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Chair

Mr. Chris Warkentin

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● (1530)

[*English*]

The Chair (Mr. Chris Warkentin (Peace River, CPC)): Colleagues, we'll call this meeting to order.

This is the 18th meeting of the Standing Committee on Aboriginal Affairs and Northern Development. Today we're continuing our study of Bill C-25, An Act respecting the Qalipu Mi'kmaq First Nation Band Order.

Today we have two representatives from the Mi'Kmaq First Nations Assembly of Newfoundland, Anne Hart and Jamie Lickers.

We want to thank you for coming and for taking the time out of your busy schedules to join us this afternoon to speak on behalf of the assembly.

Ms. Hart, we'll turn it over to you for the first 10 minutes. We'll listen to what you have to say, and then we'll probably have a few questions for you.

Ms. Anne Hart (Representative, Mi'kmaq First Nations Assembly of Newfoundland): Thank you very much for the opportunity to be here, first of all, and for the invitation to make a submission.

My name is Anne Hart. I am a member of the Qalipu First Nation. I applied for my membership in 2011. I was granted membership and Indian status on January 26, 2012. I've also been a member of the Mi'Kmaq First Nations Assembly of Newfoundland since July 2013.

The Mi'Kmaq First Nations Assembly of Newfoundland opposes the enactment of Bill C-25. While the Conservative government claims that this bill is necessary for the finalization of the Qalipu band list and to ensure the integrity of the band, it is simply a further attempt to treat the Mi'kmaq people of Newfoundland differently from other status Indians in Canada and to shield the federal government and the band from liability for the mismanagement of the band enrolment process.

The assembly was formed in May 2013 as a result of the concerns that applicants and band members had over the handling of the enrolment process and the evaluation of the membership applications. The assembly is a non-profit organization that advocates for the fair and equal treatment of all Newfoundland Mi'kmaq people and for the fair evaluation of all applications for Qalipu band membership.

The assembly has currently a membership of 8,500 people. It consists of three important groups: band members such as myself, who have received their band membership and Indian status; applicants whose applications have not yet been processed to date; and applicants whose applications for their band membership have been rejected.

The history of the struggle of the Newfoundland Mi'kmaq dates back to 1949, when the Premier of Newfoundland stated that there were no Indians in Newfoundland. For decades the Mi'kmaq people of Newfoundland had their existence denied and were prevented from accessing programs and services available to other first nations people in Canada.

In 1989 the Federation of Newfoundland Indians brought an action in Federal Court seeking legal recognition for the Mi'kmaq people in Newfoundland and a declaration that Canada was discriminating against the Mi'kmaq people of Newfoundland. Two further decades of negotiations led to the signing of an agreement with the Federation of Newfoundland Indians to recognize the Mi'kmaq people of Newfoundland and to create the Qalipu band. The agreement was signed in June 2008.

The agreement sets out the eligibility criteria for band membership. An individual is eligible for the enrolment as a founding member of the band if the individual is of Canadian Indian ancestry; was a member of the Newfoundland Mi'kmaq community or a descendant of such a person; self-identified as a Mi'kmaq on the date of recognition order; and is accepted as a member of the Mi'kmaq group of Indians of Newfoundland.

The parties received far more applications than originally anticipated. By the application deadline of November 30, 2012, the enrolment committee had received approximately 105,000 applications. It became clear that the enrolment committee would not be able to evaluate all of these applications during the prescribed time period, and much uncertainty arose as to the outstanding applications. It is important to note that some families had as many as 300 people applying.

In July 2013 a supplementary agreement was entered into between the Federation of Newfoundland Indians and the federal government. The supplementary agreement modified the application of the eligibility criteria in important ways that made it more difficult for applicants to meet the criteria.

● (1535)

The changes contained within the supplementary agreement were not ratified by the membership of the Federation of Newfoundland Indians like the agreement in principle presented in 2008.

This was a hardship for those members who applied after the formal recognition of the band and required the production of extensive additional documentation including proof of frequent visits to the Mi'kmaq communities in Newfoundland, communications with members of the Mi'kmaq group of Indians, telephone records, travel itineraries, and evidence that individuals maintained a Mi'kmaq way of life prior to 2008.

This is what brings us here today to discuss Bill C-25.

First, clause 3 of the bill allows the Governor in Council to amend the Qalipu band order to remove individuals from the band list therefore revoking that individual's membership and Indian status. There is no limitation on the Governor in Council's ability to exercise this power. He is not required to act on the advice of the enrolment committee. This is not acceptable and opens the process to abuse.

Additionally, this process removes the power of the Indian registrar to remove names from the Indian registry which is the process followed by other status Indians in Canada. By removing this power from the registrar, individuals whose names are removed from the Indian registration will not have access to the protest provision in the Indian Act which allows an individual to protest the removal of his or her name from the Indian registry without retaining legal counsel.

Clause 4 is similarly problematic in that it removes the legal right of an individual to sue the federal government, the band, or the council for the wrongs that he or she may have suffered as a result of the mismanagement of the enrolment process.

The provision shields the federal government, the band, and its councils from any liability for gross negligence, for failing to consult, for breaching its duties to the Mi'kmaq people of Newfoundland, and breaching the honour of the crown.

This clause prevents individuals from recovering damages for loss of entitlements, for life decisions made in reliance on their entitlement to band membership and Indian status, as well as any costs associated when preparing their membership application.

Clause 4 represents a denial of fundamental legal rights guaranteed to all citizens of this country. It removes the right of individuals who have suffered harm from suing for damages.

Bill C-25 should not be enacted into law.

The documentation now being requested from applicants in order to substantiate their applications poses impossible hurdles for most applicants. These applicants were not notified in a timely fashion that they would require to keep and produce extensive records to prove their self-identification, community acceptance, and participation in cultural activity. They are now being asked to produced phone records, credit card statements, travel itineraries, application forms, government documents, and records some five years after the fact.

To now shield the federal government, the Qalipu band and its council from any liability for the mismanagement of the Qalipu enrolment process would be a fundamental denial of justice to the applicants and members who may lose their Indian status.

It is the assembly's recommendation that Bill C-25 be opposed and not be enacted into law. Alternatively, clause 3 of the bill should be struck and the normal process under the Indian Act should be used for the removal of names from the Qalipu band list and the Indian register. This will ensure that existing band members have meaningful access to the protest provision in the Indian Act.

● (1540)

As a further alternative, and at a minimum, clause 3 of the bill should be amended to clearly outline the basis on which the Governor in Council may act to remove the name from the Qalipu band list. The wording of this clause should be revised to ensure that the Governor in Council cannot solely make the decision to remove individuals from the list.

Clause 4 should be struck in its entirety. Individuals who have been wronged by the mismanagement of the Qalipu enrolment process should have access to appropriate legal recourse. Alternatively, this clause should be revised to narrow the limitation of liability.

Thank you very much for allowing me to provide this information. I certainly will be open to questions.

The Chair: Thank you, Ms. Hart. We appreciate your opening submission.

We'll now turn to Ms. Crowder for the first round of questions.

Ms. Jean Crowder (Nanaimo—Cowichan, NDP): Thank you, Ms. Hart, for your submission.

There were a couple of points in your submission that I wanted to clarify with you.

As you're aware, last week we had the minister before the committee. We were seeking clarification from him on certain aspects of the bill. Specifically with regard to clause 3, with regard to the Governor in Council, we asked the minister and the department to clarify the process by which names would come to the Governor in Council for additional removal.

Minister Valcourt indicated to the committee that the Governor in Council would not be making unilateral decisions, and that they would be acting based only on recommendations made by the enrolment committee. Minister Valcourt confirmed that would be the case, that the enrolment committee would be making those recommendations, not the Governor in Council or the minister.

I don't know if you have any comments on that process.

Ms. Anne Hart: I'm glad to hear the decision will not be made solely by the Governor in Council. I wasn't aware of this discussion.

However, the enrolment committee has been part of the whole process from the beginning. For the people, like me, who are holding their status cards, I have a letter stating that I am now a status Indian. I received a letter from the enrolment committee stating very clearly that I meet the criteria. So my question now would be to the enrolment committee and certainly not to the Governor in Council, and that is, what criteria would you be making to remove my name, if it were me, for instance, from the Qalipu band list?

● (1545)

Ms. Jean Crowder: You raised the issue around the protest provision. Again, my understanding is that as of the 2011 supplemental agreement, all applications received prior to that date are being reviewed under the criteria that has been clarified in the 2011 supplemental agreement. Again, some clarification...because we're using two different pieces of language, and I know they're two different matters. My understanding again is that if the enrolment committee makes a decision to remove somebody's name from the band list, there is an appeals process outlined in the criteria for a member to appeal that decision. There's an appeals master.

You rightly point out that the Indian Act, and my colleague pointed out section 14.2, allows a protest provision. Are you suggesting there should be both an appeals process and a protest mechanism?

Ms. Anne Hart: Maybe you could respond, Jaimie.

Ms. Jaimie Lickers (Representative, Mi'kmaq First Nations Assembly of Newfoundland): I'd be happy to speak to that issue, if the committee would prefer, given that Ms. Hart is not a lawyer.

Ms. Jean Crowder: Please do, Ms. Lickers.

Ms. Jaimie Lickers: We understand there is a process under the agreement for the appeal of decisions. However, on this particular point, dealing with clause 3, we're dealing with a limited group of individuals who have already received Indian status.

Individuals in Canada who have received Indian status have a process under the Indian Act, whereby a certain process is followed if they're going to have their status revoked and their membership removed. When that happens, those individuals have access to the protest provision in the Indian Act.

Any differential treatment to members of the Qalipu Mi'kmaq band who are status Indians under the Indian Act today is differential treatment under the law.

Ms. Jean Crowder: This is not a question that we asked the department when they were here. Have you clarified that the protest provision will not apply?

Ms. Jaimie Lickers: The protest provision could apply.

Ms. Jean Crowder: Right.

Ms. Jaimie Lickers: But the case law under the protest provision says that the registrar cannot go behind an order in council.

If the registrar removes an individual's name from the Indian registry or from a membership list because that name has been removed from an order in council, recent case law says the registrar has no discretion and must remove that individual's name from the registry and from the membership list.

The protest provision on the surface remains available, but the case law makes it clear that any appeal of the registrar's decision, if his decision is based on an order in council, the result is predetermined.

Ms. Jean Crowder: So what we really do need is clarification with regard to that particular section of the Indian Act, because at this point what I'm understanding you to say is there is an appeal process and that the protest provision is available but unlikely to be applied based on case law. That's what I'm understanding you to say. Am I correct?

Ms. Jaimie Lickers: Exactly.

Ms. Jean Crowder: That's a point of clarification that we're going to require.

Ms. Jaimie Lickers: It's important to keep in mind that the protest provision under the Indian Act is meant to be a very informal process that an individual can access by way of writing a letter and submitting affidavit evidence and any other forms of evidence that the registrar will accept.

It's a very accessible process for individuals, as opposed to following the appeal procedure under the agreement and then having to go to either a judicial review application or to go to court and retain counsel to challenge that decision. They're two distinct processes and one of them is very accessible and one of them is not.

Ms. Jean Crowder: I only have 20 seconds so I'll conclude.

● (1550)

The Chair: Thanks, Ms. Crowder.

We'll turn to Mr. Strahl.

Mr. Mark Strahl (Chilliwack—Fraser Canyon, CPC): Thank you for coming.

I did have some questions regarding who you're representing, basically. I think you mentioned at the beginning of your comments 8,000 or 9,000 members?

Ms. Anne Hart: There are 8,500 members.

Mr. Mark Strahl: Right in the middle: 8, 500 members.

How does one become a member? Is it a proactive thing, that they approach you, and they request to be represented by you? How did those 8,500 people come to be represented by your organization?

Ms. Anne Hart: How it began was the organization was first known as the watchdog group. Then they incorporated themselves. A lot of it is by word of mouth and since the incorporation they've got the information out to the people who have concerns, who have put in their application, did not have their application processed, or they had their application sent in and they got a rejection letter.

Mr. Mark Strahl: Does someone take out a membership or just indicate that they would like to join your group?

I guess I'm trying to figure out.... There are 101,000 applicants, and 8,500 have.... Tell me how someone comes to be a member of your organization.

Ms. Anne Hart: There is an application process and there is a membership fee that covers whatever costs the assembly has to retain legal counsel or.... There is an application process.

Mr. Mark Strahl: What is the membership fee?

Ms. Anne Hart: It's $20.

Mr. Mark Strahl: Do you have a constitution and bylaws?

Ms. Anne Hart: Yes.

Mr. Mark Strahl: How are you governed?

Ms. Anne Hart: There is a constitution and bylaws, and there's a board of directors. There is a web page that's been set up so that we can share everything that's happening with the membership. We're structured as a.... We're incorporated.

Mr. Mark Strahl: When we tried to access the constitution and bylaws I think there was a web problem. It was bouncing back to a donation page or something. Perhaps you could provide the committee with a copy of the constitution and bylaws.

Ms. Anne Hart: Okay.

Ms. Jaimie Lickers: Certain aspects of the organization's website are restricted to members. Unless you've paid the membership fee and submitted an application you can't access things like the constitution, the bylaws, and the legal updates.

Mr. Mark Strahl: Okay, I appreciate that.

One of the things that was interesting to me, having reviewed this file going back a ways.... We had 101,000 or so...I think you said 105,000. Seventy thousand applications were received in the last 14 months, including approximately 46,000 in the last three months prior to the application deadline.

From your perspective, why do you think there was such a spike, nearly 50% or whatever it is, in applications in the last three months of a multi-year enrolment process?

Ms. Anne Hart: As far as numbers go, I personally can't give you an answer as to why it's 105,000, but today we're actually speaking about this bill and about how many of those 105,000 are going to be affected by Bill C-25.

Mr. Mark Strahl: Right, and I think the reason there was a supplementary agreement in 2013 is that they were expecting 10,000 people to apply and 101,000 did so, and they realized that while they kept the eligibility the same, they needed to change the requirement for proof of all the connections to the band.

Yes, we are discussing the bill, and the reason the bill has come forward is that 10 times the number they were expecting applied. Does your organization believe that 101,000 applications is a reasonable figure, considering that the government and the band were only expecting 8,000 to 12,000?

Ms. Anne Hart: Again I'm going to say that it was as a direct result of the mismanagement of the enrolment process, because if you look at the agreement in principle that was submitted and signed with the Federation of Newfoundland Indians and the federal government in 2008, the criteria were very open.

When the supplementary agreement was put in place—nobody was even aware it was coming down the road—they did put in criteria. But at that time you had the numbers, based on the 2008 agreement, and that's what everybody was going by. It's only in this last submission that people were having to put in their telephone bills, trying to track down travel itineraries, government forms, income taxes, and all that. That was never a requirement as part of the agreement in principle.

● (1555)

Mr. Mark Strahl: We had the FNI here last week, and they and the minister both indicated that while keeping the eligibility the same, it was as a result of that huge number that they needed the supplementary agreement to ensure that the integrity of the band was protected. If you have 101,000 applicants, I don't know how many would be successful, but that number represents 11% of first nations across the country, and certainly for the first nations themselves, that wasn't what the 2008 agreement intended.

I guess I'm struggling a little. I understand what you're saying, but at the same time, what should have been the response to 101,000 applications, if not something to protect the integrity of the first nations?

Ms. Anne Hart: I believe that when they brought the agreement in principle to the membership at the very beginning and when it was signed, it was ratified. It's now five years later. We had government officials sitting around the table; we had enrolment committee members who knew what the criteria were. This should have been brought forward long before now. It should not have taken five years.

When they saw 24,000 applications come in up to November 2009, something should have been brought forward at that point, instead of letting it go until now, in 2013, only to have a supplementary agreement put in place to cut back the numbers, to make the criteria a little bit more stringent, to see whether we can get some of the applications rejected.

This supplementary agreement was never ratified. We were never consulted. Nobody in the community, none of the membership, none of the band chiefs came to their membership and asked whether this could be ratified.

The Chair: Thank you, Ms. Hart.

We'll turn to Ms. Bennett now.

Hon. Carolyn Bennett (St. Paul's, Lib.): I guess what I'm hearing from you is that you think this is an issue that would be more appropriate for the court to decide, which would have the benefit of the facts of a particular case or class of cases.

Ms. Anne Hart: I think there has to be a decision made on what it is they're looking for as far as criteria are concerned. The problem began back when the agreement in principle began, because as I said, it was open. I think the enrolment process was flawed because there were no real criteria put into the agreement in principle. As long as people showed that they lived in a Mi'kmaq community, there was no stipulation that they had to be doing Mi'kmaq culture, none of that. They didn't have to prove any of that. They lived in a Mi'kmaq community, they showed their ancestry line, and basically that was it.

Hon. Carolyn Bennett: The government says that the supplemental agreement doesn't change the enrolment criteria, but they've changed the guidelines, and that really changes the interpretation of those criteria.

Ms. Anne Hart: It does.

Hon. Carolyn Bennett: This means that certain people who were previously granted status and added to the list might lose that status.

Ms. Anne Hart: Exactly.

Hon. Carolyn Bennett: It also means—and it was quite interesting to hear that the band hadn't even asked for this—that the bill would also remove any ability of the individuals who had incurred significant costs, perhaps flying back and forth to Newfoundland, to be reimbursed for this cost, even though a court could find that the government was at fault for this confusion—

● (1600)

Ms. Anne Hart: Yes.

Hon. Carolyn Bennett: —and that the people had been erroneously removed from the list.

Ms. Anne Hart: Yes, and the liability is something that should be decided by the courts, not by an enrolment committee, not by anyone else.

Hon. Carolyn Bennett: It seems that the purpose of the bill is to insulate the government from the legal action it is already anticipating. Is that correct? Is that what you see the bill trying to do?

Ms. Anne Hart: Yes, it is; that and taking the rights away from those who hold a card right now. I and the committee, the assembly, and other people in my community whom I've spoken with, and I have spoken to many, feel that this right is being taken away from them.

They're also not being told about what's going on. Nobody knew this supplementary agreement was coming, nobody.

Hon. Carolyn Bennett: When we heard from the federation and the band last week, they said that they hadn't asked for this indemnification, so clause 4 we see as purely of the government's.... What was portrayed as an agreement between the band and the Government of Canada, actually, this clause, in terms of the indemnification, wasn't even asked for by the band, and they seemed surprised by it.

Going back to the minister's testimony, in which he suggested that the Governor in Council doesn't have the express authority to remove names from the schedule and that this legislation is required to provide the Governor in Council with that authority, it sounds as though the Governor in Council already can add names to the membership list because of subsection 73(3) of the Indian Act. So what is the additional statutory authority required by the Governor in Council to remove names from the Qalipu Mi'kmaq First Nation band order?

Do you think that the real purpose of the bill is to insulate the government from liability and not really to implement the agreement or the supplemental agreement?

What do they really need and what would you need to get this fixed, given that it was such a botch-up? How do you fix it?

Ms. Anne Hart: How do you fix it? Well, first, what they're recommending in here by giving the power to the Governor in Council.... Under the Indian Act, the Indian registrar has the power to remove or add names, and that is the same across Canada. So why is someone else receiving the power for the Mi'kmaq people of Newfoundland?

My concern is that the power to do that has been taken away from the registrar and given over to the Governor in Council. There's nothing in there limiting.... I just understood that they're going to be going on the advice of the enrolment committee. We're concerned that it is also an attempt to reduce numbers, because there's no other way to reduce numbers. As well, we believe the supplementary agreement was introduced to do the same thing. So this is another way to take cards away from the people who have them.

I believe that 24,876 people is probably still too many for the band itself. We have 105,000 applications, and only 24,876 have received their cards, so we still have a substantial number of people just standing out there waiting to be processed, and I don't believe they will be.

● (1605)

The Chair: Thank you.

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

Mr. Kyle Seeback (Brampton West, CPC): Based on what you've said, Ms. Hart, I think your group is composed of people whose applications have been rejected, those whose applications have not been processed, and those whose applications have been approved but who are concerned.

Would those be the three kinds of people in there?

Ms. Anne Hart: No, it's in the agreement.

Mr. Kyle Seeback: Do you have any idea of the numbers? Is it an equal distribution, or do you not have any idea or you don't keep track of it?

Ms. Anne Hart: I don't have those numbers.

Mr. Kyle Seeback: That's fine.

You said that the process was very open and that there was a mismanagement of the process. I think that's what you've sort of intimated about the process early on. I take it by that you accept that there shouldn't be 101,000 people who are eligible for first nation status with the Qalipu Mi'kmaq.

Ms. Anne Hart: That's, unfortunately, not for me to decide, but based on what was presented to us to ratify after the agreement in principle was signed, it was very open. What we're concerned about now is that everything that's being done is about reducing numbers.

Mr. Kyle Seeback: I understand that, but you said it was very open and it should have been more stringent. That's directly what you said today.

Ms. Anne Hart: Yes.

Mr. Kyle Seeback: So if you're saying it was too open and should have been more stringent, by definition you're also saying that perhaps it allows far too many people to apply. Do you think this band should be one-tenth the size of all first nation communities in Canada?

Ms. Anne Hart: No, I don't have an opinion on that.

What I will say is that it was open but it wasn't done fairly. That's the other thing. The process wasn't fair.

Mr. Kyle Seeback: The initial process wasn't fair?

Ms. Anne Hart: The initial process on the agreement in principle wasn't, and I'll give you an example. When I made my application, I was the main applicant. I had brothers and sisters who applied under me. They received all of their documentation, but I did not, although I was the main applicant and all of their applications depended on my documentation.

Mr. Kyle Seeback: You didn't receive what documentation?

Ms. Anne Hart: I didn't receive the document stating that I met the criteria, but they did.

Mr. Kyle Seeback: I thought you said you obtained—

Ms. Anne Hart: I did, but it was after the fact. I had to call and demand why I didn't receive my letter. When I called, my letter was not mailed to me. My letter was dropped in a box at my house with no stamp on it. When I got into my house that evening, I received a phone call and the caller said, "You should keep your mouth shut now. You have your letter." I pressed star 69 to see who the caller was, and the number was blocked.

That's not the first instance of that we've experienced in our community.

Mr. Kyle Seeback: You've said it's very open, that it should have been more stringent. I know you're not acknowledging, or you're saying you don't have an opinion, that the number is too large, but I think what you've suggested is that's what you're thinking. If we look at that, the process now will re-evaluate these applications on the basis of the supplementary agreement.

Wouldn't you agree it's only fair that every applicant be treated the same? They can't just ignore people who have been granted status under the original agreement. It wouldn't be fair to all applicants if you said, "Well, those people are fine, but these other people here, we're going to review their applications." Isn't it an issue of fairness that if it has happened everyone should be under the same criteria?

● (1610)

Ms. Anne Hart: What I'm saying is that prior to the agreement in principle that was signed, there should have been more consultations done within the community so that the criteria should have been set from the get-go, in the very beginning.

Mr. Kyle Seeback: In the original?

Ms. Anne Hart: In the original agreement. Because that's what has opened up this Pandora's box right now. Everybody applied based on the criteria that was very open, but you still had criteria to meet under the agreement in principle. We have a signed contract with the Government of Canada.

Now we're introducing a supplementary agreement, but it took five years to do that. That's our concern. This should have been identified long before—

Mr. Kyle Seeback: If it had been done two years later, you wouldn't be having the concerns you're here at the committee with?

Ms. Anne Hart: It's the bill that we're here about because it's taking away the right of the Mi'kmaq people of Newfoundland. It's giving someone the authority to take their name off a list.

I carry a status card. My concern, like many in our assembly, is that I'm entitled to that. I feel very strongly that I'm entitled to that. I practise my culture, but it's not about the culture. It's not about whether I hunt and fish. It's not about the money. It's about my recognition that I've been looking for all of my life, and someone is going to take that away.

Mr. Kyle Seeback: Well, not necessarily. That's not a foregone.... You're saying it's a foregone conclusion—

Ms. Anne Hart: No, but based on this bill, it could happen, right?

Mr. Kyle Seeback: Those are my questions.

The Chair: Thank you.

We're going to turn to Ms. Crowder for the follow-up questions.

Ms. Jean Crowder: I think you probably are aware that the bill that's before the committee has no scope to deal with enrolment criteria. This bill simply indicates that it gives the Governor in Council the ability, based on recommendations by the enrolment committee, to add or remove people's names from the list.

The parliamentary rules don't allow us to engage in matters outside the spirit and intent of the bill, so it's a challenge for us, and probably not appropriate for us to talk about membership criteria because that membership criteria was developed initially by the community. I just wanted to touch on that for one moment.

My understanding, and I think this probably gets to the heart of this, is that the rationale behind the enrolment criteria and the subsequent clarification of it was based on the fact that parties to the agreement were guided by the Supreme Court of Canada's decision in R. v. Powley. In that decision the court recognized that belonging to an aboriginal group requires at least three elements: aboriginal ancestry, self-identification, and acceptance by the group. The Supreme Court stressed that self-identification and acceptance could not be of recent vintage. This formed the basis for the criteria set out in subparagraph 4.1(d)(i) of the agreement. The parties intended that to be the criteria used for acceptance.

So I think that the challenge for people is that they have the initial eligibility and enrolment process, and you're right in that there is a lack of clarity about that initial eligibility enrolment process under chapter 4.1, "Eligibility Criteria". My understanding is that in discussion with all parties, that resulted in the supplemental agreement in order to clarify membership criteria based on the Powley decision.

Is that your understanding of it as well?

Ms. Anne Hart: Yes, and the thing is that with the mismanagement of the process, there's a legal liability there as far as we're concerned, because we didn't set the criteria, we didn't set anything in place. All we were presented with was the agreement after it was signed, basically; this is how it's going to be, right? So someone has to be liable for the mismanagement of the process.

Ms. Jean Crowder: Ms. Hart, I'm not a lawyer either, but perhaps Ms. Lickers can comment on this particular piece.

My understanding of it is that what clause 4 does is it prevents people from suing for compensation, but it doesn't prevent people from taking the government to court for whatever else they may feel has been erroneous in this agreement.

● (1615)

Ms. Jaimie Lickers: That has yet to be determined. It's not explicit in the bill. Right now—

Ms. Jean Crowder: It isn't explicit but it's not explicit either that people are prevented from going to court.

Ms. Jaimie Lickers: No, it's not explicit that people are prevented from going to court. If you were looking for declaratory relief, I'm sure you could go to court. Not a lot of people can afford to go to court simply for declaratory relief.

Ms. Jean Crowder: We're in a position where many first nations are disadvantaged because they can't go to court on any number of matters on which they feel the government has been bargaining in less than good faith. There are all kinds of matters out there, and I would agree that the cancellation of the fund that used to be available to allow people to do that is not a good thing. I just wanted to make the point that there's nothing explicitly in this piece of legislation under clause 4 that prevents people from taking the government to court. My understanding is it just limits their ability to sue for compensation.

Ms. Jaimie Lickers: Right, to sue for even a basic recovery of the costs they incurred in preparing an application in reliance on the original criteria which was then modified without consultation and without ratification under the agreement.... It brings into question whether somebody could even recover costs if they were successful in taking the federal government or the band or council to court for anything other than damages, declaratory relief, judicial review application. It's questionable whether that individual, if successful, would even be reimbursed for any portion of the cost.

Ms. Jean Crowder: My understanding of the way this clause reads is they can't seek compensation or damages because their name was omitted or removed from the list, but it doesn't prevent them from going to court on other matters with regard to that as long as they're not seeking compensation specifically. Again, I'm not a lawyer, but the way I'm reading this is that, if it's not about compensation for damages for having their name removed, they could go to court for other matters with regard to membership as long as they weren't seeking damages or compensation.

Ms. Jaimie Lickers: I'm afraid I might be missing your point.

Ms. Jean Crowder: The point I'm making is they can still go to court for matters with regard to membership. It's just that they can't go to court to seek compensation or damages—

Ms. Jaimie Lickers: —which, in my view, would be the primary purpose for going to court.

Ms. Jean Crowder: They could be asking for reinstatement or other matters related to membership that aren't specifically related to damages.

Ms. Jaimie Lickers: I suppose, yes, they could seek reinstatement.

Ms. Jean Crowder: Thanks, Mr. Chair.

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

Mr. Mark Strahl: I'm good, Mr. Chair.

The Chair: Were there any additional questions on which anybody needed clarification?

Not seeing any, we want to thank Ms. Hart and Ms. Lickers for coming. We appreciate it has taken time out of your busy schedules. We do appreciate the fact that you've made yourselves available for our committee.

Committee members, we'll move into committee business shortly, but we'll suspend for a few minutes.

Again, we'll thank our guests and dismiss them.

[*Proceedings continue in camera*]