land. These can ultimately be governance issues that are very complicated to unpack, and to the extent that we can prevent this happening or avoid exacerbating that situation, I think we ought to try to reform it so that it doesn't happen.

● (0925)

Hon. Carolyn Bennett: Was the CBA consulted before this bill was tabled?

Mr. Christopher Devlin: No.

Hon. Carolyn Bennett: Your first choice is that we vote no to clause 7.

Mr. Christopher Devlin: Correct.

Hon. Carolyn Bennett: The second choice is that we amend it to say that it would not come into force until there has been companion legislation introduced.

Mr. Christopher Devlin: Correct.

Hon. Carolyn Bennett: And the third choice is to put five band-aids on it.

Mr. Christopher Devlin: Correct.

Hon. Carolyn Bennett: Okay.

I think those are pretty clear instructions for the committee.

Obviously the consultation process is a huge concern to all of us. Without some sort of government-to-government consultation, this is probably not the way to go.

Although do you agree that for these sections that are antiquated, it is a step forward to actually allow the private member to eliminate these things, which have never been used and are completely outdated?

Mr. Christopher Devlin: Yes.

For the residential school sections, for example, there aren't any more residential schools. For the no barter and trade from the Prairie provinces, all the bands of those Prairie provinces have been exempted.

Hon. Carolyn Bennett: So this would be a valuable bill going forward if it only dealt with those things that really need to be gotten rid of.

Mr. Christopher Devlin: Correct.

Hon. Carolyn Bennett: In the other areas—the dry reserves and the special reserves—do you have advice for those sections?

Mr. Christopher Devlin: What we've set out in the paper is that there are some nations that have adopted those bylaws. I think some consideration needs to given to whether they want to continue with those bylaws and whether the other bylaw powers of the Indian Act would be sufficient for those bylaws to stand.

Hon. Carolyn Bennett: Do you have a remedy or a prescription for fixing that?

Mr. Christopher Devlin: I don't believe we put one in our paper.

I think we drew it to the committee's attention.

Hon. Carolyn Bennett: But you could?

Mr. Christopher Devlin: Yes, we could.

Part of it is that oftentimes first nations take a different interpretation of the general bylaw-making power under section 81 than the department does. So the department will often disallow bylaws that the first nation thinks it's enacted properly under its law-and-order power.

That can be an administrative difference of opinion that has legal consequences. If the department were to say that, for first nations that have intoxicant bylaws, those can be continued under the section 81 power, that would be the solution.

Hon. Carolyn Bennett: Do you think that's fixable the way the bill is?

Mr. Christopher Devlin: It is fixable.

The Chair: Excuse—

Mr. Christopher Devlin: Deliberate consideration has to be given so that the nations that have those bylaws now and want them to continue are given the mechanism to do that, so those bylaws aren't struck down.

Hon. Carolyn Bennett: Is it the same for special reserves?

Mr. Christopher Devlin: Yes.

The Chair: Thank you very much.

We'll turn to Ms. Ambler now for seven minutes.

Mrs. Stella Ambler (Mississauga South, CPC): Thank you, Mr. Chair.

Thank you both for being here today.

Thank you for the presentation, Mr. Devlin, and the report.

I'm going to switch gears a little bit and talk about the new bylaw provision under this proposed bill. On page 3 of the report that I have, you refer to the fact that the minister's approval would no longer be necessary for a new bylaw to come into force and that the

> CBA Section believes this will be a positive change.

Could you elaborate on that a little bit for us, please?

● (0930)

Mr. Christopher Devlin: That sort of follows on the heels of my last response.

Often first nations will engage their law-making power under section 81 and will send it off to Indian Affairs and within 40 days Indian Affairs may or may not disallow.

They tend to disallow. The department has fairly definite policies about the nature of the bylaws that they will allow to go forward, as opposed to the ones that they will disallow. Sometimes there's a difference of opinion between the first nation and the department on whether something is a valid bylaw.

What this would do is the first nation would essentially incur all the liability of a bylaw so that if they wanted to pass a bylaw under their section 81 power they could. If someone thought it was invalid they'd have to challenge it in court rather than the minister having the opportunity to disallow it.

Mrs. Stella Ambler: Which is really the way it is in most other jurisdictions.

Mr. Christopher Devlin: That's right. If you think of a municipality, for example, if it exceeds its bylaw-making authority, then it can be struck down by the courts.

Mrs. Stella Ambler: It seems to me that was Mr. Clarke's intention. He's right here so I'm sure he could speak for himself. I know I've heard him say that first nation governments are treated differently. It was his motivation, really, for changing that.

Mr. Christopher Devlin: If you think of first nations as small, local governments—now some not so small—they often have legal counsel involved in the drafting of their bylaws. We're in the modern age now where there are lots of advisers, lawyers and otherwise, on governance issues. If a first nation wants to engage in its law-making power, then it can assume the liability of making laws as well.

Mrs. Stella Ambler: It's less paternalistic as well.

Mr. Christopher Devlin: Agreed.

Mrs. Stella Ambler: Thank you.

Other witnesses here have told us that Bill C-428 would introduce a bylaw publication requirement that other jurisdictions don't have to follow. It is more onerous. Clause 10 would require that the bylaws be published on the band's Internet's site, in the *First Nations Gazette*, and in a newspaper generally available on reserve. This is instead of the minister's approval now.

But I understand, through a bit of inside information, that Mr. Clarke is considering an amendment to his bill that would require the publication of the new bylaw in only one of these places, instead of all three.

Does the CBA have an opinion on this potential amendment? Again, how would it compare to other jurisdictions' publication requirements?

Mr. Christopher Devlin: We don't have an opinion on it. As a lawyer who researches these things, I would sure like to see it in the *First Nations Gazette*, but that's for my convenience. On the question of whether it's onerous to a first nation, that is a question that should be considered in terms of the additional cost that it would bring on the first nation to have to publish these things.

Mrs. Stella Ambler: In all three....

Mr. Christopher Devlin: Even now, the department sometimes has copies of bylaws, sometimes it doesn't. It can be very tricky to find all the bylaws that a first nation has passed. Even in the current system, the departments may or may not have all the bylaws of a particular first nation on hand.

Mrs. Stella Ambler: So for you, the *First Nations Gazette* would be at the top of the list, if you had to write them.

● (0935)

Mr. Christopher Devlin: Yes, it's the easiest one to have access to.

Mrs. Stella Ambler: Is it available online?

Mr. Christopher Devlin: I think it is. I'm not sure. It is widely published across the country.

Mrs. Stella Ambler: Okay. I'm thinking of the access to the bylaw change from the perspective of someone living in the community as well as for the general public, so not just for the members.

Mr. Christopher Devlin: Not all first nations have websites. Some do, some don't. Some have websites that were put up 10 or 15 years ago. They're not updated. That can be a tricky requirement as well.

Mrs. Stella Ambler: Fair enough.

I just have one more question I'm wondering about. If Bill C-428 is enacted, then will first nation communities be able to review, repeal, amend bylaws once it's enacted? Given this new independence—I probably shouldn't use the word “independence”, but in effect it is—will they then be able to amend them just as any other jurisdiction would be able to?

Mr. Christopher Devlin: The bylaw-making power isn't being changed. What's being changed is the minister's ability to disallow a bylaw made under section 81 of the Indian Act. So the chief and council would still be able to make amendments to bylaws, repeal bylaws, make new ones. Bill C-428 isn't proposing to change the actual power to make bylaws. It's just proposing to change—

Mrs. Stella Ambler: The power of approval.

Mr. Christopher Devlin: —the minister's power to disallow bylaws made by first nations.

Mrs. Stella Ambler: Thank you very much.

The Chair: Thank you.

We'll turn now to Mr. Genest-Jourdain, for five minutes.

[*Translation*]

Mr. Jonathan Genest-Jourdain (Manicouagan, NDP): Good morning.

I have read your brief on the potential impacts if section 47 of the Indian Act were repealed. Some of the comments in committee were on the impact this could have on the recognition of holograph wills, that is, handwritten wills, and on the problems this could represent in civil law. This is particularly relevant in Quebec, where holograph wills are not automatically deemed valid. Holograph wills must therefore be validated and authenticated by courts to be seen as valid.

I would like to hear your opinion on this.

[*English*]

Mr. Christopher Devlin: Thank you for the question.

My understanding of the civil law is very brief, but going by the research we did, we understand that the only time wills need to be authenticated in Quebec is when they are actually being challenged. The usual practice is that wills are deemed to be as they are unless they are so challenged in court, and then they are.

That was the information we received.

[*Translation*]

Mr. Jonathan Genest-Jourdain: No, it is a requirement as soon as you are dealing with holograph wills. They must be authenticated by a court. Otherwise, they are not valid. This is one of the basic premises for recognizing holograph wills and presenting them in court.

[*English*]

Mr. Christopher Devlin: Under the Indian Act right now, the holographic will, just a piece of paper signed by a testator, is deemed to be valid. Under the changes, then, similar to other provincial jurisdictions, in Quebec the laws you've described would prevail, and the Indian wills for Indians ordinarily resident on reserve would have to be validated in court.

[*Translation*]

Mr. Jonathan Genest-Jourdain: In your opinion, what could be the economic impact of this change, given the socio-economic realities of Indian reserves and the costs associated with presenting and producing documents in court and introducing this type of document?

[*English*]

Mr. Christopher Devlin: I think it's true of all aboriginal communities located in rural or remote locations that access to justice is a huge issue. If you have to go to court to prove your will, and go through those sorts of processes, as opposed to being able to rely on Indian Affairs to assist you with it, it's going to increase the cost. Particularly for people of modest means who are very distant from court services, it could make the difference between having a will probated or approved by a court or not, and, notwithstanding the existence of the will, families just not being able to access the court system. Then it remains unresolved.

● (0940)

[*Translation*]

Mr. Jonathan Genest-Jourdain: Thank you.

How much time do I have left, Mr. Chair?

[*English*]

The Chair: You have about a minute and a half.

[*Translation*]

Mr. Jonathan Genest-Jourdain: I will share my time with my colleague.

[*English*]

Ms. Jean Crowder: No, I think we can just wrap it up, Chair.

The Chair: Yes. I think we'll complete with that.

I appreciate your willingness to come here this morning, Mr. Devlin and Ms. Thomson. For those of us from western Canada, it's even earlier, so we certainly appreciate your willingness to be here and your being so prepared this morning.

We'll suspend the committee meeting for just a few minutes while we get our panel set up for the round table.

● (0940)

(Pause)

● (0945)

The Chair: Colleagues, we're going to resume the meeting. I'll call it back to order.

Today we're undertaking a different process for the second hour. As committee members, you're aware that we're going to undertake a little bit more of a round table approach to this second hour. We'll begin by simply going around the table and introducing ourselves, and then we'll begin the process of speaking generally about the bill we have before us today.

My understanding is that there are some members, witnesses this morning, who had hoped they could submit a 10-minute statement or an opening statement that would be included in the evidence of the committee hearing. It won't be read, but it will be tabled with the committee, and then will be included in the evidence of the committee. That is well within the provisions of the committee, so if there are members who would be interested in including that, I would be happy to receive that. I think there is support from committee members to ensure that happens.

We have Ms. Bennett on that point.

Hon. Carolyn Bennett: I think we should assure the members that we will read them too. There was a bit of a misunderstanding in that I think for a round table we had expected there would be two hours, and it's hard to have this many confined to one hour.

We'll do our best to make sure that your voices are heard.

● (0950)

The Chair: We'll begin by going around the table. I'll begin with myself. My name is Chris Warkentin. I'm the chair of the committee, and it's my privilege to have you here. It's good to have some folks from Alberta as well. We welcome each and every one of you here and thank you for coming.

I'll begin with Jean. We'll go around the table, including our guests. We'll have you introduce yourselves as we go around the table.

Ms. Jean Crowder: I'm Jean Crowder, member of Parliament for Nanaimo—Cowichan and aboriginal affairs critic for the NDP.

The Chair: Jonathan, did you want to introduce yourself?

Mr. Jonathan Genest-Jourdain: I am Jonathan Genest-Jourdain, associate critic for aboriginal issues.

Mr. Romeo Saganash (Abitibi—Baie-James—Nunavik—Eeyou, NDP): I am Romeo Saganash, MP for northern Quebec.

Mrs. Carol Hughes (Algoma—Manitoulin—Kapuskasing, NDP): I am Carol Hughes, member for Algoma—Manitoulin—Kapuskasing in northern Ontario and deputy critic for aboriginal health.

Hon. Carolyn Bennett: I am Carolyn Bennett, member of Parliament for St. Paul's in Toronto and the critic for aboriginal and northern affairs for the Liberal Party.

Chief Calvin Sanderson (Chakastaypasin Band of the Cree Nation): I am Chief Calvin Sanderson. I represent the Chakastaypasin Band of the Cree Nation, underneath the umbrella of the James Smith Cree Nation.

Thank you.

Chief Roland Twinn (Chief, Sawridge First Nation): I am Chief Roland Twinn, chief of the Sawridge First Nation. I'm also grand chief of the Treaty 8 First Nations of Alberta.

Mr. Michael McKinney (Executive Director, Sawridge First Nation): I'm Michael McKinney, executive directive and general counsel with the Sawridge First Nation.

Grand Chief Craig Makinaw (Grand Chief, Confederacy of Treaty 6 First Nations): I am Craig Makinaw, chief of Ermineskin and grand chief of the Confederacy of Treaty 6.

Ms. Sharon Venne (Treaty Researcher, As an Individual): I am Sharon Venne. I'm with Chief Craig Makinaw.

Ms. Phyllis Sutherland (President, Peguis Accountability Coalition): I am Phyllis Sutherland from the Peguis Accountability Coalition.

Mr. Barry Ahenakew (Former Chief, Ahtahkakoop First Nation): *Askitakwa sini.* I am Barry Ahenakew, chief of the Ahtahkakoop.

Mr. Greg Kerr (West Nova, CPC): I am Greg Kerr, member for West Nova, Nova Scotia.

Mr. Brent Rathgeber (Edmonton—St. Albert, CPC): Good morning. I'm Brent Rathgeber, member of Parliament for Edmonton—St. Albert.

Welcome.

Mrs. Stella Ambler: I am Stella Ambler, member of Parliament for Mississauga South, and also chair of the special committee on missing and murdered aboriginal women.

Welcome.

Mr. Ray Boughen (Palliser, CPC): Good morning. I'm Ray Boughen, MP for Palliser, which is in south central Saskatchewan.

Mr. Rob Clarke (Desnethé—Missinippi—Churchill River, CPC): I'm Rob Clarke, member of Parliament for Desnethé—Missinippi—Churchill River, which is in northern Saskatchewan.

Mr. Greg Rickford: I'm Greg Rickford, member of Parliament for Kenora.

The Chair: Thank you.

Our staff have joined us as well. We have Tonina and Norah, who are our analysts, and we have our clerk, Jean-Marie, who many of you will have been in touch with as we have worked to accommodate as many witnesses as we could today.

We appreciate that you've come from different locations to be with us today. Obviously your voices are very important to any issue, but specifically to this issue. When we're talking about the Indian Act, it's your communities that will be affected by any changes to this act.

I think we've heard agreement across this country, and across political lines, that the Indian Act is a relic of the past and something that needs to be replaced. Obviously there are different opinions across the country as to how that should be undertaken. Bill C-428 is one attempt to undertake that. We have heard from folks who have come with different perspectives as it relates to this bill as well.

We are interested in hearing your feedback. Obviously you've had an opportunity not only to read this bill, but you've also had the experience of living under the Indian Act and knowing how these changes might affect you.

We want to get right into it and hear from you with regard to it.

Obviously there are a number of provisions within this act. Specifically, I think those of you who heard the earlier submissions by the bar association will have heard that there are different components. I don't want to assume that you'll have a perspective that would be similar to the bar association or other witnesses.

However, it would seem that there are the less controversial provisions as they relate to a number of things, such as the sale or barter of produce, the departmental employees being prohibited from trading with first nations folks without a licence, and a number of provisions as they relate to truancy and the residential schools generally.

I thought we would begin with your reflections on those provisions, and then we'll get in to the issues surrounding bylaws and wills and estates further on.

I would like to turn it over to folks who might want to jump in right away. If you have a perspective as it relates to specifically the sale and barter of produce, or the ways that this is being contemplated, or the renewal of these provisions within this act, we'd like to hear the general discussion on those. If you want to go elsewhere, we're fine with that. We thought that would be a way that we could begin the discussion this morning.

Barry, we'll hear from you to begin with.

● (0955)

Mr. Barry Ahenakew: *Iyiniw pikiskwewin ki wi pikikwatinawaw.*

I was a chief for 20 years. I haven't been chief for awhile now, but once a chief always a chief to people, I guess.

I'm from Saskatchewan. During the time of treaties, Chief Ahtahkakoop was a major chief in Treaty 6. There were two major chiefs: Mistawasis and Ahtahkakoop. All the other chiefs were subchiefs. They were the lords of the plains and that's where I step from, that crew of chiefs.

When they signed treaties it was nation to nation. They stopped the telegraph line from coming through the Saskatoon area because a treaty had to be made, nation to nation. In 1876 the government people came out there and they made a treaty at Fort Carlton. It took about seven or eight days to make the treaty. Our people had our ceremonies.

To move ahead, many of the people left. They didn't want to believe in the chiefs who were making a treaty, a transition to a new way of life. Some subchiefs and followers left. They stood up and maintained an equilibrium, balance, and they made a treaty.

The treaty is the base that we have to work from—the government as a nation and our people as a nation. The Indian Act was a unilateral thing that was brought in by government, supposedly to protect my people, our people. It has done a bit of that job, but at the same time the government got carried away here and there, and abused or took advantage of certain things to hold our people down, to suppress our people. That's not the way things should be.

What you're doing today—I congratulate the MP, Mr. Clarke, and I congratulate all of you sitting here, to be sitting here for the best intentions of our people no matter where they be, from the east coast to the west coast. Things are going to be looked at legislatively by our people, our leaders. Our leaders are picked to represent our people, like Chief Ahtahkakoop and Chief Mistawasis in their day. Our people today, our leaders, still have to be recognized in that fashion. I'm glad to see the Chief of the James Smith Cree Nation here because they have to be recognized for the input they have to the changes that need to be made.

I think you should leave the student residence clause in there but reverse it. It would be all Plains Cree in Saskatchewan for those doing the residence. Nothing but Cree to be spoken. If you speak English, I'll bat you over the head. That's what happened to our people.

Four generations, now people don't speak Cree. I never went to school in residence. My grandfather and grandmother brought me up and they held me back from student residence. As a result, today I can speak Cree fluently. I know our history from the beginning of time to today. It's an unwritten history, the travels of our people—Lake Ontario, *Kici Sakahikan*; Lake Huron, *Onatowew Kami*; Lake Michigan, *Misi Kami*; Lake Superior, *Kitci Kamis—kayas ochi*, all our history, the history of our ceremonies.

We have a history, but it's been taken away by student residence. It's good to take that away and it's good that settlements have been made. But what needs to be made is legislation now to put moneys into our language and our culture for our people.

● (1000)

I was reading in the paper that there were 15 or so suicides in some reserve in Ontario. That's because those young people do not know their history, their language, or their culture. That's what it has done to us, generation to generation to generation. I brought my children up Cree, and I'm going to bring my grandchildren up Cree. No matter what takes place, they're going to speak their language. They're going to speak Cree.

My point is that you have to work with our leaders. There has to be money put in to make up legislation through the Indian Act. The Nisga'a, under the Nisga'a agreement, work through a grant system, thanks to you. You've made an agreement with the Nisga'a, but what do all the rest of us work with? We work with a contribution agreement. If the province is involved, it's out of a fiduciary system—a fiduciary system from the federal government and representing the federal government. It does not off-load everything to the province so that they make a decision on their own. No, our treaties were made with the federal government—the Queen, the crown—and our chiefs stood firm. They kept the peace.

My son was in Afghanistan fighting for Canada, fighting for all of you and me, right at the front. My father fought in the Korean War in the air force. My grandfather fought in the First World War—he was too young, but he still did it. He was there in the Second World War too.

So we stand up for Canada, but at the same time we need respect and recognition from the government.

Thank you for listening to me. I won't take up too much time.

Hai hai.

The Chair: Thank you.

We'll continue. I appreciate your beginning this discussion. This is what is important: that we as parliamentarians hear from leaders.

I'll turn to a grand chief, and then we'll go over to a regional chief.

Chief Calvin Sanderson: Thank you.

I, too, come here with many concerns and issues with the Indian Act. Back home we have what we call landowners, and yet we have a lot of obstacles. The department, the regional and the district office, are telling us that we have to take these lands back. This is an issue that was brought up back in 1955, when the district office told us that we can give these landholders land for them to prosper and profit from.

The other issue is with the wills and the estates that we have. When we lose a loved one, there are disputes, but we handle them at the band level. When people go through the process at the district and regional office, they have to wait for close to one year to get an application process through in order to try to get their grievances out of the way, yet they run into a lot of red tape through the system. This is one of the reasons we do it on our own, but it's not well respected for the chief and councils to try to settle these wills internally without any federal bureaucrats coming in to tell us what to do.

We've been doing this for some time, and yet when people pass away in our communities, they're still on the band list. They're not excluded from the band list. They're still on the band list when they pass away. A lot of these things are going on.

We pass a lot of bylaws, but they are scrutinized at the federal level too, because these are not bylaws that they accept from a first nation. When I heard that first nations are not allowed to pass bylaws....

We're under the band custom back home, whereby we have our own band elections, not elections under the Indian Act. Our people drafted their own election codes. They weren't drafted by an Indian Act process. We respect these band custom elections, because they are under our laws, which we wrote. These are respected at the regional level and at the district level and also at the federal level. They are recognized by our band membership, who pass these things at band assemblies. What our band members speak, when we pass things, goes through them, not through the chief and councils creating any of these bylaws.

So you can see that there a lot of issues that we inherit back at home as chiefs of a first nation. Yet we go through obstacles in making these changes.

I have to give Rob Clarke a pat on the back for making these changes, because back at home we are looking at a hydro project from which we can benefit in the long term. But some of these designations of the lands are a hurdle to our first nations, because we have to go through this process now in trying to benefit our people through this project. If it ever does go, then that's the wealth of our first nations back home.

Yet this Indian Act holds us back. I as a chief represent 1,050 from Chakastaypasin First Nation. It affects us on our land claims too. There are a lot of issues that affect us in this Indian Act, that tie us down.

Our elder here, Barry Ahenakew, mentioned the recipients' agreements that we signed. There are sections in these that define a band. If you're a band, you're a band. There are a lot of things in these agreements involving accountability and transparency that we have to endure for our funding, from monthly reports right down to auditing and consolidating the audits. These things are hurdles to our first nations people at home when we try to do business and our staff are not funded properly, because all the programs are at a standstill. These things and the Indian Act affect us back at home as a whole.

From a treaty perspective, I've always said that if the treaties were honoured and if the Indian Act were maybe abolished, we wouldn't be in this situation today.

● (1005)

You know, some first nations do abide by and work by the Indian Act, but it does have hurdles and it does have infringements on how to conduct business and how to prosper in the modern world today. A lot of these articles and sections are obstacles for us back at home.

I'm pleased that I am here today with my colleagues from east to west, and I guess from north and south. A lot of first nations back at home would like to see a lot of improvements in this Indian Act.

I have lots to say, but I'd like to let my other colleagues around the table here say something. I know we are limited to at least an hour here.

Thank you. If there are other questions, I will answer them as much as I can.

The Chair: Thank you.

We'll turn to Chief Twinn.

Chief Roland Twinn: Thank you.

I'll be as brief as possible. Forgive me if I'm going to switch hats as I go along.

First, I have a message from the executive board of the Treaty 8 chiefs of Alberta. We are fundamentally opposed to Bill C-428 for reasons of process. We are first nations with a treaty. A treaty is an agreement signed between sovereign nations and is the prima facie evidence that we have sovereignty. It is impractical or insulting to have changes made to an Indian Act that affects us, without proper consultation with the holders of the rights.

As far as the specifics of the question are concerned about the removal of these archaic, old-type provisions, yes, some of them should be removed. However, removing some of them would leave a vacuum. An example in our reserve is that if some of these provisions were removed, the next day there would be no ministerial approval for somebody to log the reserve. If one of the band members were to decide to log off the reserve and sell the logs and keep it to themselves, what's to stop them?

I've heard that you can pass a bylaw. What use is it to a first nation to pass bylaws, when there is no enforcement agency for those bylaws? You can give the RCMP your bylaws, in which the officer has the authority to use discretion as to whether or not he's going to enforce them. The RCMP have no connection to a chief and council, and as part of a justice system are not influenced by the chief and council. So again, what is the use of passing a bylaw?

Even the publication of bylaws in the *First Nations Gazette*—I've never even heard of it. If I ever wanted to pass a bylaw that I wanted to hide from my members, that's where I would publish it. Not one of them has probably ever heard of or even seen one. That in itself is a strange one, for my part.

Taking off the hat of grand chief and throwing on the hat of chief of the Sawridge First Nation, I say we're done with bylaws, as far as we are concerned. We understand section 35 of the Canadian Constitution Act, 1982. We have the inherent right to govern ourselves and we have exercised that right. As a matter of what we've done with that right, we have spent six years developing our constitution for our first nation. It was passed on August 24, 2009. Out of it has come our own laws. I am a four-year term chief—not under the Indian Act but under the Sawridge election act, as born out of our constitution, which has been recognized by the Government of Canada by way of an order in council removing our first nation from the election sections of the Indian Act.

Another issue is that even with some of these changes and the making of bylaws, there is no proper consultation, in my view, when you read what the act actually says. The preamble talks about consultation with first nations, but once you get past that it says the minister will consult with interested parties and organizations. I have a problem with that.

Our people seem to be the most represented people in this country, yet we're not heard. I'm the official, elected chief of our first nation. Our people are represented by me, two council members, AFN, CAP —the Congress of Aboriginal Peoples—and NWAC. Yet none of those organizations has come to our reserve and asked what we wanted. Is that really proper consultation? Do they really represent us? Where is the respect for our government-to-government relationship?

That's where I think we need to go, and speaking as the grand chief of Treaty 8, we have presented a document to the Prime Minister of Canada to talk about the treaty relationship and to deal with some of these issues. There needs to be a recognition of our sovereignty, our jurisdiction and authorities, and our powers, so that we can come to a negotiated agreement that will answer the questions you're trying to answer.

● (1010)

It is not really up to the Government of Canada to fix all our problems. We at the first nation level have recognized that we have our own responsibilities and we're moving forward in that manner. The government should be making resources available for first nations who want to go down this road and consider it an investment in the future, so that we are not a “burden” on the Canadian taxpayers. Nobody wants to be a burden.

There needs to be some healing within the community so that we can rise up and take our rightful place in this country, which we agreed to share. On our part, my great-grandfather signed the treaty in 1899 at Willow Point on Lesser Slave Lake on June 21. That was Treaty No. 8. He was an original signatory.

I'm the seventh chief since then, so we follow our customs and traditions. We've had maybe 10 elections in the last 115 years, if that, and that's all been by acclamation. We follow our own traditional ways and we want to continue that way without any interference.

Thank you.

● (1015)

The Chair: Thank you, Chief.

Before we move on, I'll note that we have three other folks who haven't spoken yet, and we want to ensure that you have an opportunity to interject or to jump in if you'd like. You might want to make sure of that.

Grand Chief, please.

Grand Chief Craig Makinaw: Good morning. I'll make my comments brief.

I agree with what the other grand chiefs are saying. My comment is going to be short. I guess this bill is a private matter that affects our constitutionally protected rights and affects our treaty relationships with the Government of Canada, as the other grand chiefs have said. That's the concern for me as the chief of the Ermineskin and the grand chief of Treaty No. 6.

Based on our treaty relationship with the federal government, that's a concern we have. If you're going to go ahead with these Indian Act changes, there are some constitutional problems that are going to come into play here, and our treaty has to be respected. It's a two-way street, as the other grand chiefs commented earlier. If we're going to work together, we have to work together in a good way, and the way that we're doing it is not the right way. It should respect our treaty.

I don't want to say too much more. My last comment will be similar to what my fellow grand chiefs have said. We have a constitution, too, that was passed in 1982. We're like the Sawridge Band. We have our own constitution and we have our own laws, custom laws. We do that.

I'll just leave it at that and let the others speak. I'll keep my comments brief.

Thank you.

The Chair: Thank you, Grand Chief.

Ms. Sutherland, it's over to you.

Ms. Phyllis Sutherland: I'm just going to make a brief statement. I wasn't really prepared. I only got the invitation five days ago

If you have a chance, I'd like to suggest that all of you read this research paper. It's very interesting. It was done as a research paper for the National Centre for First Nations Governance. The title is “Like an Ill-Fitting Boot”. It really explains a lot about the Indian Act, the lack of consultation with bands, and what reserves are and are not allowed to do. In this way, says the paper, the act “affects the abilities of First Nations to shape more accountable and democratic governments”, and it really plays a big part in how bands handle their affairs and consultation with their own people.

Just to make another comment on Mr. Ahenakew's comment about the language in the schools, I'm a first nation person who went through residential school also, and our community has lost its language completely. I'm ashamed of my grandkids growing up and not knowing any of their background or their culture. It's something that we've only started to get into in the last couple of years. I see the importance of bringing it into our schools, and not just a little band-aid, like bringing in the Cree language to grade 3. It's not helping them. They need to encompass the whole language in the school—

A voice: In the community.

Ms. Phyllis Sutherland: —and in the community, yes.

That's all I have to say for now. Thank you.

The Chair: Thank you.

Ms. Venne, we'll turn it over to you if you'd like to join us. I think the conversation has broadened out from our original one and that's great. I think that's what we want to do. We want to ensure that. We'll turn it over to you and then we'll turn it back to others among our guests.

If you want to jump in on something that somebody else has said or on a different aspect of the bill, we'd like to hear from you. I'll just put that out there so you can be thinking about it.

We'll turn it over to you, Sharon.

Ms. Sharon Venne: Thank you for giving me the time to speak. I think I probably know more about the Indian Act than anybody else in the room. I'm not bragging, but I was the one who indexed it in the 1970s. Most people probably have a copy of the index that I did on the Indian Act.

I think the problem, the issue, of the piecemeal amendments to the Indian Act is that, going back to the 1969 white paper, and even before that, when people appeared in Ottawa in 1948 and 1949 about the Indian Act, the act put in place a regime that cannot be changed piecemeal. It's all interrelated, and somehow the government over the years created sections.

For instance, the reason they didn't want Indians trading, selling stuff off the reserve without their permission, was that it was impacting on the non-indigenous people who were farming around the reserves. They couldn't make as much money as the Indians. So they put sections like that in the Indian Act.

Making piecemeal changes to the Indian Act has a ripple effect. It also affects the constitutional of rights of people. Section 91 lists “Indians, and Lands reserved for the Indians”. When you remove sections of the Indian Act related to wills and estates, you are actually moving us from the section 91 jurisdiction into section 92 jurisdiction, which is in the province. So you're actually making a constitutional amendment.

I think this is a fairly significant amendment that you would do. I've talked a lot with people about this legislation at the first nation level, and 99.9% of the people I've talked to since last November about this legislation.... I've asked people in the communities, “How many people in this room have a will?” If we're lucky, one person, in a room of 200 or 300 people, will put their hand up. That's it.

This is not something that our people generally engage in—for spiritual reasons, for cultural reasons. They just know that certain things are done a certain way. Then, when you start imposing provincial restrictions, provincial criteria, on who's adopted, who's not adopted....

I have adopted brothers and sisters who are adults. People are adopted as adults in our customs. They get things at the time of passing. This is not recognized in a non-indigenous system.

I mean, I don't know what the purpose is, but in the communities there's a lot of concern about what the government is trying to do now—again—because that's how people perceive it. I think it would be a good idea to step back and really engage in what the chiefs have talked about: a respectful relationship. As the Supreme Court of Canada said numerous times, there has to be some kind of reconciliation between the two peoples. The question is how you achieve that reconciliation.

This is not a step in that direction. This is not stepping in the right direction. I think you need to step back and evaluate. The CBA made a number of comments from a non-indigenous legal point of view. From an indigenous legal point of view we have a lot of issues, because we have two conflicting legal systems coming into play here, the indigenous legal systems and the non-indigenous legal system.

There will be a lot of problems, and this is just the beginning of seeing what those could be. There really hasn't been a study, I believe. I don't know if anybody has talked to the provincial people who deal with these areas and asked them what they think of all this, or told them what kind of burden will be put on them, or asked them whether they know anything about what they will be dealing with.

The federal government is going to off-load onto the provinces something that is...and I would say that most of the time they don't have a clue about what they will be dealing with. It will cause a lot of problems internally and externally, within the nations and outside the nations, and in the provinces their wheels will start grinding to a halt, so to speak.

Even now the public administrators, when they have to deal with first nation issues, don't know what to do with us. Mainly it's a lack of understanding. Most law schools don't teach about the traditional legal systems of the first nations. They don't learn it, so they don't know what to do. Then they try to impose non-Indian values on us, which causes more problems.

I think there has to be a step back, or a study. I think a lot more questions need to be asked for the people who are....

● (1020)

You're going to off-load to the provinces. What do the provinces think of this? I don't know if they've been invited to participate in these meetings, but they probably should be, as to how they're going to deal with this when it administratively has to be devolved to them. That would be a good question to ask.

But there are some legal issues about devolving a constitutionally protected people onto the province without our consent. Free, prior, and informed consent is our right as treaty peoples, and that has not happened. This is not a consent consultation process that is going on here. This is...we're here and, you know, we're going to leave, and most of the time when I've appeared before the committee, what we've said about what needs to be changed has not been taken up, which is why we have raised the issue in Geneva on a number of occasions.

Thank you.

● (1025)

The Chair: Thank you.

The conversation has definitely moved into all aspects of the bill. I think we're all mindful of the time, but we'd like to now open it up. I think most of you have spoken generally about wills and estates or have touched on that as well as bylaws. I guess the one question would be, are there provisions that haven't been spoken about with regard to those aspects and that you'd like to make sure we hear about?

The other aspect that we'd like to hear about from you is the process contemplated by the bill as it relates to continuing a discussion about replacement of the Indian Act. Obviously, the aspects that are included in changing or prescribed in making changes are limited. They don't apply to significant portions of the Indian Act. Are there lingering aspects, I guess, of the wills and estates discussion, or the discussion surrounding bylaws, or the process that's being contemplated?

We'll begin with Mr. Ahenakew.

Mr. Barry Ahenakew: *Meegwetch*.

What I would like to see is continued dialogue. If you don't have dialogue, then things aren't going to happen. Our chiefs have to receive money from this outfit to be able to work, to get together, and to put work together on this issue from a first nations perspective.

I can talk about governance and elections. Traditionally under the Indian Act, when I was chief, we used to pick an electoral officer. When I was there, we used to pick a fellow from the Meadow Lake area, an old cowboy. He'd come to run our elections. Now we have a band member running our elections, and there's chaos at the reserve. That band member sits on boards with the chief and council, and that should never be taking place. It's a conflict of interest. That should never happen.

If you're under the Indian Act—and there are some bands under custom—then for elections there should be a neutral, independent electoral...even Elections Canada could come in to run the election. Then nobody's going to have a squabble. Otherwise there's a squabble out there. There are over 400 people on the reserve who signed a petition against the electoral officer. The chief and council—a majority of them but not the whole works of them—picked this woman to run their elections. That has to be changed, just for the sake of fairness for people.

I talk about the demoralizing situation that student residences have gotten us into. I really have a hard time—and it's not only young women but also young men—with the amount of abuse that goes on. It's not liquor now so much; it's drugs. Whether it's prescription drugs or illegal drugs or whatever, it's rampant. You get those suicides, as I was talking about earlier, taking place on a reserve in Ontario here. I don't know how many, exactly, but there are quite a few.

We can do what we can, but we need the dollars to work with culture and language, to restore pride in our people, pride in our history, pride in ourselves as a people.

It's a heck of a job to be a chief or to be on council today. I know it's a heck of a job.

The housing dollars and capital are still the same as when I was chief. A lot of people don't really agree with CMHC—in our country, anyway. There have to be systems. It needs to be looked at, but how is it going to be looked at? Our chiefs have to be involved with their advisers to be able to put things together, to meet with you guys, to have a common understanding and eventually agreement on what needs to be put in there and what needs to be changed.

You are working ahead. You are doing things. As I said, I congratulate Rob Clarke. He's being called a sellout by a lot of our people, but he's not being a sellout. He's being a visionary for the future.

The Ahtahkakoop and the Mistawasis, and the other chiefs who signed treaties, have to change their lifestyle. We have to try to do something today for those young people. Otherwise you won't even have chiefs in the future. People will be so doggone demoralized. Everybody will be on substance abuse. It's crazy.

● (1030)

The Chair: Chief Twinn.

Chief Roland Twinn: I'm going to speak more on the process as the question. The bill contemplates that the minister will make reports to the House of Commons and will consult with those who are willing and with “organizations”. Then I go back to the point that the organizations are not the proper authorities to be dealing with legislation that affects the treaty rights of the first nations peoples.

The individual members of the first nations hold the treaty rights, not a government-funded AFN. That in itself is kind of problematic, because if the AFN cannot play ball with the Government of Canada, it does not get funded and it does not exist. For us, that's a fundamental flaw right off the bat.

As far as our nation is concerned, Sawridge First Nation has already sent in our band council resolution, our BCR, over a decade ago, stating that the AFN does not represent our interests. How can one organization represent the interests of 612 first nations recognized in Canada? We are all at different states. The Sawridge First Nation receives less than 10% of its funding from the Governments of Canada and Alberta. Ours is own-source funding. We understand economic development, but economic development is not an answer. It's a tool that can be used to come to the answers.

I wonder if the committee has contemplated section 52 of the Canadian Constitution. Section 52 states that anything Parliament does that conflicts with our rights is “invalid”, so right off the top, is Bill C-428 invalid? It's going to affect our legislative powers at the Sawridge First Nation, which we have exercised. We have our matrimonial properties act. We have our governance act. We have our financial accountability act. These acts were written by the people and passed by the people, for which I hold the funds, and I spend their funds on their behalf. How much more transparent can I be?

My salary is set by the people, not by chief and council. I've taken that off the plate as the Indian Act contemplates, so I cannot pay myself half a million dollars and be at a Prime Minister's level of pay. My pay is set by the members themselves. Nothing could be more democratic.

Is it worth the legal costs of challenging this law in the courts of Canada on its constitutionality? Is it really worth the Canadian taxpayers' dollars to go through all that just to have it thrown out in court, which I believe would not be a hard task for first nations to do? It might even get thrown out on a judicial review, but again, there would be taxpayers' dollars getting spent on something that should not have come forward.

The Indian Act is not the problem. The problem is the relationship. If we had a healthy, respectful relationship between our nation and the Government of Canada, I wouldn't have to be here today. We would be under self-government legislation. We would be looking after ourselves, which is all that we all want to do. Every human in this world wants to control their destiny. That's all we want to do as first nations: take control of that destiny.

We want to get out of this paternalistic legislation called the Indian Act, which was not spoken of at the time of the signing of Treaty No. 8 in 1899. Nobody said to any of the original signatories there, “Oh, by the way, by signing this treaty of sharing, you'll be subjugated to the Indian Act, in which the minister in Ottawa is going to be controlling your destiny, and we will be taking your children away and putting them in residential schools”. That was a double whammy for our nation, because we suffered a flu epidemic in the early 1900s in which a majority of the adults perished. There were far more children than adults and they were all taken off to residential school, and you wonder why there's a loss of culture, a loss of language? That needs to be healed.

But in a true government-to-government relationship, we should be looking at putting together some resources for those who want to.... Look at the investment in the future, as I said earlier. That's one of the fundamental problems that I see with the process. You're ignoring the duly elected officials. You're not allowing us to have a say in what changes these Indian Act provisions will have. Is there a resource to be put in place for when you take away some of these provisions, which, in my example, would allow a member—or maybe it would not allow it, but it would not disallow it—to cut down all the trees and sell them for his own personal profit?

● (1035)

Should there not be something, some transitional phase for some of these, through which we can have our own legislation put in place? Do I need to have an agreement with the RCMP or maybe the Lakeshore Regional Police Service, which is funded by the federal and the provincial government, for the five first nations along the lakeshore to understand our bylaws and be given the authority to actually enforce them? Is there a proper court in which these laws can be heard?

Where are our institutions of governance which we need to control our destiny and to be self-governing? I've been through the Federal Court of Canada. It is not friendly to first nations. There is a fundamental flaw if we go to that court, especially if we're going against the federal government.

Who appoints judges—the first nation chiefs? What are judges sworn to protect? It's the constitution and the laws of Canada. So why would they ever rule in favour of a first nation?

These are the things we need to strive towards.

Thank you.

The Chair: Thank you.

Are there any other follow-up comments?

Mr. Ahenakew.

Mr. Barry Ahenakew: The Nisga'a agreement that was made also encompasses total population. The contribution agreements that happened for our people are just for the reserve population. Yet when it comes to elections, those people living off reserve have the opportunity to vote.

For one thing, that mail-in ballot system should be booted the hell out to Mars. You can send that to Mars, because that is the easiest way for people to cheat. It should be gone. If people are going to vote, they should come and vote at a designated site.

The Chair: There may be an opportunity for this committee to review the election provisions at some point. This bill doesn't do that, but we certainly hear what you're saying.

Mr. Barry Ahenakew: Then there are people who are living way out there, from different reserves, and they don't vote. They don't give a hoot in hell to come and vote. They're making their living out there. But yet over here sometimes their name appears on a ballot. That's the kind of bullshit we've been subjected to election-wise.

Pardon my language. Thank you for listening, and I think I'll go home.

The Chair: Mr. McKinney, we'll hear from you.

Mr. Michael McKinney: I'll just make a few comments, following up on Chief Twinn.

I've worked with the Sawridge First Nation for over 26 years. So while I'm not first nations myself, I've had a lot of experience with the Indian Act. The act is quite short. It's only 122 sections. It looks very simple on its face, but over time it's gotten very thick and heavy with cases and interpretations. There are still provisions in it that, if you read them, are not true because cases have overturned them or struck them out, and Parliament hasn't cleaned that underbrush up yet.

There are a number of issues. You have to be careful when you try to make changes to that very complicated regime that has evolved over time because unintended consequences can happen.

In clause 2 of the bill, it talks about collaborations with first nation organizations. The chief has commented on that. There really should be consultation with first nations. It shouldn't be a collaboration and it shouldn't be with organizations. It's the first nations who the duty to consult is owed to, and that's who should be consulted. Prior to enactment or changes to the Indian Act, the first nations are the ones who are affected by the Indian Act, and they represent their people.

You've already commented on the barter and trade. If you take away ministerial approval, who approves the trade of materials? The resources that are on reserves will just be left in a vacuum. There should be a transition. Perhaps the chief and councils or some other system could be put in its place. Sometimes if a chief and council were put in the place of the minister, at least there would be somebody there to approve changes.

Under wills and estates, the biggest concern that I would have would be the repeal of subsection 44(3) and paragraph 46(1)(d). Both deal with lands. Those sections basically said the province didn't have jurisdiction to deal with the devolution of real property in reserves. Now, with the repeal of those sections, are we saying the provincial law applies to reserves? That is a transfer of jurisdiction, and I believe the CBA addressed that earlier.

The repeal of section 85.1 may cause problems for first nations. Sawridge doesn't have an intoxicant bylaw, but there are first nations that would definitely be affected if suddenly that power is taken away. I'm certain a court would say that power is not inherent in section 81. Otherwise why was section 85.1 passed in the first place? That history is not going to be erased.

One of my biggest concerns is proposed section 86.1. It requires the publication of laws. We've taken away the requirement of the minister to approve bylaws. But now in a very paternalistic way we've said, here's how you're going to publish your laws, instead of leaving it up to the first nation governments to publish their laws in a way that is appropriate for their first nation. It's quite onerous because if you have a thick land use bylaw, and you have to publish it in a local newspaper, that could be quite costly, and probably not too effective because the people who read that local paper might be largely uninterested.

Those would be my comments.

● (1040)

The Chair: Thank you.

I think that we've heard loud and clear the concerns.

Grand Chief, we'll let you be our final—

Grand Chief Craig Makinaw: This is my last comment. It's on off-reserve members.

There have been surveys and discussions, presentations to them that have been done in the prairie provinces. The problem I see with that is that if they're going to do that, and talk to our members who live off reserve, why can't they put the funding in towards our CFAs —our comprehensive funding arrangements—to help us provide services to them? It's like we're being penalized. In our CFAs we can't even address that issue, so it's something I want to bring to the attention to the committee. That's one of the problems we face in our CFAs. We can't provide services to our off-reserve members because we're restricted on our CFAs. That's an issue that we have. It has been brought to the table over the years, and we'd like to remind the committee of that. That's still an ongoing problem we'd like to see addressed.

Thank you.

The Chair: Thank you.

I do want to thank each and every one of you for coming today. We appreciate your comments.

As Mr. McKinney rightly described, some of the issues in the Indian Act are in fact underbrush. Our committee is tasked partly with trying to clean that up, but of course there are the issues of unintended consequences. Hearing from you today is helpful in our deliberations, and we'll be hearing from more folks who represent first nation communities across this country as well. We appreciate that you've been broad in your perspective and that it reflects many of the concerns, and also the aspirations, of folks who are here at this table as well.

So we appreciate hearing from you and look forward to working with you in the future as we undertake our work at this committee.

Again, thank you. On behalf of the committee, I do appreciate, and we appreciate, your attendance today.

Grand Chief Craig Makinaw: Thank you.

The Chair: Folks, we'll now adjourn.

The meeting is adjourned.