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Chair

Mr. Chris Warkentin

Standing Committee on Aboriginal Affairs and Northern Development

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● (1530)

[*English*]

The Chair (Mr. Chris Warkentin (Peace River, CPC)): Colleagues, I'll call this meeting to order. This is the 17th meeting of the Standing Committee on Aboriginal Affairs and Northern Development.

Today we have launched into our study of Bill C-25.

We have the minister with us for the first part of the meeting.

We want to thank you, Minister, for joining us. We're always thankful that you make time to attend our meetings. It seems to be more often than not, so thanks so much for joining us yet again.

We're going to turn it over to you immediately to hear your opening statements. Then we'll follow up with some questions.

For our second witnesses we have representatives from the Federation of Newfoundland Indians. That will be by video conference, colleagues, which is why we're in this room today.

Minister, we'll turn it over to you for your opening statement and then we'll have some questions for you.

[*Translation*]

Hon. Bernard Valcourt (Minister of Aboriginal Affairs and Northern Development): Thank you, Mr. Chair.

I thank the committee for the opportunity to come before you today to explain how Bill C-25, the Qalipu Mi'kmaq First Nation Act, protects the integrity and credibility of membership in the Qalipu Mi'kmaq First Nation.

As members of the committee will be aware, in 2008, the Government of Canada and the Federation of Newfoundland Indians announced the Agreement for the Recognition of the Qalipu Mi'kmaq Band, which provided for the creation of the Qalipu Mi'kmaq First Nation as a "landless" band. This agreement set out the eligibility criteria and a two-stage enrolment process for membership in the band.

At the end of the first stage, the Qalipu Mi'kmaq First Nation Band Order was issued on September 22, 2011. Pursuant to that process, 23,877 people were registered as founding members of the first nation. This number, although higher than the initial projections of 8,700 to 12,000 individuals, seemed reasonable, as it was not out of line with the results of the 2006 census which revealed that there were approximately 23,450 residents of Newfoundland and Labrador who self-identified as aboriginal.

● (1535)

[*English*]

However, issues with the enrolment process became apparent during the second stage. Remember, we had the first 12-month stage of enrolment. The second stage was a 36-month stage, or three years, during which people could enrol, which was really intended to ensure that all would have ample opportunity to apply and be added to the members list. The second stage ended on November 30, 2012.

As you may know, an unexpected number of individuals submitted applications to join the band during that second phase. As a matter of fact, more than 75,000 additional people submitted applications, bringing the total number of applications for membership in the first nation to more than 101,000. From the outset it was clear that the parties'—and when I say the parties, members have to realize that we're talking about the Federation of Newfoundland Indians and Canada—original intent was that a member of the band would be someone who has a current and substantial connection with the Mi'kmaq group of Indians of Newfoundland as described in section 1.13 of the 2008 agreement.

The supplemental agreement also notes that it was further understood by both the Federation of Newfoundland Indians and the federal government that the agreement would apply primarily to people who live in or around the 67 communities named in the 2008 agreement. This did not mean, however, that non-residents could not also become members. The 2008 agreement specifically provided for individuals who lived outside of these locations to become members if they self-identified as members of the Mi'kmaq group of Indians of Newfoundland and were accepted by the group. However, they would need to have maintained a strong and substantial cultural connection with a Newfoundland Mi'kmaq community.

Now, the vast number of applications from outside of these communities and outside of the province raised significant questions about the credibility of this process. These were concerns that were shared by the first nation, not to mention the practical problems that this situation presented in creating an enormous backlog of applications to be processed and the fact that the deadline for dealing with applications had expired.

Because of such reservations, the federation and the Government of Canada entered into a joint process to address these issues that had arisen during the enrolment process in order to protect the integrity of the enrolment process and the community's reputation. Discussions between the federation and Canada regarding the appropriate implementation of the 2008 agreement led to the signing of this 2013 supplemental agreement this past July.

The supplemental agreement does not change the substance of the original 2008 agreement; that agreement is still fully in effect. Rather, what the supplemental agreement does is it provides clarity to the requirements for enrolment, outlines additional documentation requirements for applications, and provides for an extension of the 2008 agreement timelines.

It is also important for committee members to understand that the criteria for enrolment, as negotiated and agreed to by the parties and set out in section 4.1 of the 2008 agreement, have not changed; the criteria are the same. What the supplemental agreement does is it ensures that only those with a legitimate claim to membership and registration are enrolled to become Qalipu Mi'kmaq First Nation members.

The implementation of the supplemental agreement provides, I suggest, for a fair process that ensures the equitable treatment of all applicants by requiring that all applications submitted since the enrolment process began be renewed so that it is not limited to the second-stage applications but covers both stages.

This brings us to the necessity for the legislation we have before us today. The requirement under the supplemental agreement to review all applications, including those that were found to be eligible under the previous process, means that the Governor in Council may be required to amend the recognition order initially establishing the band. You will remember that after the first stage and the court action that delayed the adoption of the recognition order was done—on September 22, 2011, I think—the recognition order establishing the band was made by the Governor in Council.

More specifically, it means that it is possible that some of the current 23,877 members will have their membership revoked as well as their entitlement to be registered as Indians under the Indian Act.

● (1540)

Because the Governor in Council does not have, as we speak, the express authority to remove names from the schedule to the recognition order, legislation is required to provide the Governor in Council with that authority. This step is therefore required in order to complete the enrolment process.

[*Translation*]

In addition, clause 4 in the bill provides certainty that no compensation or damages will be paid either by Canada, the first nation or any other party, to those individuals who—at the end of the process—are determined not to be members of the Qalipu Mi'kmaq First Nation.

I know that this clause has been the source of significant debate, and I want to take this opportunity to be very clear that nothing in this bill prevents individuals from appealing the enrolment committee's decision pursuant to the agreement, nor prevents court challenges to the agreement.

Rather, this clause ensures that applicants who are found not to be entitled to registration do not obtain compensation for benefits that are only intended to registered Indians. As you know, the fact of conferring band status and associated membership brings with it a range of important benefits under the Indian Act, such as access to certain federal programs and services for first nation members, and should not be taken lightly.

This legislation will help us ensure that an individual considered for membership fully meets all the conditions required to join Qalipu Mi'kmaq First Nation and at the same time respects our responsibility to taxpayers. It is my hope that as the committee studies the bill, members will recognize both the necessity and merit of the Qalipu Mi'kmaq First Nation Act, and will help to ensure its swift passage.

I would be happy to answer your questions now. If I cannot do so, I am accompanied by two officials, Mr. Andrew Saranchuk and Mr. Martin Reiher, who will help me to reply to your questions if I need to call on them.

Thank you.

● (1545)

[*English*]

The Chair: Thank you, Minister. We appreciate your opening statement, and thank you again for being here.

We'll begin our rounds of questioning with Ms. Crowder.

Ms. Jean Crowder (Nanaimo—Cowichan, NDP): Thank you, Minister, for coming before us.

As you know, the NDP supported the bill in principle at second reading, but we did want it to come to committee because we have a couple of technical questions, so I'm going to start with some of the technical questions.

Clause 3 of the bill, as you pointed out, gives the Governor in Council the ability to add the name of a person to or remove the name of a person from the schedule. Just for clarification of that process, will the Governor in Council act based on recommendations by the joint committee that will be recommending that names be added or removed?

Hon. Bernard Valcourt: The enrolment committee has been given the directive to submit at the end of the process a new founding members list, which will be submitted to the minister, who in turn will ask the Governor in Council to approve that list. That is the schedule to the recognition order, so that's the amendment that would occur. That will be on the findings of the enrolment committee.

Ms. Jean Crowder: Just to be really clear, because I think there has been some confusion, it's the enrolment committee that's making these recommendations, and the minister and the Governor in Council will act on those recommendations.

Hon. Bernard Valcourt: You are correct.

You see, the enrolment committee makes a determination of eligibility and admissibility. If someone is not happy with that finding, the appeal master is still there. They can appeal to the master and after that, this is the decision that the enrolment will embody in the list that they will provide to the minister for recommendation to the Governor in Council.

Ms. Jean Crowder: Also, and you alluded to this in the answer to the question, in the supplemental agreement, where it says, "Now therefore the parties agree as follows:" point number two says, "All Applications Reviewed." It says, "All appeals will be determined by the Appeal Master by 31 March 2016."

I want to clarify whether that appeal process applies to members who may have been accepted as band members as of 2011. As these applications are all being re-reviewed, any member who may have had their membership revoked based on the supplemental agreement will also have an avenue of appeal. Is that correct?

Hon. Bernard Valcourt: That is correct.

Ms. Jean Crowder: I think there also has been some misunderstanding about that as well.

Everybody in effect, whether they're currently in the application process or whether they were previously applied and approved, will still have the right to appeal.

Hon. Bernard Valcourt: You're right.

Ms. Jean Crowder: I want to touch on the 2011 date, because I think a number of us have some confusion.

There are two pieces in the briefing notes. You alluded to it again, that the first stage resulted in the issuance of the Qalipu Mi'kmaq First Nation band recognition order on September 22, 2011, legally creating the band. Then in the questions there was an appendix, a comparison of enrolment committee guidelines provided to the committee for clarification.

I wanted to clarify this point. It says, "Applications signed on or before 22 September 2011 are not required to take further action or to provide additional documentation to demonstrate self-identification."

Am I understanding that people who were included in the 2011 process at this point will not be required to submit additional information on self-identification? It would only be on other grounds that they would be required to submit additional information. Is that correct?

Hon. Bernard Valcourt: Acceptance by the community, yes.

Ms. Jean Crowder: I presume the significance of the 2011 date is that's the date the band was officially created and that's the kind of cut-off point going backwards and forwards. Is that correct?

Hon. Bernard Valcourt: The wording of the agreement was such that the self-identification had to be at the date of the recognition order, or before. Since the recognition order is dated September 22, 2011, self-identification after is subject to a different.... Those have already met the conditions. That's why on this they don't have to resubmit.

Ms. Jean Crowder: This is really just a point of clarification because I believe there was some confusion about that 2011 date, and so that's the reason the band was created on that date and there's a before and after. Is that correct?

Hon. Bernard Valcourt: Yes.

● (1550)

Ms. Jean Crowder: With regard to the numbers, I understand it's a challenge to estimate numbers. We've seen it in the McIvor decision. We saw it in the 1985 Bill C-31 about estimating how many people are going to receive status or be reinstated as a result of legislation.

I know you mentioned the census figures in your speech, but were there other factors that the department considered when it was determining the anticipated membership, and I would assume determining the resources required to process those membership applications?

Hon. Bernard Valcourt: There is a long history. We have the action that was started by those Mi'kmaq people in Newfoundland who were arguing to be recognized as Indians under the Indian Act in 1949. They had lists of their membership. We had several groups throughout, and in the communities where they were assembled, they had their lists.

That, I think, is the information which led to this assessment that there would be between 8,700 and 12,000 people who could qualify as an eligible member. As it turns out, that number.... The federation will tell you that they were as surprised as we were about the number of applications.

After the first round, when it came to 23,000, it was way beyond what was expected. It's almost double. Then if you look at the census for Newfoundland and Labrador, where about 23,000 self-identify as aboriginal, then you know....

Then the three years after when you see 75,000 more, and 46,000 of those in the last three months, it was the rush to the golden gate. That's what it looks like.

If we care about the Mi'kmaq of Newfoundland, these people have the right to a band that includes the people who had that strong connection with them, the cultural connection. They have to be real members of the Mi'kmaq First Nation. I think that this is the integrity we want to protect for the band.

Ms. Jean Crowder: Thank you.

The Chair: Mr. Strahl, we'll turn to you.

Mr. Mark Strahl (Chilliwack—Fraser Canyon, CPC): Thank you, Minister, for coming here today again. It seems every other meeting we have the minister here to chat with us. It's good to see you again.

During the debate at second reading, we heard numerous times about the need to restore integrity to the enrolment process for the benefit of the Qalipu Mi'kmaq First Nation. As the debate progressed, we kept hearing about, as you've just described, the last-minute rush: 101,000 applications, as opposed to the 10,000 or so that were expected. A figure I remember is that would represent 11% of the total first nations in the country, if we were to take that at face value, so certainly there's a massive influx of applications there.

Obviously, it raised red flags for the Federation of Newfoundland Indians and the government, so something had to be done. I think this bill is what that is.

Can you inform the committee, maybe expand a bit on how Bill C-25 accomplishes the goal of restoring integrity to the selection process for the Qalipu Mi'kmaq First Nation?

Hon. Bernard Valcourt: When you talk about the integrity of the enrolment process, you can also talk about the integrity of the first nations.

The word "integrity" refers to the state of being whole and undivided and the quality of being honest and having strong moral principles. At the heart of this worthy project to extend application of the Indian Act to the Mi'kmaq of pre-Confederation Newfoundland communities were the eligibility criteria agreed to by formal agreement and which this bill upholds and guarantees. Those criteria were also founded upon the Supreme Court of Canada decision in Powley, outlining the principles that should be considered when determining appurtenance to a group seeking recognition as aboriginals.

As you know, and this is confirmed by the supplemental agreement, only an individual of Canadian Indian ancestry, whether by birth or adoption, and on or before March 31, 1949, was a member of the Newfoundland pre-Confederation community, or is a descendant of such an individual either by birth or adoption who is not a registered Indian at the date of the recognition order, that is September 22, 2011, but that at such date self-identifies as a member of the Mi'kmaq group of Indians of Newfoundland, and is accepted by the group, is eligible to be enrolled as a founding member.

This is what this bill will guarantee. Because—and we don't know; we'll find out at the end of the process—if people have received status and have been declared a founding member without meeting these fundamental conditions to the integrity of the first nation, then they would have to be removed from the list. That's why we are seeking the authority. As the law currently stands, we don't think we have that certainty that the Governor in Council can take names out of the schedule. This is why we need this piece of legislation.

● (1555)

Mr. Mark Strahl: Obviously, the Qalipu Mi'kmaq First Nation was established to grant recognition to first nation individuals living in Newfoundland who, due to historical circumstances, hadn't previously been granted that status. I think as the second reading debate showed, there was a general consensus that we want to recognize the Mi'kmaq heritage and culture in Newfoundland. Being recognized as a founding member obviously is something of great importance and pride for the Mi'kmaq people.

One of the other criteria relates to very specifically real and substantive connections or ongoing connections to those communities, to that heritage. Can you elaborate on how Bill C-25 will ensure that the intent of the 2008 and 2013 agreements with the FNI will be reflected in the final version of the founding members list?

Hon. Bernard Valcourt: Bill C-25 will ensure that the intent of the 2008 and 2013 agreements is reflected by ensuring that those persons having a current and substantial connection to a pre-Confederation Mi'kmaq community as well as a current and substantial connection to the Mi'kmaq group of Indians of Newfoundland become founding members of the first nation as per section 1.13 of the 2008 agreement. Founding membership in the Qalipu Mi'kmaq First Nation was intended, as you mentioned, to be granted primarily to persons living in or around the locations enumerated in the 2008 agreement. It was agreed at the start that persons who did not reside in or around these locations had to have a substantial connection to the Mi'kmaq group of Indians to be eligible to become founding members.

As you know, individuals whose names appear on the founding members list are entitled to registration under the Indian Act. Clause 3 of the bill will enable the removal of individuals from the founding members list, and once an individual's name is removed from the founding members list, the registrar will be able to remove the individual from the register under the Indian Act. This will mean that an individual previously enrolled and registered would lose band membership and Indian status. This ensures that the first nations founding members list will be those who are legitimate Mi'kmaq people entitled to become status Indians under the Indian Act.

● (1600)

The Chair: We'll turn to Ms. Bennett now for this round of questions.

Hon. Carolyn Bennett (St. Paul's, Lib.): We in the Liberal Party are very sensitive to the fact that this is an agreement that was made between the first nation and Canada in the agreements of 2008 and 2011. However, I think we felt it was important to bring this to committee in that it's a rather unusual precedent that in a process that badly underestimated the numbers and where clause 4 says that even though the process was severely flawed, people can't receive any compensation or damages or indemnity for what was a flawed process. This seems to be an unusual precedent for a government to indemnify itself against mistakes that clearly were made.

We want to know why you don't think it should be the courts that decide and why you are asking Parliament to prejudge this situation.

Hon. Bernard Valcourt: Of course we received legal advice. We know that right now the Governor in Council does not have the express authority to amend the schedule and remove names from it, so this is about protecting the taxpayers of the country. If a person within the spirit of the agreement—and everyone was well meaning when those eligibility criteria were adopted—the first nation doesn't want to be swamped by people who are not and don't have that connection with this first nation. Since we know that we don't have the express authority to change the schedule, we are seeking that authority.

On the issue of the inability of people to claim damages from anybody with regard to a situation where, for example, they would not be on the founding members list, it simply respects the principle that if you are not entitled to these benefits, you should not get them. We all know how the law works and the principles of representation and negligence, so the taxpayer should not bear the cost of someone getting benefits that fundamentally and fairly, according to the intent of the parties, they ought not to have got.

We have been clear that if someone is removed from the list, we will not go after these people to get back the benefits they've since been getting.

Hon. Carolyn Bennett: If somebody is removed from the list, they have the ability for an administrative appeal. Is that correct?

Hon. Bernard Valcourt: Yes, that's correct.

Hon. Carolyn Bennett: If the administrative appeal finds they were wrongly removed from the list, the Government of Canada doesn't owe these people anything in terms of damages or what they've just been put through.

Hon. Bernard Valcourt: No, because they wouldn't keep their status.

Hon. Carolyn Bennett: But they've still had to go through a lengthy process and appeal and there is no compensation for having put them through that. In terms of rule of law, it seems to be an unusual precedent that you are preventing people from having what they normally would have in any other case.

● (1605)

Hon. Bernard Valcourt: I've been a lawyer all of my life and I've never seen clients come in where the government was paying their fees. All my clients were paying their legal costs to assert their rights. These people, if they decide to enter legal cause to pursue the matter, are just like all other Canadians, and I don't think we have an obligation to pay those costs for these people who want to assert their rights. We don't do it for all other Canadians. It would be great if we had budgets to do that, but we don't and I wouldn't advocate for this.

Hon. Carolyn Bennett: We're not just talking about their legal fees. We're talking about if they feel they've been wrongly removed from the list that the government now is protected from any damages or payment for the fact that the person had to go through this process.

Hon. Bernard Valcourt: You are not compensated in court for going through the process. You are going to recover damages for your losses, which the court determines.

Hon. Carolyn Bennett: It's a matter of justice if you were wrongly removed from the list.

Hon. Bernard Valcourt: You cannot be wrongly removed from the list, because that will be determined through the process. If the appeal master decides, or the enrolment committee decides, that a person does not meet the criteria, then that person is not eligible. That person loses nothing because they are not eligible.

Hon. Carolyn Bennett: But they have the right to appeal that.

Hon. Bernard Valcourt: They have the right to appeal that—

Hon. Carolyn Bennett: What if they win the appeal?

Hon. Bernard Valcourt: —enrolment decision to the master and then they can resort to the court on the agreement, but they will not get damages unless a court decides that.... I don't know what the court can.... This is a private agreement, contracted between two parties and the terms are clear as to who is eligible and there is a process agreed to, to determine that eligibility. Once that process is done, the matter is over.

Hon. Carolyn Bennett: You mentioned that you've been a lawyer all your life. Do you know of any other situation where the government has done this to indemnify themselves against damages?

Hon. Bernard Valcourt: Absolutely. If you look, for example, at the Indian Act, at what we did in 1985.... I was a young member of Parliament. We did Bill C-31. That was when we wanted to remove the discrimination against women who were losing their status because they were marrying white people. We did that, the Conservative government in 1984. Clause 22 states: For greater certainty, no claim lies against Her Majesty in right of Canada, the Minister, any band, council of a band or member of a band or any other person or body in relation to the omission or deletion of the name of a person from the Indian Register in the circumstances set out in paragraph 6 (1)(c), (d) or (e) of the Indian Act.

The Gender Equity in Indian Registration Act, which the previous Parliament passed in 2010, Bill C-3, contains in section 9: For greater certainty, no person or body has a right to claim or receive any compensation, damages or indemnity from Her Majesty in right of Canada, any employee or agent....

This is not a novel concept to protect taxpayers.

Hon. Carolyn Bennett: It's only in respect to aboriginal people, it seems.

Hon. Bernard Valcourt: It happens. I'm giving you two examples because they relate exactly to what we're talking about.

The Chair: Thank you very much.

We'll turn now to Mr. Boughen for the next round of questions.

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

Let me welcome Minister Valcourt back to our abode here and his officials with him. We look forward to sharing part of this afternoon.

I have a couple of questions, Minister. First of all, our government stands up for Canadian taxpayers. This means we respect the public purse that has been entrusted to us. To that end, when 101,000 applicants were received for membership in the Qalipu Mi'kmaq First Nation, both our government and the FNI recognized that granting all applicants membership was imprudent from both cultural recognition and fiscal standpoints.

Can you please explain how Bill C-25 ensures that those applicants entitled to membership will receive the rights and benefits due to them, while respecting taxpayers' trust in our government? I know you talked about some of this earlier today. Maybe you could just flesh that out a little bit for us.

● (1610)

Hon. Bernard Valcourt: It is important to stress that each application, each of the 94,000 we're left with for membership, is being assessed on its own merits. It is important for members to realize there is no quota or maximum number of members who will be registered at the end of the enrolment process.

In order to ensure that all applicants are treated fairly and equitably, all applications, except those previously rejected, will be reviewed. To complete the enrolment process and finalize the membership list of the first nation, as I've said, it is necessary to amend the schedule to the recognition order that lists the names and dates of birth of the founding members of the first nation. The amending of the schedule to the recognition order is required, of course, to implement the agreements.

This is what will result in the taxpayers being respected. More importantly, or as importantly, I should say, the integrity of the first nation will be maintained so that only those who have this strong cultural connection to the band become its members. I think that's how we will ensure that, yes, taxpayers will be respected, but the spirit, the culture and the heritage of that first nation also will thus be protected.

Mr. Ray Boughen: When we look at Bill C-25, we see a bill that's technical in nature and seeks to ensure integrity in the enrolment process, which you just talked a little bit about there, of the Qalipu Mi'kmaq First Nation. I understand there's an independent and fair process that all applicants will go through for the determination of eligibility for membership in the first nation.

Can you explain how Bill C-25 will be implemented? Why would the government like to move swiftly on this file for the benefit of the first nation?

Hon. Bernard Valcourt: It is as I explained a bit earlier. Right now while the Governor in Council has the authority under paragraph 2(1)(c) and subsection 73(3) of the Indian Act to declare a body of Indians to be a band for the purposes of the Indian Act, there's no express authority in the act to amend an order establishing a band. Certainty is required if we are going to implement the supplemental agreement, and that certainty can only be obtained by enacting legislation that will provide the Governor in Council with the appropriate authority to make the required corrections to the recognition order.

That legislation is an essential part of the enrolment process in order to fully implement the agreements. It ensures that the Governor in Council is properly authorized to carry out the last step of the process, which is the issuance of a new founding members list to modify the existing one.

Mr. Ray Boughen: Minister, we talked about preserving the integrity of the enrolment process and the original intent of the 2008 and 2013 agreements. I think it's fair to say that some people have been less well-informed on the issue, which is very technical in nature. Can you explain to the committee why the changes to the band order required a legislative response and cannot simply be made through regulations? Can you please explain why legislation is required to implement the 2013 supplemental agreement?

● (1615)

Hon. Bernard Valcourt: This goes back to the question of ministerial authority to remove names under the Indian Act. Prior to 1985, the Indian Act included the mechanism through which a person could legally cease being an Indian within the meaning of the act and the mechanisms in those days were either voluntary or non-voluntary. When we amended the Indian Act in 1985, we did away with that, such that if you look at the intent of Parliament.... That's why I say there's no express authority for the Governor in Council to do what it might have to do in this instance, which is the amending of the schedule. That's why we need this bill.

Mr. Ray Boughen: Thank you, Chair.

The Chair: Thank you.

Ms. Crowder just has one short question.

Ms. Jean Crowder: It's a very quick question, Minister.

Was there any consideration given for children that were subject to the sixties and seventies scoop? They wouldn't be able to maintain those close ties to communities, having been forcibly removed from their homes. I just wondered if that had come up in the discussions.

Hon. Bernard Valcourt: No, it did not and the reason it did not is there were no reserves in Newfoundland at the time of the sixties scoop. There were no reserves there from which children could have been removed. This means that the sixties scoop did not happen in Newfoundland since there were no reserves.

Related to this kind of question is the fact that the supplemental agreement is clear as to adopted children. They will still be able to become members of the band if their parents are.

The Chair: Thank you.

Minister, we want to thank you for coming today. We appreciate that you have a busy schedule and that you made time for us.

Colleagues, we will suspend and then we'll have our next witnesses by video conference.

The meeting is suspended.

● _____ (Pause) _____ ●

● (1620)

The Chair: Colleagues, I'll call this meeting back to order.

We are joined for the second portion of our meeting by Mr. Stephen May, who is the solicitor for the Qalipu Mi'kmaq First Nation.

We want to thank you, Mr. May, for joining us. We appreciate that you're very busy and we want to thank you for making time.

We will turn it over to you for an opening statement, and then we'll have some questions for you following.

Mr. Stephen May (Solicitor, Qalipu Mi'kmaq First Nation, Federation of Newfoundland Indians): Mr. Chair, I'm actually here on behalf of a request of the Federation of Newfoundland Indians, a party to the agreement with the Government of Canada to establish the Qalipu Mi'kmaq First Nation.

My client asked me to appear as a result of an invitation issued by the committee to provide a representative to speak to Bill C-25, and just as importantly, to speak to the underlying agreement and the activities that have surrounded the agreement and have led to Bill C-25's being introduced in Parliament.

By way of background, the Federation of Newfoundland Indians started as the Native Association of Newfoundland and Labrador in 1971. It changed its name in 1973 to the Federation of Newfoundland Indians to represent Mi'kmaq bands that had established in various communities around the island of Newfoundland. The primary goal of the organization was to achieve recognition of its members for registration under the federal Indian Act.

The negotiations between the Federation of Newfoundland Indians and the Government of Canada towards this goal were first initiated in the late 1970s and resulted in the federal government's agreeing to recognize one of the member bands of the Federation of Newfoundland Indians, that being the Conne River band, as an Indian Act band in 1982, with its ultimate formation in 1984.

However, at that time there was no agreement reached to recognize the remaining federation bands under the Indian Act. While discussions continued between the Government of Canada and the Federation of Newfoundland Indians, they were without any avail and resulted in the federation's commencing litigation against the Government of Canada in 1989 in the Federal Court, the goal being recognition of its members as status Indians under the Indian Act.

I won't go into the details of the litigation or the basis upon which the litigation was commenced, but ultimately, in the early 2000s, the Federation of Newfoundland Indians and the Government of Canada commenced discussions to find means to settle the court case with the result of recognition of federation members as status Indians under the Indian Act.

Those negotiations ultimately resulted in an agreement in 2008 that met this goal. But they also brought into the agreement the fact that other Mi'kmaq organizations on the island of Newfoundland had also commenced litigation or were in the process of commencing litigation. The agreement was negotiated so as to bring the members of those groups under the umbrella of the agreement.

The overall intent was to establish a landless band for the Mi'kmaq group of Indians on the island of Newfoundland. When I say "landless band" I mean a band without a reserve. The agreement does not, in the opinion of the federation, affect potential land claims that the band may have but recognizes that the band would be organized for the provision of benefits that would normally be provided to off-reserve Indians.

The negotiation of the agreement provided a unique opportunity for the Federation of Newfoundland Indians and the Government of Canada to establish a membership for the band based on negotiated criteria. Consistent with the litigation that had been commenced by the Federation of Newfoundland Indians, those criteria for membership came to be based on the criteria of community and the aboriginal community under the decision of the Supreme Court of Canada in the Queen versus Powley.

● (1625)

Those criteria, which are embodied in section 4.1 of the 2008 agreement, required evidence of aboriginal ancestry without regard to a set minimum of blood quantum. There had to be evidence of connection to an ancestral Mi'kmaq community as listed in the agreement, recognizing the fact that these communities had not been recognized for Indian Act purposes when the Province of Newfoundland joined Canada in 1949. There had to be evidence of self-identification as a member of that Mi'kmaq group of Indians on the island of Newfoundland prior to the formation of the band. Furthermore, there had to be evidence of individuals having been accepted as a member of the Mi'kmaq group of Indians on the island of Newfoundland prior to the formation of the band.

Again, these criteria were drawn from the Powley decision. Neither was to be weighted ahead of any other, meaning that all of the criteria were to be considered on their own merits and one was not to determine membership above any other.

Membership in the Mi'kmaq group of Indians for the purposes of self-identification and community acceptance was based on two fundamental principles: residency, if the applicant for membership was living in or around one of the communities listed in the agreement, or frequent visits or communications with resident members of the Mi'kmaq community; and evidence of maintenance of Mi'kmaq culture or way of life. This could include membership in an organization promoting Mi'kmaq interests and the individual's own knowledge of Mi'kmaq customs, traditions and beliefs, and participation in cultural or religious ceremonies or pursuit of traditional activities. The intent was to allow for non-residents to display a level of involvement in the local Mi'kmaq groups that they could be said to be members even though they lived outside those communities.

Ultimately, the band was to be made up of Mi'kmaq with current and substantial connections with the listed communities on the Island of Newfoundland who, based on their residency or level of involvement with the Mi'kmaq group, were in a position to actively contribute to the development of the culture, traditions, and activities of the Mi'kmaq communities throughout the island of Newfoundland.

During the course of the negotiations, it was recognized that the agreement could be applied to more than members of the Federation of Newfoundland Indians which, at the time the agreement was signed, approximated 10,500 members. Nevertheless, the parties did not expect any more than 20,000 applicants. Now there is in excess of 100,000 applicants, the vast majority of whom appear to reside outside the Mi'kmaq communities listed in the agreement.

These numbers raised questions within the Federation of Newfoundland Indians as to whether the agreement had been and would continue to be followed as intended when it was first negotiated. The Federation of Newfoundland Indians, as a party to the agreement, viewed itself as having an obligation to ensure that the criteria for founding membership in the Qalipu Mi'kmaq First Nation had been applied as intended.

As it became clear that under the terms of the original agreement the number of pending applications could not be considered before the process ended, my client wrote the federal minister to request an extension to the agreement, which ultimately led to discussions and an agreement, known as the supplemental agreement, that allowed for all applications that have been filed to be assessed and reassessed to determine whether the criteria for founding membership had been applied as intended by the parties to the 2008 agreement, and to assure the equal application of the criteria in that agreement to all applicants regardless of when they filed.

Ultimately, this assessment and reassessment may result in people who have obtained membership in the Qalipu Mi'kmaq First Nation being determined not to have met the original criteria.

● (1630)

This necessitates, in our understanding, the legislation, Bill C-25, to ensure that the Government of Canada has the authority under the law to remove the name of a person who has been added to the founding membership list but is found to have not met the criteria.

In our view, the legislation gives effect to the intent of the supplemental agreement, and in that respect, Mr. Chair, the Federation of Newfoundland Indians is here to answer any questions arising out of the circumstances leading to the introduction of that legislation.

I'm happy to answer any questions that any members of the committee may have.

The Chair: Thank you, Mr. May.

We'll begin the rounds of questions with Ms. Hughes.

Mrs. Carol Hughes (Algoma—Manitoulin—Kapuskasing, NDP): Mr. Chair, I will share my time with Vice-Chair Jean Crowder.

Thank you very much for your submission.

Given the numbers that are out there now with a number of applications having been received, do you know if the enrolment committee has the necessary capacity to evaluate and re-evaluate all of these applications before the 2015 deadline? If not, has the government indicated that they would actually be providing more resources for this?

Mr. Stephen May: Well, pursuant to the agreement, of course, the enrolment committee is specified to include two representatives appointed by my client and two representatives of the Government of Canada, as well as a chair. The Government of Canada has committed administrative resources to the committee to allow it to basically set up a process that should allow the committee to review each of the applications.

The agreement calls for an implementation committee to be established, with three representatives from my client and three representatives from the Government of Canada, with a view to monitor the pace at which the enrolment committee is able to review the applications and from that, to determine whether sufficient or adequate resources are available.

At this time, it is the expectation that we should be able to meet the 2015 date that is in the supplemental agreement for the assessment and reassessment of these applications. It is a situation that will be monitored. From my client's perspective, they will be interested in seeing resources applied to ensure that the date is met.

● (1635)

Mrs. Carol Hughes: You've indicated that it's going to be monitored. Is there a point in time such that there will be a re-evaluation of whether or not it looks like it's going to be done on time?

Mr. Stephen May: No specific point has been identified in our discussions to date.

There is a report card system that has been established based on where the enrolment committee is expected to be at particular points in time. If there is an indication that they're falling behind, this is supposed to be reflected in the reports that are supposed to come to the implementation committee monthly. At that point, if it's falling behind, obviously there will be questions asked as to why and whether there needs to be some additional response to put the process back on track.

Ms. Jean Crowder: Thank you, Ms. Hughes.

Thank you, Mr. May. I have just one question for you.

When the minister was here, I posed a question with regard to children who were removed from their communities in the sixties and seventies. It's commonly referred to as the sixties scoop. The minister indicated quite rightly that there were no reserves in Newfoundland. However, these children could potentially have been raised in communities where they would have been able to maintain their cultural and linguistic connection, and because they were forcibly removed from their homes, even if they weren't reserves, they were not able to maintain those cultural and linguistic connections.

Did this matter of children who were forcibly removed from their homes come up for discussion about how it might be considered in the membership? They wouldn't be able to maintain those connections through no fault of their own.

Mr. Stephen May: I'm familiar with the sixties scoop. Because of the unique history in Newfoundland, where our first premier, Mr. Smallwood, is reported to have indicated that there were no aboriginal people on the island of Newfoundland, something we view as challengeable and always have, it didn't lead to the type of forced relocation that happened in other areas of the country during the 1960s.

Having said that, I can't dismiss the fact that there may have been a potential for somebody to have been adopted outside of their community to parents with non-aboriginal ancestry. That was not specifically addressed in the agreement. It was recognized, however, that people who had left their communities and were aware of their aboriginal ancestry, particularly with respect to their Mi'kmaq ancestry on the island of Newfoundland, did have an opportunity, or would have an opportunity if they were aware of that, to connect with their culture, and would be provided an opportunity to apply under the agreement.

In more recent times, under the supplemental agreement, there are provisions to allow children who may have been adopted outside of their communities and who had not reached the age of 18 before the band was established, and still have not reached the age of 18, to apply and still rely on the ancestry of their parents, including their parents' self-identification and group acceptance.

That's perhaps not a complete answer to the situation that you're addressing, Ms. Crowder, but there is an opportunity for young people who didn't have the opportunity to pursue their past or to self-identify or connect with their culture to do so through their parents. Going back to the 1960s and 1970s, however, it was envisioned that people who were aware of their ancestry would have come forward and indicated an interest to connect with their culture, and if they did, this agreement would address that.

● (1640)

The Chair: We'll now turn to Mr. Seeback for his round of questions.

Mr. Kyle Seeback (Brampton West, CPC): Thanks, Mr. May, for being here and giving us your information.

I took the opportunity to read through the supplementary agreement. As I read through section 8 of the agreement—I don't know if you have it there or not—it certainly talks about the criteria from the Powley decision. It says:

> The Parties intended that the Enrolment Committee assess whether applicants had previously self-identified as Members of the Mi'kmaq Group of Indians of Newfoundland.

Then it goes on to explain that section 24 of the guidelines stated that as long as you signed an application, that counted as previous evidence of self-identification.

As a lawyer myself, I look at that and wonder if this was perhaps what I might describe as a drafting oversight or a drafting error in the first agreement.

Mr. Stephen May: Yes, it was. It became apparent as we proceeded into the process. We received reports of a huge influx of applications after the first year of the agreement, which, as you know if you've read the agreement, would have been the first stage of it. We were getting far more applications than we had anticipated we would when the agreement was being negotiated, and we wondered where these applications were coming from considering the number of people we had anticipated being involved in the aboriginal organizations in Newfoundland.

The idea behind signing the application was that a person was self-identifying before the establishment of the band in the same way that anyone did when they answered a question as to their aboriginal status on a census form or a job application where an affirmative action program existed. Doing so was viewed as self-identifying. However, when the numbers came in and we looked at the agreement, we recognized there was a drafting oversight and a disconnect between the guidelines and the criteria, which made it clear that self-identification had to occur as of the date of the recognition order or, in other words, the establishment of the band. Section 8 of the supplemental agreement was negotiated to address that drafting oversight.

Mr. Kyle Seeback: Great. That's my question.

The Chair: Ms. Bennett, we'll turn to you for your questions.

Hon. Carolyn Bennett: When this bill was first tabled, we actually made a call to your client. They hadn't yet seen the bill, so that was a bit worrying to us, but it seems that your client is quite comfortable with this bill.

This is an agreement between your client and Canada. Is there anything in the actual tabled bill that you feel needs to be amended, or are you quite comfortable with the bill as it is right now?

Mr. Stephen May: We're not making any presentation to require an amendment to the bill. My client stands behind the supplemental agreement that it negotiated. The bill is a technical response on the part of the Government of Canada to fulfilling the obligations under the supplemental agreement, particularly where it might involve the potential removal of a person from the founding members list who is ultimately found not to have met the criteria that the parties put in place in 2008. In our reading of the legislation, we do not see anything in the legislation in that respect that in any way conflicts with the supplemental agreement and its intent.

● (1645)

Hon. Carolyn Bennett: Obviously the band welcomes the indemnification, but do you see any concern regarding the precedent this kind of legislation preventing citizens from going to court and being awarded damages might set?

Mr. Stephen May: The section you're speaking of, which I believe is clause 4 of the proposed legislation, is not specifically addressed in the supplemental agreement. I want to make it clear that it's not something that my client specifically requested in the agreement.

I have had previous experience with this type of provision in my home province, where an award of a court actually was reversed in legislation. I'm aware that similar provisions have been present in previous federal legislation and have resulted from policy changes, particularly in dealing with the previous law, which had the result of women sometimes losing their aboriginal status. That was corrected back in 1984-85. I believe the legislation that brought about that change had a similar type of provision.

The other thing I wish to raise in respect of that provision is that my client and the Government of Canada, through our continuing discussions, have gone to great lengths in trying to communicate the supplemental agreement to every applicant, including those who have been placed on the founding members list or have received letters stating that under a decision of the enrolment committee there would be a recommendation to the minister that their name be added to the founding members list.

Those people have been advised through communications. My client has attempted to communicate it through its website, and I understand the Government of Canada has done the same thing. We've sent individual mailings to every applicant to advise of the supplemental agreement and its requirement and potential impacts. People have two years to adjust their expectations, based on what has been negotiated. That's important to keep in mind when people argue that they may have a claim in damages, because the important thing here is the integrity of the criteria that our clients negotiated.

As I said in my presentation, my client has an interest in ensuring that those criteria are followed and that people who were never intended to be granted membership do not receive it, because that undermines not only the integrity of the agreement, but the fight that my client undertook for over 30 years to get to the point to have a band established for those who fought for that band and those who are in a situation to add to the culture and growth of the Mi'kmaq presence on the island of Newfoundland. If people who never met the criteria get in and undermine that process, I think that has a detrimental impact on the band itself and for the development of the Mi'kmaq culture on the island.

So between the two things—

● (1650)

Hon. Carolyn Bennett: I'm sorry, but could I just ask.... So the intent was the integrity of the list, and you don't need the bill to be able to add people to the list, but you do need the bill to be able to take people off the list. But in the original request, clause 4 about damages was not in your original understanding of the bill.

Mr. Stephen May: It's not something that we requested. We were aware that a bill was being tabled, but it wasn't presented to us for vetting before it was presented to Parliament.

The Chair: Thank you, Ms. Bennett.

We'll turn to Mr. Dreeshen for the next questions.

Mr. Earl Dreeshen (Red Deer, CPC): It's great to be able to talk to you, Mr. May. I appreciate this opportunity.

Among the things you mentioned, I was curious about the criteria that you outlined. No doubt they were well intentioned, but the concept of residency, where you are living in or around a particular region or having frequent communications...and of course you are there promoting the Mi'kmaq interests. You have all these different levels of involvement, but I think as you're rightly saying, it got to the stage where people's interpretation was such that the expectations became somewhat difficult to deal with.

I think of my own situations in Alberta. Of course it's an entirely different case, but simply because your grandparents had dealings with the Indians in central Alberta when it was in the Northwest Territories or with fur traders and so on or you'd set things up to help aboriginals in your communities, those things don't tie into the same level of involvement that perhaps some of the 100,000 people whose names are there are expecting.

One of the other things you said was that they had all these decades of litigation as they tried to sort things out and come up with a solution. You had to work closely with the Government of Canada in order to make this work. I'm just wondering if you can speak to some of that collaboration. You mentioned how the FNI and the government have gone to great lengths to communicate with the founding members. Perhaps you could expand on that for a moment.

Mr. Stephen May: Well, as I responded to the previous question, we've recognized all along that it was important to communicate the supplemental agreement and the underlying principles leading to the supplemental agreement to not only the founding members but all applicants who applied under the process. My party has posted the agreement on its website. The chief of the Qalipu Mi'kmaq band has posted various messages on his website to try to make people aware of the process. Each applicant was sent a comprehensive bulletin describing the supplemental agreement and the requirements of the supplemental agreement.

With all those communications, in addition to responses to media requests—there has been quite a bit of media surrounding this, at least in my home province—people in general, even people who are non-applicants, are aware that this assessment and reassessment are taking place. The goal is not to keep it secret or to somehow keep it under wraps. We have gone to great lengths to make the details public so that applicants will know what to expect. All of that has been discussed between the parties, with each party encouraging the other to take steps to make sure the public is advised.

● (1655)

Mr. Earl Dreeshen: Thank you.

In your communications with all of the applicants, have you found any who have said they would voluntarily remove their name from the list? Are they looking at it and maybe saying they don't want to have to force your organization or the government to actually go through this entire vetting process, or are they more or less waiting around to see if the lottery ticket shows up?

Mr. Stephen May: I'm not sure I can answer that. I have no personal knowledge one way or the other, so I'm unable to answer that question.

Mr. Earl Dreeshen: Okay.

There is also, I suppose, a bit of a misconception that this bill was intended to impose a quota on the number of applicants who can become members of a first nation. I know you said the independent chair of the enrolment committee stated that there wasn't a quota. I wonder if you could elaborate on this for the benefit of the committee.

Mr. Stephen May: Yes. In fact I'm not aware of any discussions where a quota is being set or there is a magic number that people want to get to. I want to make it clear that while it's reasonable to anticipate there will be a reduction in the number of founding members as a result of this assessment and reassessment, there is no clear indication as to what that reduction level will be. The number will be the number, whatever that number will be, after these applications are assessed and reassessed. There is no goal to try to reduce or diminish the numbers down to a particular level.

The Chair: Mr. May, we want to thank you for coming and for being available to our committee to answer the questions that we had. I think your answering provided clarity for committee members, so we do appreciate that. Thank you for being with us and certainly thank you for your time.

Committee members, we will now adjourn.