HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on Aboriginal Affairs and Northern Development

AANO • NUMBER 020 • 2nd SESSION • 41st PARLIAMENT

EVIDENCE

Tuesday, April 8, 2014

Chair

Mr. Chris Warkentin

Standing Committee on Aboriginal Affairs and Northern Development

Tuesday, April 8, 2014

● (1535)

[*English*]

The Chair (Mr. Chris Warkentin (Peace River, CPC)): Colleagues, I will call this meeting to order.

This is the 20th meeting of the Standing Committee on Aboriginal Affairs and Northern Development.

Today we begin the study with respect to wills and estates.

Colleagues, today is an opportunity for us to quiz the Department of Justice and the Department of Aboriginal Affairs with regard to the subject material.

We're going to turn it over to Mr. Saranchuk to begin.

I believe you have an opening submission.

Mr. Andrew Saranchuk (Assistant Deputy Minister, Resolution and Individual Affairs Sector, Department of Indian Affairs and Northern Development): Correct.

The Chair: Then we'll have some questions for you. We're going to keep the first round of questions rather structured, according to what is our usual practice.

There may be a more organic way to continue after that. If people have questions on a subject as it comes up, we may do that, but we'll give it a shot after the first rounds of questions.

We'll turn it over to you, Mr. Saranchuk, for your opening submission and then we'll have some questions.

Mr. Andrew Saranchuk: Great. Thank you.

I'd like to thank the committee at the outset for providing this opportunity to speak to the administration of wills and estates on reserve.

My name is Andrew Saranchuk. I'm the assistant deputy minister responsible for the resolution and individual affairs sector in the Department of Aboriginal Affairs and Northern Development. That sector of the department includes the residential school settlement agreement, the secure certificate of Indian status card, the office of the Indian registrar, and Indian moneys, estates, and treaty annuities.

I have with me today, Roy Gray, who is the director who leads the Indian moneys, estates, and treaty annuities team, and two of my colleagues from the Department of Justice, Mr. Martin Reiher, acting general counsel, and Mr. Tom Vincent, legal counsel, since this is, of course, an inherently legal issue.

We're pleased to be here today to brief you on the administration of wills and estates on reserve land. I thought it would be helpful to begin by describing the existing system under the Indian Act and the process for the administration of estates. We will then identify some considerations that would likely be relevant to any review in this area that might be undertaken.

As you know, in Canada, wills and estates are a provincial responsibility. Therefore, for most Canadians, the laws of the province or territory where they lived at the time of their death apply to the administration of their estate, whether they died testate, with a will, or intestate, without a will. However, for first nations individuals who are registered or entitled to be registered under the Indian Act and who have died ordinarily resident on a reserve, the administration of wills and estates is the responsibility of the Minister of Aboriginal Affairs and Northern Development. To be clear, the minister does not administer the estates of first nation individuals who live off reserve.

There are some key differences between the Indian Act estates system administered by the minister and the provincial and territorial systems. I will identify five main areas related to the administration of estates on reserve and highlight the main commonalities and differences with the provincial and territorial systems. In doing so, I hope to provide the committee with an understanding of what both the minister and the department do in this area.

[*Translation*]

I would like to begin by examining the process related to wills.

As I mentioned, when a person dies, they will have either left a will or died without one. In most provinces, before a will is recognized as having legal force, it needs to be probated, which is the process of proving that a document is the valid final will of the deceased. Probate is usually granted by a court. In Quebec, individuals may also register a will with a notary. A notarial will in Quebec has legal force when the testator dies, and it does not need to be probated after their death.

On reserve, the Indian Act and the Indian Estates Regulations provide the legislative framework and administrative guidance for estates and will administration. Under the act, all registered Indians are entitled to write wills. However, after a death, rather than go to a court to have the will probated, the will is sent to a regional office of Aboriginal Affairs and Northern Development Canada, where an official will approve the document on behalf of the minister, based on the conditions set out in the act.

The conditions that need to be met for a will to be approved under the Indian Act are similar to those in the provinces and territories, but not as strict, in certain respects. For example, most provinces require that a will be witnessed, but that is not the case under the Indian Act. The will must also be written and signed by the deceased, and indicate the deceased individual's wishes with respect to the disposition of his or her property upon death.

Once the will has been approved as meeting the basic requirements, family members may challenge it, if they believe there are problems. It is at this stage that the minister, similarly to the provincial system, has the authority to declare a will, or part of a will, void in certain circumstances.

Those circumstances include the following: if the will was written under duress or undue influence; if the testator lacked capacity—for example, owing to illness or infirmity at the time it was made; if the terms of the will would impose hardship on the testator's dependants; if the will disposes of land in a reserve in a manner contrary to the interests of the band or to the Indian Act; or, if the terms of the will are too vague or uncertain and would render the administration and equitable distribution of the estate difficult or impossible to carry out.

This brings me to the second area of estates administration, and that is dispute resolution.

One of the main differences between the Indian Act system and that of the provinces and territories involves the way a will may be challenged.

Since Aboriginal Affairs and Northern Development Canada is not set up to hear and resolve disputes in estates in the same way as courts in the provinces, the general practice has been to transfer jurisdiction of such disputes to a provincial or territorial court. Under the Indian Act, on behalf of the minister, the department has the authority to refer a particular question, or an entire estate, to the court. In either case, the Indian Act continues to apply, but the family can plead their case before a provincial judge, rather than before the department's officials.

● (1540)

[*English*]

The third area of estates administration that I would like to mention is intestacy and the process of appointing estate administrators.

Generally in the provinces and territories, if there is no will, then family members need to apply to a court for letters of administration according to the laws of the province or territory.

Under the Indian Act, if there is no will for a first nation individual living on reserve, family members apply to the department to be appointed as the administrator of the estate. The department will make all efforts to appoint a family member of the deceased to administer the estate. Family members are invited to apply to be an administrator. Once an administrator is selected, the others with an interest in the estate will be given an opportunity to object to the appointment, if they wish. Departmental officials will only be appointed if no family member is willing or able to administer the estate.

In the majority of cases, for first nations individuals who die ordinarily resident on reserve, there is no will in the estate. This means that the intestacy provisions in the Indian Act, found at section 48, apply to determine how and to whom the estate is to be distributed. These provisions are similar to those of the provinces and territories.

Under the act, section 48 specifies clearly how the estate is to be divided in the event there is no will. For example, if there is a survivor, the first $75,000 goes to the surviving spouse. If there is one child, the surviving spouse and the child split the estate after payment of the spousal preference share, and so on. You'll see there's quite a series of rules there. Intestacy can also include the division of any possession of interest in reserve lands that was held by the deceased.

This brings me to the fourth aspect of the Indian Act estates administration that I would like to mention briefly. That is the treatment of reserve land when it is part of an estate, and in particular, the rules of the Indian Act designed to maintain the integrity of on-reserve land.

The Constitution Act, 1867 grants the federal government exclusive jurisdiction over lands reserved for the Indians. This means that provincial and territorial laws cannot deal with the possession of interests in reserve land, and this includes provincial wills and estates legislation. It is for this reason that the Indian Act has rules regarding reserve lands and estates. In particular, the Indian Act clearly states that reserve land interests can only be transferred to people who are members of the first nation that holds that reserve, and this applies in the context of wills and estates as well.

The existing estate process provides that if an heir or beneficiary of the reserve land interest is not a band member, and is therefore not entitled to possess reserve land, under the Indian Act, the minister is obliged to try to sell that land to another band member and give the proceeds of the sale to the heirs or beneficiaries involved. If there is no buyer after six months, the land will revert to the first nation. Clearly, this is a significant difference from the provincial system.

The fifth and final aspect I'd like to note is that various services relating to wills and estates under the current system are provided by the department at no cost to first nations individuals. For example, the approval of wills and the appointment of administrators are both done at no cost to the estates or to the heirs. This is not the case under provincial systems, and there is normally a cost associated with those steps.

That's not to say all costs associated with the wills and estates of first nations individuals living on reserve are covered. In particular, there are costs such as legal costs and the court fees that are not covered for first nations individuals.

The five aspects I just presented relate to the existing system, and hopefully give this committee a sense of what the minister and the department do in this area. But as part of its general responsibility in the area of estates administration, the Department of Aboriginal Affairs has begun exploring how its services in this area could be improved. Since the introduction of Bill C-428 in June 2012, we have spoken with several experts to gain a better understanding of how estates work in the provinces and territories, and where there may be potential intersections and opportunities to improve the current system if changes are desired.

From that perspective, I would like to offer very brief comments to the committee on some of the considerations that would likely be relevant to any possible review or reform of the estates system for first nations individuals on reserve.

At the broadest level, a review could explore whether improvements could be made to the current Indian Act estates system. For example, in addition to its administrative function, as mentioned, the department currently has a role in the resolution of disputes arising from estates. Consideration could be given as to whether or not the department could maintain its administrative role and devolve the judicial function to another body. A review could also explore whether options exist for first nations, or aggregates of first nations such as tribal councils, to have a role in estates administration, particularly with respect to these judicial functions. This would be consistent, of course, with first nations' aspirations for more control over their own affairs and with the objective of reducing departmental and ministerial involvement in their day-to-day lives.

In any review, consideration will have to be given to the jurisdictional challenges that are inherent in any potential changes to the administration of estates on reserve land. The Constitution Act, 1867 grants the federal government exclusive jurisdiction over "lands reserved for the Indians". The case law has interpreted the constitutional doctrines of distribution of powers to mean that provincial and territorial laws cannot deal with the possession and transfer of interests in reserve land, and this includes provincial wills and estates legislation.

Therefore, some federal rules will presumably always be required at least in respect to reserve lands. However, there might be options for greater application of provincial laws in other areas, although this would obviously necessitate engaging on these issues with provinces and territories to a certain extent.

As part of this, consideration would also have to be given to the fact that if the estates provisions in the Indian Act are removed, an alternative regime would be required to replace them. If no alternative were explicitly identified, provincial or territorial laws might apply to the administration of estates on reserve to the extent that they were not inconsistent with the Indian Act and did not deal with the possession of reserve land. However, it seems clear that provincial and territorial laws would presumably not apply of their own force to the possession or transfer of reserve lands. So, simply removing the provisions of the Indian Act would, at a minimum, create a partial legislative gap meaning that the courts would need to get involved to provide guidance in this area. The result is that meaningful and orderly change in this area is not as simple as simply repealing the estates provisions in the Indian Act. Our advice would be to be clear and explicit about any replacement regime and not leave it to the courts.

Finally, it would likely be relevant to consider the potential implications of modifying the services that are currently provided by the department to first nations individuals, some at no cost, and consider how they would be paid for in the future.

I hope we have made this complex area a little bit clearer. We would be pleased to answer any questions that you might have.

● (1545)

The Chair: Thank you very much. I appreciate your opening submission.

We'll turn to Mr. Genest-Jourdain for the first questions.

Colleagues, if you do have members who want to be on the questioning list, we'll make sure that happens before we go to a less formal way of engaging with the questions.

We'll begin with Mr. Genest-Jourdain.

[*Translation*]

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

I looked at the information and figures provided in the document titled "Evaluation of Indian Moneys, Estates and Treaty Annuities", dated April 2013. That document is about the number of estate files related to registered Indians on reserve in 2010-2011.

How do you explain that almost 23% of estate files for registered Indians were handled completely by representatives of the Department of Aboriginal Affairs and Northern Development in 2010 and 2011? Having failed to find an administrator or someone interested in administering the estate, the department had to take care of everything. How do you explain that lack of interest?

[*English*]

Mr. Roy Gray (Director, Indian Moneys, Estates and Treaty Annuities, Department of Indian Affairs and Northern Development): Mr. Chair, I think what is being referred to is the ratio of non-departmental administrators of estates versus departmental administrators. The department's policy is, and has been for some time, to try to encourage family members of deceased individuals to take over the administration of their estates. However, there are circumstances that arise where there may not be somebody available, or there are family members who are just not prepared to come forward and take over the responsibilities.

On average, about 20% of the estate administration files are handled by departmental employees. The majority are handled by family members, and that is the thrust: to try to encourage family members to take over.

● (1550)

[*Translation*]

Mr. Jonathan Genest-Jourdain: If the Department of Aboriginal Affairs and Northern Development were to offload its responsibility with regard to administration, and Indian estates and gifts, how much would it cost to have the 577 files from 2010 and 2011 handled by an external administrator? I am not sure whether you have already looked into that, but I am asking you to answer based on your knowledge of these issues. How much would it cost to hire a professional to administer those estates, which have so far been administered by the Department of Aboriginal Affairs and Northern Development? Have you ever tried to quantify that?

[*English*]

Mr. Roy Gray: We do have some experience with that. In two of the regions in Canada, contracts have been entered into with the provincial governments to take over the administration of estates files. I don't have the costs at hand, but that is done in two jurisdictions.

[*Translation*]

Mr. Jonathan Genest-Jourdain: I will now talk about holograph wills prepared by individuals without the help of a notary.

You know that, in Quebec, holographs have to be probated by a court. You also mentioned that in your opening remarks this morning. I do want to clarify something. In Quebec, if those types of documents are typewritten, they are not recognized as valid. The will has to be written in the hand of the testator and signed by them. However, that is not what is set out in section 15 of the Indian Estates Regulations. The following is stated: "Any written instrument signed by an Indian may be accepted as a will by the minister [...]". No further clarifications are provided.

In Quebec, there could be some problems caused by a shift in provincial regulations, especially if we consider that the department already has to fully administer 23% of estates across the country. If any additional elements were to create obstacles for first nations, would Indians almost systematically have to use a notary to ensure that their wills are compliant?

[*English*]

Mr. Roy Gray: We have to bear in mind that we are talking here about wills and the administration of estates on reserve, which are governed by the rules in the Indian Act. The Indian Act, in section 45, sets out rules as to what the requirements are for first nations individuals ordinarily resident on reserve to make a will.

Basically, it boils down to the fact that the will has to be in writing and it has to be signed by the individual and deal with their property on death. If an individual makes a will in accordance with that section, there shouldn't be any problem disposing of land or any other assets on reserve.

I don't know if my colleagues at Justice have anything to add on that.

[*Translation*]

Mr. Martin Reiher (Acting General Counsel, Director, Operations and Programs, Legal Services, Department of Justice): Yes, I would like to add something. I am not sure I fully understand your question.

You are entirely correct in saying that a holograph will cannot be typed and must be handwritten. However, a typewritten will in Quebec can be valid if, of course, a witness is present at the signing.

Mr. Jonathan Genest-Jourdain: That's not the case for a holograph will.

Mr. Martin Reiher: This is true.

That said, you correctly pointed out that the current rules under the Indian Act are unclear. So a typewritten document could be valid under the Indian Act. The current rules are not more rigid than what is set out in provincial legislation.

So, I fail to see how it is currently more difficult for a will made by an Indian to be valid than for a will made off reserve. That's why I am not sure I fully understand your question.

However, I think clarifying the rules would definitely help.

Mr. Jonathan Genest-Jourdain: As you pointed out, so far, there has been a convivial aspect to accepting and probating the wills of registered Indians on reserve. If the department offloaded that responsibility, and provincial rules—if possible—applied to this situation, additional barriers would be created, since people have gradually gotten used to whatever approach was in effect. Ultimately, a will written on a napkin could be considered valid.

We already see that 23% of those files have to be processed fully, taking into account complications, understanding of fees and cultural distinctions.

I think that applying those rules, which are fairly strict in Quebec —we can agree on that—could be a factor that would surely slow down the process or, at least, make registered Indians less likely to become administrators and ultimately get involved in the administration and liquidation of the estate.

● (1555)

Mr. Martin Reiher: Thank you for the clarification.

I actually think that, if the rules of the Indian Act were simply eliminated, a number of problems would arise. The provincial rules would in all likelihood fill the void partially, but not completely. If they were to fill the void, the current provincial rules, being slightly more strict than the rules under the Indian Act, could cause issues for existing wills and current practices. It would be important to provide for a regime that would apply in such cases.

Mr. Jonathan Genest-Jourdain: Thank you.

[*English*]

The Chair: We'll turn to Mr. Clarke now for the next questions.

Mr. Rob Clarke (Desnethé—Missinippi—Churchill River, CPC): I'd like to thank the witnesses for coming in today.

I'm very interested in this study and appreciate the committee actually addressing this issue, because it was part of my private member's bill.

I want to clarify a couple of things.

First of all, I have a very straightforward question. Do first nations have the same rights as every other Canadian in Canada in regard to wills and estates?

Mr. Andrew Saranchuk: I believe they do, but I'll let my colleague fill you in more.

Mr. Roy Gray: Yes, I would say so. For example, a first nations individual has the right to make a will, and there are rules analogous to the rules that apply off reserve to non-first nations individuals and first nations off reserve regarding the administration of their estates.

Mr. Rob Clarke: But on reserve, do we have the same rights?

Mr. Roy Gray: Well, as I say—

Mr. Rob Clarke: According to the Indian Act.

Mr. Andrew Saranchuk: I think there are similarities and differences that we've tried to outline.

Mr. Rob Clarke: But is any other Canadian governed by the Indian Act besides first nations?

Mr. Andrew Saranchuk: No. What I would say is that the particularities that we try to explain in terms of the disposition of reserve lands, I think, complicate things certainly with respect to disposition. So, what you're getting at, if I understand correctly, is there are certain limitations in terms of how property can be bequeathed, because if it's tried to be bequeathed to somebody who is not a band member and it's reserve land, then that's not possible under the terms of the Indian Act. So there are certain limitations that non-first nations individuals would have.

Mr. Rob Clarke: In the department, how many individuals work on wills and estates?

Mr. Andrew Saranchuk: There are about the equivalent right now of 44 full-time equivalents spread out across the country.

Mr. Rob Clarke: How many new cases are brought up each year, on average? How many contested?

Mr. Roy Gray: There are, on average, about 3,600 open files each year. Some of those are new; some of those are old. As you can imagine, some estates may involve more complex issues which take longer to resolve, but on average it's about 3,600 open.

Mr. Rob Clarke: With 44 individuals working in aboriginal affairs, monitoring the wills that are uncontested and with the cost, how much money is expended on the caseloads per year, including the individuals working in the department?

Mr. Roy Gray: This isn't identified, for instance, in the core budgets of regional offices, but based on an analysis we've done, we think the cost runs at about $3.5 million annually. That includes, for instance, grants and contributions moneys, moneys that flow to communities for various capacity-building initiatives, or wills workshops. It also includes operations, maintenance, and salary dollars.

Mr. Rob Clarke: To provide some clarification here, I know Jonathan had mentioned during questions when my private member's bill was brought forward that Quebec law—and forgive me if I'm wrong—would supersede wills and estates.

Am I correct on that, Jonathan? No? Would it supersede any types of wills that are being contested in Quebec on first nations? I think it was one of the questions that was brought up.

● (1600)

Mr. Andrew Saranchuk: Sorry, I can't remember the question, but I do remember, and you're right, there was an issue about Quebec law and Bill C-428. I'm sorry, but I just can't remember the question at the time.

Mr. Rob Clarke: My understanding was that Quebec law would supersede first nations wills and estates. Does it?

Mr. Martin Reiher: No, the same situation would occur in Quebec as anywhere else in Canada in terms of the application of rules regarding wills for on-reserve people. To the extent that the Indian Act deals with the subject matter, including the regulations, the provincial law would not apply. To the extent that there are possible gaps, it's possible that certain rules of the provincial legislation would find application currently.

My colleague might have something to add.

Mr. Tom Vincent (Counsel, Operations and Programs Section, Department of Justice): Certainly, the Indian Act rules would apply to the estates of people who died ordinarily resident on reserve, and Quebec rules would apply to people who died ordinarily resident in the province of Quebec.

Mr. Rob Clarke: We've heard testimony and currently are there first nations communities, for instance Cree law, and individuals of first nations administering their own type of law on wills and estates?

Mr. Roy Gray: If I'm not mistaken, under the Cree-Naskapi (of Quebec) Act, the Cree and Naskapi have the authority to deal with estates or successions, yes. There may be other self-government situations where this is occurring.

Mr. Rob Clarke: How is that working out? Are there any problems with that coming back to the department from Cree law?

Mr. Roy Gray: None that we're aware of, although we wouldn't necessarily know, if they're in a self-government situation.

Mr. Rob Clarke: I recall your mentioning the Constitution going back to 1867, both provincial and territorial. I look back at the current system of today's society. Do you think the Indian Act can be phased out in regard to wills and estates? If so, how can the department phase that out and let first nations govern themselves?

Mr. Andrew Saranchuk: I'll take a crack at it to start and then I'll turn it over to my colleagues.

I think anything is possible. It would be possible to phase out a large degree of the Indian Act. It wouldn't be easy. There would have to be a replacement system that clarified how things were going to apply. We don't think it would ever necessarily be possible to phase out the issue that you and I were just discussing with respect to reserve lands, because it wouldn't be possible for provincial laws to apply in that case, but it would be possible to phase out.

We tried to give a little bit of a sense of this in the opening remarks. It would be possible to think about some of the current functions, whether or not they be administrative or judicial, and look at whether or not those could be turned over to first nations, maybe aggregates of first nations as we said.

It would be possible to think about having provincial laws apply in their entirety, and I wouldn't want to tell people how to proceed, but that would probably require some sort of engagement with the provinces, because there would be practical implications for them. Their systems might not be set up right now or attuned to actually applying on reserve and some of the complexities there.

Mr. Rob Clarke: Doesn't provincial law—

The Chair: Mr. Clarke, your time is up.

If you have a follow-up question, I'll allow that, but we are out of time.

Mr. Rob Clarke: Just as a follow-up question to that, I'm wondering about provincial law. When a first nations member on reserve has an estate contested and he lives on the reserve and has provincial assets, how is that situation addressed by the department?

● (1605)

Mr. Andrew Saranchuk: You are talking about private assets that are not reserve land.

Mr. Rob Clarke: That's right.

Mr. Andrew Saranchuk: Those would be administered, depending on whether he was testate or intestate, by the executor or the administrator.

Am I missing something, Tom?

Mr. Tom Vincent: That's right. If the person died as ordinarily being a resident on the reserve, then the intestacy provisions of the Indian Act would apply or the will would apply to administer that estate.

The Chair: We'll go to Ms. Bennett.

Hon. Carolyn Bennett (St. Paul's, Lib.): I'd be happy to have an informal conversation about what we do about all this.

The Chair: Okay. There are a few people who have indicated they want to maintain their line of questions—

Hon. Carolyn Bennett: One thing I would ask, if you were going to go to provincial...a first nation like Akwesasne spreads over two different provinces.

Voices: Oh, oh!

Hon. Carolyn Bennett: This has been our concern with things like the water act, when you talk about provincial standards. Do you have any advice on that?

Mr. Andrew Saranchuk: We were laughing a little bit, because you can imagine the jurisdictional complexity of Akwesasne, where there are the five different jurisdictions, including the U.S., Canada, Quebec, and Ontario. I can imagine how complex it would be if there were a property right near some of those lines. That's probably, of course, an outlier in terms of...but it would have to be factored into any new system for sure.

What would my advice be? It really depends on how much of a change Parliament would like to make in this area, I suppose. You could see change being made. On the other hand, I would just suggest that there are certain benefits. I appreciate the questions in terms of the constraints, if you will, in terms of reserve land and how that's dealt with under the Indian Act in wills and estates, but as we tried to make clear, there are certain services that are offered to first nations individuals on reserve that aren't necessarily offered anymore through the provincial system. If, for instance, I were to die and my will had to be probated, presumably that would require somebody engaging a lawyer or going to court, and there would be fees associated with that. Those fees, in terms of probate, are currently provided at no cost by the department. If you look at taking the department out of the affairs, then individuals would lose that service or benefit, if you will.

There would be pros and cons to that, and I suppose the only other thing I'd mention—and Akwesasne is a good example in terms of complexity—would be thinking that through with regard to more remote communities. For a community that's in the north, when you're talking about engaging a lawyer to probate a will, there are going to be travel costs associated with that, even in terms of getting to the nearest courthouse.

So there are potentially complexities associated with changing the system, which is not to say that there's any resistance about potentially changing the system. It is actually a complex area in terms of how it works on the ground right now. It's relatively complex.

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

Mr. Mark Strahl (Chilliwack—Fraser Canyon, CPC): Mr. Chair, I'll share my time with Mr. Seeback.

Perhaps we'll get into this as the study progresses. Have any stakeholders, AFN or other groups, expressed to the department any desire to delve into this matter at this time or at any time in the past, or is this kind of a result of Mr. Clarke's private member's bill? Has this come forward from other groups as well?

Mr. Andrew Saranchuk: I would say generally that the work we have been doing in terms of some policy engagement here is largely as a result of Mr. Clarke's bill, and we did some outreach when we realized there was potential legislative appetite here to make changes. We've done some outreach with some groups, some experts, and some provinces in terms of their views because, as I tried to indicate in our remarks, we understand the federal system vis-à-vis the Indian Act. We don't have a total understanding of how the provincial systems work or of how they would operate if the federal system weren't there, so we're trying to gain that understanding in the event that there are changes.

Mr. Mark Strahl: I want to turn now to the chart that the analysts provided to us about the regional workload analysis on estates administration. I'm not sure if you have that. Some things jumped out at me.

In British Columbia, my home province, there are 169 departmental employee administrations. In Alberta it's zero. In Manitoba there are 349. How can one province have zero and another have 350 or 100? Is that just a statistical anomaly? Even the number of person-years dedicated to estates shows that B.C. has four times more than Alberta has.

I'm trying to understand the regional disparity. Why isn't it consistent across the country?

● (1610)

Mr. Andrew Saranchuk: Those are good questions. We've actually looked at the chart and asked ourselves that.

I'll try to field the second question first with respect to the person-years dedicated. It's tough to answer that question. Partially it's a result of how that departmental region allocates its resources, and the extent of emphasis it puts on those resources. Some of this, as Mr. Gray was trying to explain, is about their outreach to communities there. There is an outreach involved whereby people are trying to educate groups about potentially making wills, and how they deal with wills. There's a greater emphasis on that, for whatever reason, in the B.C. region.

I, myself, had the same view as you when I looked at the column, though, about the number of appointments of administrators. How there could be zero in Alberta, to be honest, it didn't make sense to me.

I don't know, Mr. Gray, if you have anything to add.

Mr. Roy Gray: I'm looking at that and asking myself whether that is an anomaly, because it really doesn't make sense, the zero.

That said, generally speaking, just to echo what Mr. Saranchuk was saying, the resources that are allocated are based on regional decisions. For instance, in B.C. there are significant resources allocated to the function and they do, as a result, a fair bit of outreach that's not done in other regions.

Mr. Mark Strahl: Zero is the big one, but there are three in Saskatchewan, and six in Ontario. Those numbers are also really low. Does that have something to do with what's happening in that region with the office there? I don't know. I'd be interested if the department had an opportunity to provide us with further analysis, more detail on that.

Anyway, I do want to give Kyle some time here.

Mr. Kyle Seeback (Brampton West, CPC): When you look at those numbers, what's the processing time for someone who has applied through AANDC? Is there an average processing time?

I don't want to know about contested ones, where you have to refer to the courts—I want to get to that in some of my questions, and maybe in a later round—but the average person that comes in and....

Mr. Roy Gray: Our understanding is, for example, for approval of wills, it takes seven to twelve days. Bear in mind it's done at the regional level. It's done by a regional officer. That's if there are no issues. If two wills show up, obviously there's an issue, so it's going to take more time. But generally speaking, it doesn't take very long.

If we're talking about appointment of administrators, it may take 120 days or so. Built into that is a notice period. As Mr. Saranchuk mentioned, if you're going to appoint a family member as an administrator, you have to go out and notify the other family members to make sure that they're okay with that.

Moving from that to the overall administration of the estate from start to finish, it's hard to say, because, again, that would much very depend on the complexities.

Mr. Andrew Saranchuk: For example, whether or not land is bequeathed in the estate to a non-band member, all of a sudden you're into that complexity that we tried to explain. If it's relatively straightforward, it could go a lot quicker.

Mr. Kyle Seeback: Presumably the will could not be challenged initially, but as the distributions take place, there could be a challenge from other family members. Do they then come to AANDC and say, “Wait a minute. I was supposed to get *x* and I didn't get *x*; I got *y*”? Is that something that happens within your department as well?

● (1615)

Mr. Roy Gray: Yes, there could be a complaint, in which case there could be an investigation. What can happen often is.... Because the minister has the authority to transfer a whole or a part of the estate administration to a court, that could happen, because admittedly the department isn't necessarily that well equipped to manage those kinds of disputes. It's not as well equipped as a provincial court.

Mr. Kyle Seeback: Do you know how many get referred to the court on a yearly basis?

Mr. Roy Gray: I don't have that information with me now.

Mr. Kyle Seeback: No? I'd be interested to know what that number is.

How am I doing for time, Chair?

The Chair: You're out of time, but we'll have additional time for you later.

A voice: Do you want some of mine?

Mr. Kyle Seeback: I can wait for my round.

The Chair: We'll turn to Ms. Crowder and then we'll be back.

Ms. Jean Crowder (Nanaimo—Cowichan, NDP): I have more questions than five minutes will allow for.

I think you're well aware that the reason this is before the committee is the stripping out of the sections of the Indian Act without specifically, as you mentioned in your notes.... There were a couple of points that you did raise in your speech, but there were a number of other things you didn't raise that are different. I know that you only had a limited amount of time, but I wanted to touch on a couple of them.

One was that some provinces don't recognize custom adoption. This is a challenge I think for the department as well as perhaps provincial governments, but there are some custom codes in terms of who inherits what, based on some first nations practices.

For example, I'm aware that for some first nations there are certain things, such as ceremonial pieces, that perhaps go to specific family members and may be outside of what would happen if somebody died intestate. I also want to point out, is it roughly only 8% of people who have a will?

Mr. Andrew Saranchuk: That's correct.

Ms. Jean Crowder: Ninety-two per cent of people die intestate, so the rules the department outlines may not actually respect custom and tradition within a first nation. I don't know how the department deals with that.

There's another thing that I wouldn't mind you touching on. The numbers have been raised...in terms of whether these numbers are credible.... I understand in the evaluation some concern was raised with regard to monitoring and the numbers themselves. It says that the lack of adequate performance data made it impossible to determine success on a number of things. I wonder if the department can comment on what they're doing in terms of the data capture so that it more accurately reflects what's going on.

I guess the final thing on these numbers is, are these all estates? I assume the number that is here, the 2,574, is for everybody who died, whether they had a will or not. Is that correct? Do you want to start with that one?

Mr. Roy Gray: I don't know if I understand the question.

Ms. Jean Crowder: The total number of new estate files opened in 2010 is 2,574. Is that everybody who died? Does it include people with wills and without wills?

Mr. Roy Gray: Well, this would be the number of estates files opened. There could have been people who died where there wasn't a file open—

Ms. Jean Crowder: But this number represents people with and without wills.

Mr. Roy Gray: Yes, it does.

Ms. Jean Crowder: Okay.

Mr. Andrew Saranchuk: And it's the number that Mr. Gray is trying to explain is the open basket.... It's the in basket. There are always.... I'm not sure it represents the exact number of deaths that year, but it represents an approximate number, because there are people coming out of there and people going in there, wills going in there and wills going out of there....

Ms. Jean Crowder: In fact, part of the evaluation identified that sometimes the department is not aware that somebody has passed away.

Mr. Andrew Saranchuk: That's one of the big things we didn't mention. That's really one of the huge problems here. First nations individuals might not tell us about a death, at which point there's an issue for us if it's not brought to our attention. That's one of the reasons we're trying to do greater outreach in this area: to make people aware of the need for that. But it is a lacuna, if you will.

Ms. Jean Crowder: But with regard to other issues that are unique to the Indian Act with regard to custom adoptions and the passing on of ceremonial items.... You did mention the issues about lands, but it's far more complicated than that, as you know. There are allotment lands, there are certificates of possession, and there are certificates of occupation. So it's even more complicated, and to expect a provincial jurisdiction to take this on....

● (1620)

Mr. Andrew Saranchuk: I don't think they could take on the lands part, and that's the point, although they potentially could take on the other aspects. I'll defer to my colleagues on this, but I don't think, without some sort of clear legislation, it would be possible for them to take that on. It certainly wouldn't be possible in the absence of clear legislation.

Ms. Jean Crowder: In effect, then, if we were going to make a change, we would still have part of wills and estates operating under the Indian Act because of the nature of first nations lands, and another part could operate under provincial jurisdiction with agreement from the provinces.

You've talked about consulting with provinces, but I'm assuming that you're also talking about consulting with first nations as well.

Mr. Andrew Saranchuk: Yes, obviously, and I think that's the point I was trying to make in terms of the last point about understanding what level of services are currently provided. Any transition to a new system might see those lost, so that would of course require engagement with first nations communities and also with individuals, I would assume. This is an area that's a little bit different, because it's very much focused towards individuals, partially, and also towards communities, as opposed to certain other areas of the Indian Act that may be a little more community focused.

I'm conscious, though, that we didn't answer your question, Ms. Crowder, about custom codes. I don't know who would be best placed to answer that.

Mr. Tom Vincent: I can tell you that with regard to ceremonial items, I've never encountered a dispute regarding those sorts of things in an estate, and I've been advising for 12 years for the department. My assumption has been that those precious ceremonial items actually devolved by the custom of the first nation and that they've been undisputed and never brought to the attention of the department for resolution.

Ms. Jean Crowder: It may not have been brought to the attention of the department, but there was a fairly high-profile case in British Columbia where some ceremonial masks were sold off by a family member. There were some efforts made to recover it, but there was some allegation that the family members who sold it off did not have the rights to those ceremonial masks. So it may not have come to the department's attention, but I think it speaks to the complexity of these matters and where provincial jurisdiction simply would not have the background or the knowledge to deal with some of these complex matters.

I went through the testimony that was before committee on Bill C-428, where of course any number of issues were raised. Certainly one of them was that in other pieces of legislation where it's been suggested that provinces could step in, some serious concerns have been raised about the lack of capacity of the provincial jurisdiction to deal with some of these very unique situations.

Mr. Roy Gray: If I may say something, too, the complexity would also manifest itself in the context of individuals trying to administer estates. That's something we've been giving some thought to. I'm sure people who have personal experience would attest that it's difficult enough to work your way through the administration of an estate. It's hard to imagine having to do it within two legal systems or two jurisdictions. That's another aspect of the complexity.

The Chair: Mr. Seeback, you're up again.

Mr. Kyle Seeback: Great.

I think I already have this answer from looking over your notes again, but I want to go back to when this is transferred to the court. I think I asked if you would give me numbers on that. I did ask that last time? Good. Okay.

Will any dispute that arises with respect to an estate result in the department saying, “We can't solve this, you have to go to court”? If so, what's the process that the parties to the dispute have to follow? Do they then go through the regular process with respect to a disputed estate? For instance, here in Ontario they have to file court materials, court documents, and have it adjudicated on by a judge, either in a summary fashion or in a longer way with a trial.

Mr. Tom Vincent: I can tell you that not every dispute ends up in court. In fact, very few of them do. Quite often the department is able to administer some decision-making authority and control over these estates and they don't end up in court.

It's largely the high-value estates where there are assets that are really worth the expense and you have two sides that are willing to put money into legal fees and take it to court. The process is that one side or the other sends a letter to the regional office, asks for a transfer of the minister's jurisdiction to the provincial court, and from there, once they receive that transfer of jurisdiction from the minister, which can typically take a few months to obtain, they have to commence their own court action in their own court, whether it be the Saskatchewan Court of Queen's Bench or the Ontario Superior Court—

● (1625)

Mr. Kyle Seeback: Yes, hire their own lawyers, pay their own lawyers, all those kinds of things.

Mr. Tom Vincent: Then the process is there and the court then has those powers that the minister doesn't have to sit, convene court, issue subpoenas, hear witnesses, and adjudicate their credibility.

Mr. Roy Gray: I just want to make the point that the court would apply the Indian Act rules.

Mr. Kyle Seeback: Of course, that's understood. They would have to. Sorry, I thought that was understood.

I guess in certain circumstances then, you act almost as a mediator in some of the smaller value estates. Would that be a fair comment?

Mr. Roy Gray: I would say so. The regional folks would do that, yes.

Mr. Kyle Seeback: With respect to appointing a family member to administer, what are the rules on that? I remember way back in law school we talked about degrees of consanguinity, but do you look at that when you're choosing which person should administer the estate?

Mr. Tom Vincent: Yes, absolutely, that's what we do. We look for the closest family relative, and that's usually what guides us. We do have a policy and we look for somebody who is willing and has an interest in administering the estate.

Mr. Kyle Seeback: One of the things I noticed that was interesting with respect to an intestacy is that the first $75,000 goes to a surviving spouse. I know that in Ontario, I think if the estate is under $200,000, the first $200,000 goes to the spouse. There's a bit of a difference there. Have you heard anything anecdotal about that affecting children? I don't know the general size of an estate that comes through for members of the first nations. Would most estates end up, from your experience, with the first $75,000 going to the spouse and nothing for the children? Do you detect any problems with that?

Mr. Roy Gray: I'm not aware of any.

Mr. Tom Vincent: That could be an issue, and there is a provision in section 48 of the Indian Act that the minister has the authority to transfer some of that $75,000 to the children to relieve hardship. That is not an application that I've heard raised; it just doesn't seem to come up.

Mr. Kyle Seeback: Okay, that's great.

The Chair: Ms. Crowder.

Ms. Jean Crowder: I want to turn to section 50 sales just for clarification. You did touch on them. My understanding is that, if there is a certificate of possession or something, and the spouse is either non-status or not a member of that particular band, then the department is required to attempt to sell the land under section 50 and share the proceeds of that sale with the survivors. Do I have that right?

Mr. Roy Gray: That's correct.

Ms. Jean Crowder: So there's a rule where—I can't imagine having provinces look at this—if it's not sold within six months, the property reverts to the band. Is that correct?

Mr. Roy Gray: That's correct, yes.

Ms. Jean Crowder: Do you know many cases where the land actually reverts to the band, where you're not able to sell it?

Mr. Tom Vincent: I don't know. I don't have that information here today. We'll have to get back to you.

Ms. Jean Crowder: It would be interesting to look at how often that happens, because that has implications. For example, the matrimonial real property bill that the House considered looked at division of assets when there's a spouse living, but you could have similar circumstances where the spouse has passed away and there's a division of assets.

The second piece was with regard to one of the things that witnesses raised with respect to the First Nations Land Management Act and the land code. I looked at a paper that was put together by Devlin Gailus. They looked at the Tsawout First Nation on the Saanich Peninsula that does have a land code. They say that the land code must be consulted, but that the majority of estate provisions of the Indian Act, including sections 42 to 48 and subsections 50(1)to 50(3), continue to apply. I had understood that if there was land code developed, it excluded these conditions, but that's not how I'm reading this. Can you clarify this for us?

● (1630)

Mr. Roy Gray: I don't think the First Nations Land Management Act excludes all of the estates provisions of the Indian Act. It only applies to the transfer of land. But I'll look to my colleagues.

Mr. Tom Vincent: Yes, I can clarify that what is excluded under the First Nations Land Management Act is the role of the minister to approve the transfers. Under section 49, the minister would approve the transfer from the deceased to the living and under the FNLMA, the first nation would take on that role.

Ms. Jean Crowder: Okay, but the rest of the act, as noted, sections 42 to 48, continues to apply.

Mr. Tom Vincent: Yes, it does.

Ms. Jean Crowder: Okay. With regard to the capacity building, one of the things that was raised in the evaluation was that everybody agrees that capacity development for first nations was identified as the single most effective way to improve program effectiveness and efficiency, but the evaluation revealed that there's a lack of consistency in training across all regions, and low participation. I think the department has put on sessions but there has been very low take-up on that.

Are you doing anything differently as a result of the evaluation?

Mr. Roy Gray: Thank you for the question. I was going to mention this earlier. In response to the evaluation, we have developed an action plan and implementation of that action plan is under way.

Ms. Jean Crowder: Is that something you can share with the committee?

Mr. Roy Gray: I believe the action plan is on the website.

Ms. Jean Crowder: Okay, I'll look it up.

Mr. Andrew Saranchuk: We can still share it [*Inaudible—Editor*] if that's the case.

Ms. Jean Crowder: This issue about if you are normally resident on reserve and let's say to make it easy, you have a will and you die, and you have property off reserve, are you saying that the rules for the Indian Act apply to the off-reserve property? Say you have a will made up that meets the requirements of the Indian Act, but as my colleague Jonathan pointed out, it doesn't meet Quebec's provincial rules for wills and estates, can the will that was developed for on reserve be used in the Quebec judicial system?

Mr. Tom Vincent: Yes, it can. It's still a valid will, and in place of a document that was normally obtained from a court of letters probate, the estate would receive a document from the minister approving the will and appointing an executor who would then have the authority to deal with off-reserve assets, including land.

Ms. Jean Crowder: So it really isn't a concern that it doesn't meet the conditions for how a will would be devised in Quebec or any other province, for that matter. As long as the minister has approved the will as meeting the conditions under the Indian Act, the provincial jurisdiction will consider that will as valid even though it wouldn't meet the rules under the provincial jurisdiction if it were actually being probated in provincial courts.

Mr. Tom Vincent: That's right. It's a simple system.

Ms. Jean Crowder: Good heavens.

Voices: Oh, oh!

Ms. Jean Crowder: I have it straight though. That's what I'm pleased about.

I think that's the end of my questions.

The Chair: Thank you, Jean.

We'll turn to Mr. Clarke.

Mr. Rob Clarke: One of the questions I have, and it's pretty simple and straightforward, is do any other Canadians have to get ministerial approval for wills and estates, or be reviewed by a minister?

Mr. Roy Gray: No.

Mr. Rob Clarke: Just to follow up on Jean's questions, when a will is contested by family on a first nations reserve, they have to take it back to a provincial jurisdiction to decide its fate. Is that correct?

Mr. Roy Gray: If the minister transfers his authority.

Mr. Rob Clarke: How many times has that happened?

Mr. Roy Gray: That was the question. I don't know the answer to that question.

● (1635)

Mr. Rob Clarke: Right.

Now my question is, with 44 individuals working in aboriginal affairs on wills and estates, how many of those are lawyers?

Mr. Roy Gray: I should just make one clarification, first of all, regarding the numbers. The 44 people work on deceased estates but they also work on living estates. In other words, the minister has a responsibility vis-à-vis dependent adults and vis-à-vis children, minor children. I'd just like to make that point.

Of the 44, I'm sorry, I don't have that information. I know there are some but I don't know how many. The other point to bear in mind is that those 44 people include clerks and administrative people. It includes executives. It's a bunch of different people.

Mr. Andrew Saranchuk: If I can add, I'm not sure that the 44 do include Justice legal counsel. Was that your question, Mr. Clarke?

Mr. Rob Clarke: Right.

Mr. Andrew Saranchuk: I think there would be one or two Justice lawyers who advise us regularly in addition to the 44, Mr. Vincent being one of them.

Mr. Roy Gray: That would include regional legal counsel as well.

Mr. Rob Clarke: What would you say was the average salary right now of people who are working in administration in aboriginal affairs? Are we looking at $50,000 or $60,000?

Mr. Roy Gray: I'm not really in a position to say. I don't know the answer to that.

Mr. Andrew Saranchuk: I think if you were looking at the overall number expended, Mr. Gray had a number.

Mr. Rob Clarke: It would be $3.5 million.

Mr. Roy Gray: That's right. So I guess we could do....

Mr. Rob Clarke: That's including the salaries of individuals or is that...?

Mr. Andrew Saranchuk: That includes salaries plus....

Mr. Rob Clarke: That includes court costs, no costs?

Mr. Roy Gray: No, I'm sorry. The $3.5 million includes vote 1 and vote 10, so it includes salaries, operations and maintenance, and contributions.

Mr. Andrew Saranchuk: It's the average total expended per year, if you will.

Mr. Rob Clarke: I did a calculation. On average, for 44 individuals at $60,000, that probably would have been around $2.9 million. That's quite a bit just to administer the Indian Act.

Mr. Roy Gray: Again, we have to bear in mind that some of that $3.5 million is operations and maintenance. Some of that $3.5 million is contributions that flow to first nations communities, organizations.

Mr. Rob Clarke: In what way are the organizations involved in first nations?

Mr. Roy Gray: It could be a band or a tribal council. It could be things like first nations hiring a lawyer to do information sessions on preparing wills.

Mr. Rob Clarke: Have first nations communities contested a will asking for that certificate of ownership back?

Mr. Roy Gray: I'm not sure I understand the question.

Mr. Rob Clarke: When a person died and they owned a home, had a certificate of ownership, or even when first nations who went overseas and fought and were given certificates of ownership for properties, say, in Saskatchewan or land ownership in a first nations community, that plot of land was either given or sold to other first nations on their home reserve. What happens when first nations communities ask for those lands back once a person passes away and there's no beneficiary? Is it contested between the first nations individual band member and the home first nations reserve or band?

Mr. Roy Gray: I'm not aware of any cases.

Mr. Rob Clarke: Because what I hear, even on Mistawasis and Muskeg Lake, is there are individuals out there who are asking their first nations community for almost exorbitant amounts of money, over $2 million, to repurchase their land, which really belongs to the band membership.

Mr. Roy Gray: What we're talking about in the minister's approval of transferred land is interests in land that are recognized by the Indian Act, certificates of possession, for example. If it's band-held land, it's not part of the estate.

Because it's band held, there isn't an individual interest, so that doesn't fall into the pot. It's transferred on the estate.

● (1640)

The Chair: Thank you, Mr. Clarke.

We're going back to Ms. Crowder.

Ms. Jean Crowder: One of the things that I didn't see in any of the notes or in.... Has the issue around living wills and powers of attorney come up anywhere?

Mr. Roy Gray: I'm not aware of that having come up. I don't know. I don't think the minister has any authority, so no.

Ms. Jean Crowder: I'm curious because in the non-indigenous population, those issues come up.

Mr. Roy Gray: Looking at my Justice colleague, I would imagine that first nations individuals have the right to make living wills and have the right to.... I don't know whether the powers of attorney would apply.

Ms. Jean Crowder: A living will is really outside this.

Mr. Roy Gray: Yes.

Ms. Jean Crowder: I would assume a power of attorney could possibly come up.

Mr. Tom Vincent: Yes, powers of attorney are made by first nations people, the same as any other Canadians.

Ms. Jean Crowder: And there's nothing in the Indian Act that would govern a power of attorney.

Mr. Tom Vincent: No, I don't believe so.

Ms. Jean Crowder: Mr. Saranchuk, when you were presenting to the committee, you indicated that a review could explore whether improvements might be made to the Indian Act estate system and whether the judicial function could be devolved. Do you have anything more specific on that which you would suggest the committee look at?

Mr. Andrew Saranchuk: No.

Do you have any thoughts on that in terms of the judicial devolvement?

Mr. Roy Gray: The only thought I would have is—and this has come up through internal discussions—it's a question of expertise and a recognition that the department doesn't necessarily have the expertise to deal with these sorts of issues. On the other hand, if you maintain the administrative role, there would be benefits in the sense that while there would certainly be cost benefits for individuals—

Ms. Jean Crowder: I'm sorry, for individuals or for the department?

Mr. Roy Gray: For individuals, we were thinking. In other words, as things stand, as Mr. Saranchuk mentioned, first nations individuals don't need to pay for probate or hire lawyers to get their wills approved. That falls into the category of the administrative side of things.

Mr. Andrew Saranchuk: The judicial side would largely be the voiding of the will, say, or the reviewing or the revoking of appointment. Presumably, the easiest way for that to occur would be to have the provincial system apply there. As opposed to somebody making an application to the minister, it would simply be a straight application of provincial law with respect to those functions. So, essentially, what I'm trying to say is provincial courts would take over.

Ms. Jean Crowder: Wouldn't that then increase costs to first nations?

Mr. Andrew Saranchuk: There would be associated costs with that. It's the see-saw between not having the minister involved in their day-to-day lives and having them treated like other Canadians, there being the pros and cons, I think, involved there.

Ms. Jean Crowder: I think probably people would generally welcome having first nations treated like other Canadians, which would mean they would have access to clean drinking water, clean housing, adequate incomes, and all those kinds of things.

I'm concerned about any suggestions that download costs to first nations without perhaps the capacity to find the money to actually pay for some of those costs. That would be a concern.

Mr. Andrew Saranchuk: The suggestion wasn't made in the spirit of downloading costs; in fact, it's the other point I was trying to make at the end. These were just considerations to try to identify the boulders in the road that you would want to consider.

The other consideration which we pointed out was the fact that some of these services are provided at no cost right now to individuals—as I already said, at no cost. As I said, there would be implications, of course, for people in remote communities having to try to probate a will, where right now they can do it via regional officials of the department.

Ms. Jean Crowder: Are there specific people who you would recommend we call in before the committee to provide testimony?

Mr. Andrew Saranchuk: Again, it's obviously at your discretion, but I think it would be important to hear from provinces. I think, generally, in the provinces you'd want to have a different cross-section, Quebec, for sure, but there would be some bigger ones with larger aboriginal populations that you would want to hear from. And it's not just the provinces writ large, it's usually the—

● (1645)

Mr. Roy Gray: Provincial guardians and trustees.

Mr. Andrew Saranchuk: —provincial guardians and trustees who deal with these sorts of issues. They're in a position to indicate how they deal with estate issues that are brought before them. Obviously, again, as I said at the outset, this is an inherently legal issue. The CBA would likely have views. The Indigenous Bar Association would likely have views, and obviously first nations groups, communities, and individuals would all have views.

In the same way that unfortunately we can't answer all your questions about provincial systems, I'm not sure there's a great understanding out there generally about the first nations system. I would suggest that probably at the end of this hour and a half or two hours there's going to be a much greater understanding in this room than there is out there generally, not even in the broader society, but potentially in certain first nations communities. It's an awfully complex system. We have to go through 42 to 50, and your last question showed that, the complexity of trying to put together all those factors in one question.

Ms. Jean Crowder: Mr. Gray mentioned there were two jurisdictions that take a much more active role. Was my understanding correct?

Mr. Andrew Saranchuk: It was more our regional offices that take a more active role in those areas.

Ms. Jean Crowder: It's the regional offices. Okay.

I thought jurisdictionally there were some first nations that were more actively engaged and they might be good witnesses, but it was the department. Okay.

Mr. Andrew Saranchuk: We can reflect on that, if you'd like. I'd like to reflect on who—

Ms. Jean Crowder: That would be great because most of us here aren't lawyers. We have some very good lawyers, I might point out, but I think it's important that we get advice and guidance from people who are experts in that area.

Mr. Andrew Saranchuk: I would just add to that. It's also the practical.... I'm not an expert, but I'm becoming an expert in this, and it's the practical realities associated here and the costs.

As one of my colleagues was saying, as any of us who unfortunately have had a deceased family member and have had to go through probating a will and dealing with estates would know, it's a difficult time at the best of times. Trying to do it is difficult, whether or not you're in the Indian Act system, the provincial system, or both systems. There are complexities, so I'd recommend working that through as well.

Ms. Jean Crowder: Thank you.

The Chair: Thank you.

We'll turn to Mr. Dreeshen.

Mr. Earl Dreeshen (Red Deer, CPC): I have a couple of questions.

Jean brought some of this up in talking about section 50. Just for my own awareness of this, it talks about heirs and beneficiaries who are not members of the same band with which reserve lands are associated but are entitled to the proceeds of a sale. Then you spoke about this "if after six months", so I'd like to know when the meter starts running.

The other thing is when it says "heirs and beneficiaries", can some of the beneficiaries be people who would not be subject to the act? When you're looking at a will, you can name pretty well anyone, so I'm just curious how that would fit into it, because that's a bit of a murky area.

If there's anything else that you can tell me about section 50 as well, I'd appreciate it so I can get a full feel for what is taking place there.

Mr. Andrew Saranchuk: I'll let my colleagues answer.

My understanding with respect to your second question, though, is that heirs and beneficiaries don't have to be people who are necessarily...so they could be broader people.

Mr. Roy Gray: That's correct.

Mr. Andrew Saranchuk: In terms of the clock running, Mr. Vincent, could you...?

Mr. Tom Vincent: The clock starts running when the minister advertises the sale. That could be six months after the death; it could be six years after the death and the estate still remains not administered.

Mr. Earl Dreeshen: Is there anything else that a person should know on section 50 that might seem a little odd? I was thinking about it from one perspective, and I've been hearing a few different ideas here, so I'm wondering if there's anything else that I should be aware of about how section 50 is interpreted.

Mr. Tom Vincent: I think it's interesting to know that section 50 applies to Indians who weren't normally resident on reserve at the time of their death. Half of the Indians in this country live off reserve, so section 50 applies to only half of the estates.

For the Indians who are living off reserve and die off reserve at the time of their death, section 50 never becomes a problem for the department to administer the will. It becomes a problem for the estate representative, the executor or the administrator, who then can follow any process that he chooses to liquidate the asset and then provide a cash benefit for the heirs and beneficiaries who are not band members.

● (1650)

Mr. Earl Dreeshen: Then, by definition, what about when the reverse happens? Someone has spent a great deal of time not on the reserve, but then they come back to the reserve, and they have assets that they have accumulated.

Traditionally, if I were an executor of an estate, nothing is gone until you've paid the taxes and everything else that's associated with it, so how would that scenario work if a person was outside of the system? You know, they went and worked, and did all these other things, accumulated the assets that they have, and then came back and spent the last 20 years of their life on the reserve so that technically they are ordinarily resident on reserve. How does that work?

Mr. Tom Vincent: In that case section 50 could apply to their estate if their will provided for a number of beneficiaries who would be non-band members.

For example, you might say, "I give my house to my grandchildren in equal shares", and some of the grandchildren are band members and some of them are members of a different band. In that case, there would have to be a sale to allow for the grandchildren to inherit the money rather than to inherit the land, unless the grandchildren decided among themselves that they could divide it another way to their satisfaction.

Mr. Earl Dreeshen: Is there anything else in that scenario?

Mr. Andrew Saranchuk: I'm sure there are other complexities that you can imagine, but I think Mr. Vincent has hit one of the main ones here.

Mr. Earl Dreeshen: Thank you, Mr. Chair.

The Chair: We'll turn to Madame Sellah.

[*Translation*]

Mrs. Djaouida Sellah (Saint-Bruno—Saint-Hubert, NDP): Thank you, Mr. Chair.

I would first like to let the witnesses know that I am not a permanent member of this committee. I am replacing a colleague.

I am pretty curious about what I read in your presentation, Mr. Saranchuk. When a will is deemed to be valid, the family has the right to challenge it. The minister can declare a will, or part of a will, void. You listed the reasons the minister could get involved. Afterwards, you said that, in case of a problem, Aboriginal Affairs and Northern Development Canada is not set up to hear and resolve disputes and that it would transfer jurisdiction of such disputes to a provincial court. Did I understand that correctly?

[*English*]

Mr. Andrew Saranchuk: If you'll excuse me, I'll answer in English.

I suppose what I would say is—

[*Translation*]

Mrs. Djaouida Sellah: I'm not done with my question.

Mr. Andrew Saranchuk: Oh, sorry.

Mrs. Djaouida Sellah: I was just summarizing the procedure.

There could be a dispute neither the minister nor the provincial court was able to resolve. We could be talking about something like land transfers. Would that land go to the band or to the government? Of course, I am talking about land that belongs to someone living on reserve.

Mr. Andrew Saranchuk: If that's okay with you, I will answer in English.

Mrs. Djaouida Sellah: No problem.

[*English*]

Mr. Andrew Saranchuk: Like most questions today, it's a complex one.

I'll just go back and try to explain that the minister does have to decide whether or not he is going to approve the will, or whether or not there were difficulties with the will that would lead him not to approve it.

Once it's approved, family members could challenge the will, for the reasons of its duress, or they would say that the person who wrote the will didn't have the capacity and weren't in a position to understand.

At that point, if there were challenges, and I'm looking at my colleagues to confirm this, it could be referred to the courts. As was mentioned earlier, somebody would bring an application. The department would say that it is not in a position to judge between two family members who are disputing it. It would invoke that part or that section of the Indian Act that allows it to refer it to a court, at which point the court would be in a better position to hear from witnesses and make a determination about those issues.

Your question was what happens at that point with respect to the land portion of the estate. I guess I'm looking to Mr. Vincent to finish off my comments. I'm proud of myself for just having followed the question to this point.

● (1655)

Mr. Tom Vincent: If the matter is referred to the court, the court will make an order with regard to the validity of the will and whether any portion should be struck out as invalid. From that point, the court could also determine the rest of the issues of the will, such as who is going to receive the land. After the court has made its order, the minister gets to approve the transfer.

[*Translation*]

Mrs. Djaouida Sellah: So the court would issue an order, which would be approved by the minister. Is that what you're saying?

[*English*]

Mr. Tom Vincent: Yes.

[*Translation*]

Mrs. Djaouida Sellah: Okay. Thank you.

[*English*]

The Chair: We'll turn to Mr. Boughen.

Mr. Ray Boughen (Palliser, CPC): Thanks to the panel for sharing their afternoon with us. We appreciate your input.

As we look at estates and wills, there's a passage that talks about the wife being heir to $75,000 if and when there's $75,000 in the estate to begin with.

Is there anything else that says the wife is automatically entitled to something, or the reverse, is the husband entitled to something? If his wife owns two sections of land, can he be the recipient of that land?

Mr. Andrew Saranchuk: I didn't mean to imply it was a wife. I think probably in the ordinary course, it's the surviving spouse. Probably in the ordinary course, if I understand society, it's the husband dying before the wife in the majority....

If you look at section 48, it provides those very express rules with respect to intestacy, for somebody who has died at that point without a will. If you have a will, you can put what you want in the will. If you die without a will, then this other system takes over, under section 48, and it uses the $75,000 threshold for the surviving spouse. Then it has a series of other—

Mr. Ray Boughen: So either male or female can receive the $75,000.

Mr. Andrew Saranchuk: That's correct. I'm sorry if I implied otherwise.

Mr. Roy Gray: To be clear, that includes common-law spouses. There's another option for spouses now. Since the enactment of an act with a very long name, the Family Homes on Reserves and Matrimonial Interests or Rights Act, a spouse may have an option when the other spouse dies in terms of whether to take the $75,000 share under the Indian Act or to take half of the matrimonial assets under the new legislation.

Mr. Ray Boughen: Thanks, Mr. Chair.

The Chair: Ms. Bennett, do you have any follow-up questions?

Hon. Carolyn Bennett: I do not.

The Chair: All right. Good.

I think Mr. Clarke maybe has one final question, and then we'll be done.

Mr. Rob Clarke: Thanks, Mr. Chair.

I have two small ones.

One question is about provincial jurisdiction. Is it possible to use the Queen's Bench to resolve any of the issues coming forward on contested wills and estates instead of using provincial jurisdiction?

Mr. Roy Gray: Under the current system, that could come into play if the minister made the decision to transfer the jurisdiction to the provincial system. Then I guess it would be the provincial superior court. I'm not certain.

● (1700)

Mr. Rob Clarke: It would be the Queen's Bench for any jurisdiction.

Now just to segue, we're looking at the Indian Act and at how wills and estates affect first nations in their daily lives. As a committee, we sit here and look at ways to help first nations on a daily basis. We can look at how South Africa back in the 1920s used the Indian Act as a template for apartheid. In this current day and age, in 2014, we're still under the Indian Act. However, back in the 1990s, South Africa got rid of apartheid and basically almost got rid of the entire Indian Act.

Maybe Carolyn can add some input here too. I think it might be an excellent idea to look at how the Indian Act may have been dismantled in South Africa. In the sense that it's on both sides of the world, and that the Indian Act and apartheid were so similar, what would the consequences be if wills and estates were dismantled in the same manner that apartheid was? That could be an option to look at it. Maybe there could be a further study.

Do you have any input or are you aware of any similarities between wills and estates through the South African apartheid process and wills and estates under the Indian Act currently?

Mr. Andrew Saranchuk: I'm not aware of that in terms of the South African regime. I would just add, with respect to the main thrust of your question, that it is open to Parliament to abolish or repeal these parts of the Indian Act.

I think what we tried to demonstrate in our answers and in our presentation is that you just have to be aware of certain factors when you're doing that. If that's the policy thrust, that's fine, but you have to be aware that the lands issue complicates things. As well, you need to be aware of the need to have a clear alternate system so that the courts and first nations individuals and communities are clear about what applies.

Mr. Rob Clarke: I think it would be an excellent idea to see how South Africa—

The Chair: Thank you, Mr. Clarke.

Unfortunately, we're going to have to end there. We will have bells ringing in 15 minutes, and we do need some time for committee business.

We want to thank our witnesses today. Thank you for spending your afternoon with us. We appreciate your expertise and your willingness to share it with our committee.

Colleagues, we'll just suspend for a few minutes to go in camera and get through a couple of things on committee business.

[*Proceedings continue in camera*]

Published under the authority of the Speaker of the House of Commons

SPEAKER'S PERMISSION

Reproduction of the proceedings of the House of Commons and its Committees, in whole or in part and in any medium, is hereby permitted provided that the reproduction is accurate and is not presented as official. This permission does not extend to reproduction, distribution or use for commercial purpose of financial gain. Reproduction or use outside this permission or without authorization may be treated as copyright infringement in accordance with the *Copyright Act*. Authorization may be obtained on written application to the Office of the Speaker of the House of Commons.

Reproduction in accordance with this permission does not constitute publication under the authority of the House of Commons. The absolute privilege that applies to the proceedings of the House of Commons does not extend to these permitted reproductions. Where a reproduction includes briefs to a Committee of the House of Commons, authorization for reproduction may be required from the authors in accordance with the *Copyright Act*.

Nothing in this permission abrogates or derogates from the privileges, powers, immunities and rights of the House of Commons and its Committees. For greater certainty, this permission does not affect the prohibition against impeaching or questioning the proceedings of the House of Commons in courts or otherwise. The House of Commons retains the right and privilege to find users in contempt of Parliament if a reproduction or use is not in accordance with this permission.

Also available on the Parliament of Canada Web Site at the following address: http://www.parl.gc.ca

Publié en conformité de l'autorité du Président de la Chambre des communes

PERMISSION DU PRÉSIDENT

Il est permis de reproduire les délibérations de la Chambre et de ses comités, en tout ou en partie, sur n'importe quel support, pourvu que la reproduction soit exacte et qu'elle ne soit pas présentée comme version officielle. Il n'est toutefois pas permis de reproduire, de distribuer ou d'utiliser les délibérations à des fins commerciales visant la réalisation d'un profit financier. Toute reproduction ou utilisation non permise ou non formellement autorisée peut être considérée comme une violation du droit d'auteur aux termes de la *Loi sur le droit d'auteur*. Une autorisation formelle peut être obtenue sur présentation d'une demande écrite au Bureau du Président de la Chambre.

La reproduction conforme à la présente permission ne constitue pas une publication sous l'autorité de la Chambre. Le privilège absolu qui s'applique aux délibérations de la Chambre ne s'étend pas aux reproductions permises. Lorsqu'une reproduction comprend des mémoires présentés à un comité de la Chambre, il peut être nécessaire d'obtenir de leurs auteurs l'autorisation de les reproduire, conformément à la *Loi sur le droit d'auteur*.

La présente permission ne porte pas atteinte aux privilèges, pouvoirs, immunités et droits de la Chambre et de ses comités. Il est entendu que cette permission ne touche pas l'interdiction de contester ou de mettre en cause les délibérations de la Chambre devant les tribunaux ou autrement. La Chambre conserve le droit et le privilège de déclarer l'utilisateur coupable d'outrage au Parlement lorsque la reproduction ou l'utilisation n'est pas conforme à la présente permission.

Aussi disponible sur le site Web du Parlement du Canada à l'adresse suivante : http://www.parl.gc.ca